The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules

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Abstract

This article contends that piecemeal changes to the adversarial process since the dawn of the new millennium have transformed the CJS. The advent of (near) compulsory disclosure means the defendant has to reveal many elements of his defence. This dilutes the adversarial battle and leaves a process which is managerialist in nature. The Early Guilty Plea system is a mechanism to increase the efficiency by stemming the amount of cases reaching the trial stage. This has an impact on the defence lawyer's role and renders him conflicted between advancing the best interest of the client against other pre-trial obligations. This small empirical study suggests that classic adversarial lawyers are seen as a relic of a bygone era. The modern criminal justice system prioritises speed and efficiency. If a case reaches court, the defendant is treated as an "informational resource" of the court reminiscent of his position in the 17th century.

Introduction

In the current criminal justice climate, disclosure is extremely topical. Since the turn of 2018 there have been a number of cases which have collapsed as a result of disclosure failings.[1] Whilst these cases concern CPS disclosure failings, the cases have brought a great deal of attention to an often-ignored area of criminal procedure. These cases highlight the problematic nature of disclosure and the more general problems with an adversarial approach. The approach is now underscored by a drive for efficiency in the post-Auld Review era, which seeks to increase the efficiency of the adversarial criminal trial by implementing a number of efficiency drivers.[2] Yet questions remain about how the changes of legislation and judicial culture have impacted the fair trial rights afforded to the defendant and the role of the defence lawyer. This article explores the evolution of adversarialism and suggests that whilst the system may be cumbersome, the inherent due process safeguard contained within the process are a worthy price. However, since the dawn of the 21st century, adversarialism has been diluted at an accelerated rate and has given rise to a more managerial mantra which this article will term the "New Regime". The New Regime has prioritised efficiency over effectiveness and fundamentally shifted the classic position of the defence lawyer. The empirical work is taken from semi-structured interviews designed to explore how practising defence lawyers perceive their own role, the findings suggest that defence lawyers struggle to view themselves as classically adversarial when they have a number of competing obligations and duties imposed by both the Criminal Procedure Rules (CrimPR). This work follows in the footsteps of numerous academics who argue that adversarialism is on the wane. Already in 1994 McConville et al. (1994) suggested that adversarial lawyers did not exist in reality and did not offer clients a zealous adversarial defence. More recently, McEwan (2011, 2013) claimed that the CrimPR weakened the adversarial nature of the criminal process in England and Wales. Further, Owusu-Bempah (2013, 2017) argues that forcing the defendant to participate in the criminal process fundamentally alters the adversarial framework and finally Quirk (2006, 2018) asserts that the changes made to the Right to Silence by the Criminal Justice and Public Order Act 1994 paved the way for the dawn of the disclosure regime and was arguably the genesis of the new regime. The pursuit of greater efficiency compels the defendant to participate to a greater degree and, ultimately, undermines the due process protections that the adversarial process provides, thus heightening the possibility of a miscarriage of justice.

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[1] See Liam Allen (Metropolitan Police and CPS, 2018), Samson Makele (Dearden, 2018), Isaac Itiary (Brown, 2017) and Oliver Mears (Walter and Maidment, 2018).

[2] CrimPR Rule 1.1(2)(e) suggests that the overriding objective to "deal with cases justly' can be met by dealing with cases efficiently and expeditiously. This article contends that the focus of criminal procedure over the last 20 years has been to satisfy this goal. A number of reviews and programmes have been established to improve efficiency, particularly in the magistrates' courts, *inter alia* Auld (2001); Courts and Tribunals Judiciary (2015a); Gross and Treacy (2012) and Leveson (2015).

This article is based on a small empirical project that was carried out between 2015 and 2016.[3] The first part of the article sets the scene by examining the drive for efficiency and the implications of the Auld Review. The second part analyses how the efficiency drivers manifested in practice, focusing on the use of the Case Management Forms and the Early Guilty Plea regimes, as well as the impact of the Legal Aid cuts. The article then examines the inadequate sanctions for failing to comply with the new regimes before drawing to a close with the suggestion that traditional adversarial values have been eroded and replaced with a managerial process that compels the defendant to take part in proceedings whilst weakening the due process protections afforded to them, which ultimately dilutes the role of the adversarial defence lawyer.

A brief history of defence disclosure

The disclosure regime is a relatively recent creation and until the mid-1990s disclosure was generally an obligation for the prosecution to discharge, save in instance of alibi and expert evidence.[4] The regime of prosecution disclosure was viewed as a mechanism to address the inequality of arms between the prosecution and the defence. As the prosecution was state-funded, they should have to disclose facts of their case to the defence, as there is a clear imbalance of resource between the two. *R v Bryant and Dickson*[5] is commonly regarded as the start of the process in which the courts begin impose a duty on the prosecution to disclose material that may lead to the acquittal of the accused (Corker and Parkinson, 2010: 3). The case established an obligation on the prosecution to make available to the defence witnesses whom the prosecution knew could give material evidence. The rule in *Bryant and Dickson* was extended further by *Dallison v Caffery*.[6] In Lord Justice Denning's words:

if he [the prosecutor] knows of a credible witness who can speak [of] material facts which tends to show the prisoner to be innocent, he must either call that witness themselves or make the statement available … it would be

[3] Methodology – Fundamentally, the aim of the research is to develop a deeper picture of the impact of the Criminal Procedure and Investigations Act 1996 (CPIA 1996) and the Criminal Procedure Rules (CrimPR) from a defence lawyer's point of view. With this aim, the author carried out 24 semi-structured interviews with practising defence lawyers with varying years of experience. The vast majority of participants were selected via Twitter and then the other participants were recruited via snowballing. This is "when the researcher accesses informants through contact information that is provided by other informants". The potential reach of using Twitter is vast and very attractive to an empirical research study. A person can "tweet" another user directly without requiring prior permission. Further to this, other users can share existing information with their own followers by "re-tweeting" a tweet. This extends the reach of the original tweet as it will be seen by far more users. Twitter was selected over other forms of social media as it was easier to identify lawyers and to then approach them from a position of no pre-existing relationship. From tailoring my own personal account it was clear that there is a large community of defence lawyers and academics with an interest in criminal defence on Twitter. The length of experience differed greatly between the lawyers; ideally, the study sought lawyers who were in practice prior to the disclosure changes made by the CPIA 1996 and those who have only practiced with a culture of defence disclosure imbedded in their practice. This goal was successful; the most experienced lawyer in the group had practised criminal law for 40 years, whereas the most recently qualified criminal lawyer had four years' experience. The mean length of experience was almost 17 years. The choice for semi-structured interviews is justified in the following manner: the general aim of the interview is to encourage the participants to talk at length about their own experiences and thoughts and that the process is not concerned with obtaining the "right" answer but what the lawyer thinks a structured interview might lead to short, simple, general or abstract answers to the interviewer's questions. In contrast, the semi-structured interview allows the participants to talk about the CPIA 1996 and CrimPR in terms of their own frames of reference; by doing this, the participants also maximise the interviewer's own understanding of their responses. Although the interviewer has a clear set of issues, i.e. the main questions, that has to be addressed, he/she is prepared to be flexible in terms of allowing the interviewee to develop ideas and speak more widely on the issues raised. The emphasis is on the interviewee elaborating on key points of interest and broaching a broader range of issues. Further, the semi-structured interviews allowed the interviewer to ask follow-up questions, exploring the areas of ambiguity and seeking clarification on any relevant issue, as well as to probe the answers given by the participant.

[4] Alibi evidence had to be closed pursuant to s. 11 of the Criminal Justice Act 1967 and expert evidence was required to be disclosed under s. 2(1) of the Criminal Justice Act 1987.

[5] [1946] 31 Cr App R 146. Prior to *Bryant* and *Dickson*, in the case *R v Clarke* (1930) 22 Cr App R 58 the court held that where there is a discrepancy between a witness's evidence at trial and his statements made previously to the police, the prosecution should consider if an actual copy of the witness's statement should be disclosed rather than just information given about it.

[6] [1965] 1 QB 348.

highly reprehensible to conceal … the evidence which such a witness can give.[7]

For Lord Denning, disclosure was about ensuring that justice was done and not simply following a particular rule; it was the spirit of the rule that should prevail, not its letter.[8] Until the 1960s, obligations to disclose information were placed exclusively upon the prosecution. The Criminal Justice Act 1967 was the first exception to this general rule, s. 11 of which states that in trials on indictment that the defendant shall have to give notice of the particulars of an alibi witness.[9]

In 1981, the "first attempt by the government, without recourse to statute, to comprehensively improve and overhaul the disclosure system"[10] was made. The guidelines created a set of criteria for determining what should and should not be disclosed and established the notion of disclosing "unused material', which was defined as:

i. witness statements and documents not included in the committal bundle;
ii. statements of witnesses who are to be called at committal, and any documents referred to therein; and
iii. the unedited version of edited statements included in the committal bundle.[11]

In 1986, the Fraud Trials Committee published their report (hereafter, the "Roskill Committee"), Lord Roskill chairing the report. The findings of the Committee led to the second major development in the area of defence disclosure. The Committee was established because, it was said, the public no longer believed the legal system was capable of bringing the perpetrators of serious frauds to book (Roskill, 1986: 1 at para. 1). The Committee found that the legal system was too archaic, cumbersome and unreliable. Every stage of the legal process was an "open invitation to blatant delay and abuse" (Roskill, 1986: 1 at para. 1). Owing to this blatant abuse the Committee stated in its summary that radical reform was necessary. Although the terms of reference for the report related to fraud trials, the Committee argued that the changes could "be of benefit to a wider range of criminal cases".[12] The Committee believed that forcing the defence to outline its case in advance of trial would make the trial both "shorter and more efficient". Furthermore, this would make the trial clearer for the jury, if they were told at the outset what part of the prosecution's case the defence intended to challenge. Requiring the defence to disclose a case outline would reduce the risk of fabricated defences; the prosecution would be able to investigate in advance any defence claims that required investigation (Roskill, 1986: 103 at para. 6.72). However, the Committee admitted that they had been unable to empirically test the truth of the assertion that the jury's understanding of the case is impaired where it is not clear at the outset what the case may be.

The Committee considered a number of objections to the proposal. First, it accepted that the main objection was that the proposal was an infringement of a fundamental principle of our criminal law; that the burden of proof rests with the prosecution. A further objection to the proposal was the lack of an effective sanction against a defendant who fails to comply with the provisions. To alleviate any fear that a defence disclosure regime would weaken the burden of the proof, the Commission stated:

The prosecution would still have to prepare their case fully … including making early disclosure of their evidence … we recognise that the burden of proof would be affected if the prosecution were allowed to alter the nature of their case once the defence had been disclosed. To avoid this possibility, any proposal would therefore have to involve the prosecution's case being "fixed" before the defence could show his hand. If the prosecution sought to change their ground … to overwhelm the case put forward by the defence, the judge might well be justified in

[7] Above n. 6 at para. 369.
[8] Above n. 6, at 3.
[9] Criminal Justice Act 1967, s. 11(1).
[10] Above n. 6, at 7.
[11] *Guidelines for the Disclosure of "Unused Material" to the Defence in Cases to be Tried on Indictment* (1982) 74 Cr App R 302, para. 1. Although the guidelines are non-statutory, to all intents and purposes they are intended to have the force of a statutory provision.
[12] Roskill (1986: 2 at para. 4). The Committee did stop of recommending any proposal to anything other than fraud cases, they would leave that discussion for those with wider concerns than then own.

intervening to stop the case altogether or, if it were not too late, to ensure that the prosecution adhered to the original case. (Roskill, 1986: 104 at para. 6.75)

By implementing the safety net of allowing the judges to intervene should the prosecution deviate from their original case, the Committee believed the burden of proof would remain intact. Following the Roskill Committee's report, the Government enacted the Criminal Justice Act 1987. The Act provided that in serious fraud cases, persons can be required to give information about and produce documents concerning the investigation. Section 2(3) of the Criminal Justice Act 1988 allowed the director of the investigation "… to require the person under investigation, or any other person to produce any specified document which appear to the Director to relate to any matter relevant to the investigation …".[13] The Crown Court (Advance Notice of Expert Evidence) Rules[14] provided that any statement in writing of any finding or opinion of an expert upon which a party intended to rely had to be disclosed as soon as practicable after committal. These obligations in the mid-1980s were the first deviation from the notion that the accused does not have to outline any aspect of his defence prior to trial, save for any alibi notifications.

The provisions of the 1980s were dramatically enhanced during the mid-1990s, the defence disclosure regime was radically overhauled by the Criminal Procedure and Investigations Act 1996. The provisions compelled the defendant to disclose aspects of his defence for indictable-only cases.[15] The content of the defence statement was defined by s. 5(6). It is a written statement:

a) setting out in general terms the nature of the accused's defence;
b) indicating the matters on which he takes issue with the prosecution;
c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

At the time Hannah Quirk suggested the disclosure provisions were unworkable as the provisions were flawed due to three fundamental reasons: (1) the lack of understanding of the role and culture of each of the participants, (2) the inadequate allocation of responsibility and (3) the insufficient sanctions for non-compliance with the rules that can be imposed fairly on defendants.[16] Defence statements contained often minuscule amounts of information and were generally as vague as possible; they often served as nothing more than a denial of the charge. For example, a defence statement completed by the defence in answer to a charge of handling a stolen motor vehicle, offered the following response: "the accused denies that he dishonestly received the vehicle and that he knew or believed that the same was stolen' (Taylor, 2001: 114, 117). The vagueness of this statement could potentially leave the door open for the defence to spring an ambush defence at trial.[17] In a study for the RCCJ, which acted as a catalyst for the CPIA, Roger Leng suggested that the threat of ambush defences was "the single most powerful factor in the campaign to abolish the right to silence and to require the early disclosure of the defence case' (1995: 706). Yet, as Leng's study for the RCCJ suggested, the idea that disclosure was needed to combat "ambush defences"[18] was misplaced (Taylor, 2001: 114, 117). The price for springing the ambush was that the defence may miss crucial material not being disclosed at the second stage of prosecution disclosure. The statement does not indicate any particular defence that the accused will rely on and therefore leaves the prosecution without any suitable guidance as to what material would be of use to the defence.

Quirk further suggested that the notion of defence disclosure and the idea of rebalancing the system fitted neatly

[13] Criminal Justice Act 1988, s. 2(3).
[14] SI 1987/716.
[15] They do not apply to summary trials, although s. 6(2) does allow the accused to voluntarily provide a defence statement to the prosecution. Richard Card and Richard Ward believe the section is unnecessary as it is always open to the accused to disclose facts about his defence. For further discussion please see Card and Ward (1996: 37).
[16] Hannah Quirk discusses these issues at length in Quinn (2006: 42).
[17] However, in light of the Criminal Procedure Rules and the Overriding Objective, the Court explicitly prohibits ambush defences. This point will be discussed later in this chapter.
[18] An ambush defence is one which surprises the prosecution at trial. The prosecution have no idea what evidence the defence will call and is therefore "ambushed" by their tactics.

with the philosophy of managerialism (Quirk, 2006: 56) and the early disclosure of the defence case would combat the use of an "ambush defence"[19] which could frustrate the interests of justice. However, in reality, the defence was not problematic for the courts, Leng's study for the RCCJ found that ambush defences were raised in 2-5 per cent of trials; all of which ended in the conviction of the defendant (Leng, 1995: 706). Leng also cites the work of Block, Corbett and Peay, who observed 100 trials and did not find one single use of an ambush defence (1995: 706). However, Zander and Henderson's study found ambush defences were raised in 7-10 per cent of trials and half of these ended in a conviction (Zander and Henderson, 1993: 14-15). Redmayne suggested that the creation of the defence disclosure regime "forms part of the shift towards a criminal justice system whose prime concerns are efficiency and managerialism" (Redmayne, 1997: 93). Ultimately, these encroachments to adversarialism were a continuation of a toxic political atmosphere concerning due process rights of the defendant. It is important to note that this evolution did not occur in a vacuum and a number of other changes to criminal procedure occurred in the 1980s and 1990s. The genesis of change can be traced to the Commission reporting in 1981. The Commission was established in the wake of a number of miscarriages of justice that blighted the criminal justice landscape in the late 1970s (see Home Office, 1977). The Commission rejected any notion that there should be any curtailment of current provision of the right to silence at both the pre-trial and trial stage. In fact, the Commission re-emphasised the importance of the advanced disclosure being made to the accused as "it might put strong psychological pressure on some suspects to answer questions without knowing precisely what was … the evidence against them …" (Home Office, 1977: para. 4.50). In fact, the Commission appeared to enhance the due process rights of the accused and the recommended proposals that established PACE 1984. Quirk suggests that the Act was "momentous" and codified both parties' rights in relation to stop and search, arrest, detention, questioning and charge (Quirk, 2017: 36).

Then the 1990s saw a succession of successful appeals on the basis of false confessions.[20] These cases "exposed a catalogue of wrongdoing in the process of … criminal investigation' (Quirk, 2017: 40). In response, the government established the Royal Commission on Criminal Justice (RCCJ) to examine potential reforms to the criminal justice process. Quirk suggests that although the Conservative Party of the early 1990s had won a fourth successive General Election, they were in fact, rather unpopular (Quirk, 2017: 43). As such, a governmental notion of "law and order" had begun to counter the rising concerns about crime. The then Home Secretary, Michael Howard, suggested at the 1993 Conservative Party conference that "the right to silence will be abolished. The innocent have nothing to fear" (Travers, 1993: 44). This conflation of guilt and silence was endemic in both the crime control policies and political atmosphere of the time and something that allowed the creation of the defence disclosure regime and breeding ground for the CrimPR.

The rise of the "new regime'

Through the Police and Criminal Evidence Act, the late 1980s afford the suspect greater protections in the criminal justice system and the 1990s tried to reign in these protections. This continued into the 21st century which saw the acceleration of the of the managerialist regime.[21] In his Review of the Criminal Courts of England and Wales (Auld, 2001, hereafter "the Auld Review"), Auld LJ said: "… fairness, efficiency and effectiveness of the criminal justice system demand that its procedure should be simple, accessible and, so far as is practicable the same for every type of criminal jurisdiction" (Auld, 2001: ch. 10, para. 271) He commented that the 1996 Act "was not working as Parliament intended and its operation did not command the confidence of criminal practitioners".[22] Auld also argued that there was a high level of non-compliance by the defence in its duty of completing an adequate defence statement; this non-compliance was a major deficiency in the disclosure provisions and he believed that the current three-stage disclosure process was both "logical and fair" (Auld, 2001: 466, para. 171).

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[19] Whilst this is a pejorative term from a defence perspective, the prosecution ought to be prepared for any defence to be presented, and this is a commonly used term to describe this type of defence.

[20] The Birmingham Six (*McIlkenny and Others* [1992] Crim LR 117; *R v Kiszko* (Unreported) 18 February 1992, CA.; The Cardiff Three (*Paris, Abdullahi and Miller* [1993] 97 Cr App Rep 99); and Judith Ward (*R v Ward* [1993] 1 WLR 619 96 Cr App Rep 1).

[21] However, it is arguable that the both the Conservative and Labour governments of the 1990s paved the way for a crime control agenda with their "tough on crime' rhetorics.

[22] Auld, 2001: 463. For an analysis regime's failings, please see Plotnikoff and Woolfson (2001) and Quirk (2006).

In keeping with the recommendation of the Auld Review, the Criminal Procedure Rules Committee was established "to create a single and simply expressed instrument" (Auld, 2001: 472, para. 184) that codifies criminal procedure. The Rules would govern the practice and procedure to be followed in the Criminal Division of the Court of Appeal, the Crown Court and for criminal proceedings in magistrates' courts. Furthermore, the Committee is responsible for the development of the necessary procedures to bring about the closer alignment of the criminal courts (Department for Constitutional Affairs, 2010). The Rules were created under the authority of s. 69 of the Courts Act 2003 and the Act explicitly states that they should secure that "the criminal justice system is accessible, fair and efficient and the rules are simple and simply expressed".[23] Rule 1.1 explicitly states that the overriding objective of the new code is that criminal cases should be dealt with justly. Rule 1.1(2) provides a non-exhaustive list of what "justly" means.

To assist the courts in satisfying the overriding objective, Part III of the CrimPR created the case management provisions, which obligate all actors in the process to help fulfil the overriding objective. Whilst the case management provisions are nothing new to the court, the impact has transformed the role of the judiciary. Prior to the creation of the CrimPR were generally perceived as passive, neutral umpires (see Johnston, 2016a). However, that it is no longer the case, the judiciary is an active participant in proceedings. The shroud of passivity would be shed with the dawn of the new millennium. In *Jisl*[24] Judge LJ highlighted the importance of having an active and interventionist judge. Talking about the starting point for any criminal case he stated:

The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited … time itself is a resource.

In order to conserve resources, the culture of the criminal trial would have to change. Now, there would have to be a degree of cooperation between the opposing sides. This was mainly achieved by the introduction of a Case Management Form which is effectively compulsory in the magistrates' courts and almost mirror what was required in the CPIA defence case statement. Whilst the defence statement was designed to narrow the issues at trial the Case Management Forms were designed to "identify the real issues" and make the trial process more efficient and expeditious. This seems to run counter to the concept of adversarialism. Traditionally, a fundamental principle ran through the common law: the defendant has the right of silence throughout criminal proceedings and to require the prosecution to prove its case. As Viscount Sankey LC stated, "throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt …".[25] However, not all lawyers are embracing the aforementioned change to disclosure: Andrew Keogh claimed that the "clever technical lawyer is now officially dead".[26] Although it is impossible to refute that the courts have adopted a new approach to hearing criminal cases[27] this position, however, appears rather extreme. Indeed, to say that the clever technical lawyer is dead might not necessarily be the case.

What is the "adversarial defence lawyer" and did they ever exist?

Before investigating whether the "clever technical lawyer" is indeed dead it is worth establishing a theoretical conception of what the defence lawyer's role is. The role can be seen to operate on three interwoven levels: first, he is the mouthpiece of his client; secondly he is an officer of the court; and finally he acts as a zealous protector of the rights of his client (Blake and Ashworth, 2004: 167). Despite being charged with advancing his client's case, the defence lawyer's obligation to his client is, at times, tempered by obligations owed to other parties in the criminal

[23] Courts Act 2003, s. 69(4)(a) and (b).
[24] [2004] EWCA Crim 696.
[25] *Woolmington v DPP* [1935] AC 462 at 481.
[26] Keogh (2001: 1). The clever technical lawyer is one who is zealous in the defence of their client and uses all available tactics to advance the client's best interest.
[27] For example, see *R (on the application of the DPP) v Chorley Justices & Anor* [2006] EWHC 1795 *per* Thomas LJ at para. 24.

justice process; this notion was expressed by Lord Reid in the case of *Rondel v Worsley*:[28]

… Counsel has a duty to fearlessly raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But as an officer of the court concerned with the administration of justice, he has an overriding duty to the court, to the standards of his profession and to the public, which may and often lead to a conflict with his client's wishes …[29]

It is clear from this statement that the role of the defence lawyer is not as clear-cut as merely advancing the case of his client and acting in his best interest. At times, he will be charged with actively engaging in ethical decision-making. It has been claimed that the defence lawyer operates on the horns of a trilemma: he needs to accumulate as much knowledge about the case as possible; to hold it in confidence; and yet to never mislead the courts (Blake and Ashworth, 2004: 173). The adversarial criminal process in England and Wales is rooted in the image of the defence lawyer acting as the accused's shield from the powerful state; this notion has in turn cultivated the ideal of neutral partisanship becoming a central tenet of the role of the defence lawyer (Blake and Ashworth, 2004: 169). This duty of neutral partisanship reflects a dual part of the adversarial ethos; the accused is to be adequately protected from the "oppressive" state, and the truth is best discovered by arguments on both sides of the question.[30] It has been argued that this classic view of the adversarial defence lawyer does not exist in reality. McConville et al.'s *Standing Accused* (McConville et al., 1994) suggested that defence lawyers were not being adversarial defenders of their clients and lawyers often held low opinions of their clients. The study was rather scathing of the criminal defence profession, stating that lawyers would "import their own working assumptions about criminal suspects and inclinations toward crime control values" (McConville et al., 1994: 282). The study also found that "defence practice [was] seemingly concerned with the efficient management and processing of its clients through the "machinery of justice" [rather] than the delivery of justice itself" (McConville et al., 1994: 295). Ultimately, the study found that, overall, defence practitioners offered "poor quality services which [did] little to uphold the values or principles in our criminal justice system' (McConville et al., 1994: 298). The findings of were classified into four distinct types of law firms: *The Classic; The Managerial, The Political* and *The Routine*.

Newman followed the work of McConville et al. by categorising different titles for different firms. He used the terms "radical" and "sausage factory". A radical firm is a "dying breed of lawyers who devote themselves to their clients" (McConville et al., 1994: 30). The "sausage factory" is an example of an emergent thread that places profits before clients. The sausage factory is the antithesis of the radical firm (McConville et al., 1994: 30). This firm is more associated with the notion of a passive defence. Newman uses the title "sausage factory" because in the food industry the factories are presumed to reduce diverse raw materials into uniform, easy to manage and cheap products. The study was less concerned with how firms work, but with the values, attitudes and perceptions held by the individual lawyers within the firms. This study only examined what the lawyers said – no observations were undertaken in this particular study. There is a distinct disadvantage in only interviewing lawyers, as Newman realised when he uncovered significant differences in formal interviews when compared with observational research. He found that lawyers would espouse the view that they stood for active defence and therefore fitted into the "radical" category but that they appeared to practice something far more passive and akin to the "sausage factory" (Newman, 2013: 147).

Whilst this study should be mindful of participants providing answers they do not necessarily practice, the findings nevertheless hold value, as they present data on how defence lawyers perceive their own role in the modern era of criminal defence work. However, this study suggested that defence lawyers frequently did speak of themselves in terms of being an adversarial protector of defence rights, but these views were often tempered by the competing obligations in the case management era of the modern criminal trial.

However, despite studies suggesting that the adversarial defence lawyer did not exist in practice, the importance of the role, at least in academic literature is clear. Steinberg suggests that the lawyer needs to be zealous as this

[28] [1969] 1 AC 191.
[29] Above n. 28 at 227-228.
[30] *Ex parte* Lloyd (1822) Montagu's Reports 70n, 72 *per* Lord Eldon.

benefits society – the victim, the judge, the defendant, witnesses, juror or disinterested bystander – because any one of them can switch roles and become a future defendant (Steinberg, 1960). However, as suggested above, the work of McConville et al. suggested that defence lawyers who treated their clients with disdain offered poor-quality services.

The impact of the introduction of case management forms on the work and role of the defence lawyer

The small empirical study was designed to analyse how practising defence lawyers view themselves and their role in criminal process. As this paper established, the theoretical conception suggested that the lawyer was zealously adversarial in their pursuit of advancing the best interest of their client. However, empirical work in the early 1990s and the early part of the new millennium painted the lawyer in a rather disappointing light. They were not in fact adversarial and often viewed their clients with disdain. This study attempted to analyse if the lawyers were adversarial in terms of prioritising the best interest of the client over other competing obligations.

It was clear from the interviews was the fact that the "clever, technical lawyer" was not actually dead. In order to complete their case management obligations, lawyers would frequently take a tactical or technical approach, which provided enough detail to the court but tactically, did not reveal their hand completely:

I will not disclose his defence … the form is completed in minimal detail. But completing the form causes difficulties because we are working from a skeleton. The response is very basic, not very detailed. [011] (Partner, 19 years' experience)

The approach of outlining a skeleton defence, rather than a full defence, in the Case Management Form is a problem the courts have faced since the inception of the CPIA 1996.[31] Plotnikoff and Woolfson found that 52 per cent of defence case statements contained a bare denial of guilt or did not meet the requirements of s. 5, CPIA 1996 (Plotnikoff and Woolfson, 2001: 77). Furthermore, they highlighted that nearly 90 per cent of judges and barristers "rarely or never adduce evidence of the contents of the defence statement at trial, other than to rebut alibi evidence" (Plotnikoff and Woolfson, 2001: 77). Quirk found that the defence case statements are "merely an administrative requirement rather than anything of any practical utility" (Quirk, 2006: 57). Some of the lawyers interviewed had established a more cooperative attitude toward their obligations. They have embraced the era of cooperation and do not necessarily adopt a technical approach to completing the Case Management Forms. A small minority[32] of participants openly embraced the notion of cooperation and happily assisted the court by identifying the real issues in the case:

I flag all issues, there is no point springing the issues later as you will be criticised by the court … it's difficult because, I know it's not a listed penalty, but you do not want your client receiving a heftier sentence but [I think] it does have that effect sometime. We will not write paragraphs we will just say what the "nature' is. [004] (Solicitor, 8 years' experience).

I do not see this as onerous. What is the point of creating more work for everyone when the end point is going to be the same and most likely that your client is going to be prejudiced by you trying orchestrate otherwise … generally we don't have too many "no comment" interviews so the forms are not telling the CPS anything they don't know already … [005] (Solicitor, 5 years' experience).

It is somewhat surprising that more lawyers did not take this approach, especially in light of the post-*Firth*[33] decision. If, as Auld LJ stated in *Gleeson*, the trial is "… a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate themselves"[34] then surely the decision in *Firth* is difficult to reconcile with either of those principles and defence lawyers should be mindful of it.

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[31] In *Tibbs* (The Times, 28 February 2000) the Court of Appeal stated that is was not suitable to merely use the general legal description of the defence i.e. accident or self-defence. The form needs extend to the facts the defendant will rely on at trial.
[32] 4/24 participants thought the form posed no danger to their client and they were happy to complete the forms.
[33] *Firth v Epping Magistrates' Court* [2011] EWHC 388 (Admin).
[34] *R v John Vincent Gleeson* [2004] 1 Cr App R 29 per Auld LJ at para. 36.

In *Firth*, the defence lawyer made an assertion in the case progression form that the accused was acting in self-defence, which at trial was successfully relied upon by the prosecution, arguing that it was an admission of the defendant's presence at the scene. The defence tested the prosecution's point and quite properly took the point that identification could not be established (Rhodes, 2011). However, the magistrates admitted the Case Management Form as evidence of an admission by the defendant that she was present at the scene and struck the complainant. In the Divisional Court, Toulson LJ upheld the magistrates' court decision, explaining:

It does not infringe against the principle that a defendant is not required to incriminate themselves for the court to require that the nature of the defence is made plain well before the trial. Of course, any requirement for disclosure of the nature of the defence must be a fair requirement, in the sense that it must not be extracted from a defendant in circumstances where the prosecution has no case …[35]

However, some protection is afforded to the defendant by virtue of *R v Newell*.[36] Here, the appellant appealed against a conviction for possession of cocaine with intent to supply. At the Plea and Case Management Hearing (PCMH), the appellant did not serve a defence statement and when completing the Case Management Form, the lawyer, who did not represent N at trial, stated "no possession". On the morning of the trial, and under the instruction of new solicitors, a defence statement was served in which he accepted possession of cocaine but denied the intent to supply. The CPS sought to cross-examine the defendant because there were inconsistencies with his case progression form and the defence statement admission. The judge allowed the cross-examination. The Court of Appeal allowed the appeal, holding that the judge should have excluded the case progression form under s. 78 of the Police and Criminal Evidence Act 1984, as the sanction of adverse inferences for the failure to serve the defence statement was sufficient.[37] This highlights just how careful the lawyer needs to be when completing the form in order to not incriminate his client.

I do not think it's unreasonable to say to a D we need you to identify what your defence is. These are public funds. Because of *Newell*,[38] we do not have to be as cautious as one once was. [006] (Senior Partner, 40 years' experience).

Another Senior Partner [with 30 years' experience] held the opinion that the protection afforded in *Newell* was robust enough to withstand any tactical use by the prosecution. Nevertheless, the lawyer adopted a very cautious approach to completing the forms:

I complete the forms with great care. Although, the higher courts have said the forms would not be used against a defendant[39] … but someone will always raise it in my view … We basically need a full picture [of evidence]. That isn't happening. We have to make progress, but we have 1/3 of evidence yet have to advise the client. If he is pleading not guilty, we have to complete the Case Management Form. It has to be done very carefully; it could undermine his position at trial.

The completion of the case progression form is inescapable and the Case Management Forms are analogous to the defence statement served under s. 5, CPIA 1996. Rhodes suggests that whilst there are no adverse inferences for failure to complete the case progression form, perhaps the lawyer should write on the form "the issue at trial is whether the prosecution can prove its case, I am not instructed to make any factual admissions until after the prosecution has complied with its duty of disclosure" (Rhodes, 2011). However, it is hard to imagine a court

[35] Above n. 33 *per* Toulson LJ at para. 22
[36] [2012] EWCA Crim 650.
[37] Above n. 36 at para. 36.
[38] The protection afforded by *Newell* (above n. 36) is welcomed, but it can be viewed as somewhat opaque. The court decided the Crown could not use a statement made in a PCMH to prove the defendant's evidence at trial was inconsistent with the completed form. The prosecution could not use the statement to the detriment of the appellant. This would be unfair to the defence. However, if the spirit of the Rules is not complied with, the court may allow such evidence to be admitted at trial (*per* Sir Anthony May P at para, 37).
[39] Above n. 36.

accepting such a small level of detail, as one of the participants explained:

the magistrates say "[your client] should complete the form because he knows if he's done it" [committed the offence]. That's wrong. It shows a fundamental misunderstanding of the law and it's a deliberate manipulation. [002] (Senior Partner, 32 years' experience)

Despite the protection afforded by *Newell*,[40] Lord Justice Gross and Lord Justice Treacy suggested that as a sanction for non-compliance with the CrimPR, the prosecution should be able to use what completed forms they have as evidence. They stated: "We see no reason why a defence statement should not be capable of forming part of the prosecution's case … since the statement is deemed to be made with the defendant's authority it is thus akin to comments he makes in an interview" (Gross and Treacy, 2012). Whilst this point concerns the defence statement, if the Case Management Form has been deemed to be "analogous to the defence case statement" (Keogh, 2001: 1) any repercussions may present a similar danger to lawyers. Rochford[41] suggests it is not a Contempt of Court to not file a defence statement and Anthony Edwards suggests that the defendant is entitled to hold back the information provided the defendant is prepared to take the risk an inference being drawn.[42] However, a basic completion of the form is now viewed rather dimly by the courts as "the client knows if he has done it." As such, it creates a normative expectation that the forms will be completed fully, containing extensive detail.[43] This provides a difficulty for the lawyers. On one hand, the courts are pressing to ensure the form is completed adequately and yet they may not have received full disclosure from the prosecution, rendering it very difficult to offer clear and comprehensive legal advice.

Active case management and early guilty pleas

This constant drive for efficiency creates tensions for the lawyers. Some lawyers stated that they feel it is difficult to provide adequate legal advice as a plea has to be entered and the case fully managed at the first hearing, irrespective of prosecution disclosure or access to legal advice. The CrimPR dictates that the advocates must assist the court with their Active Case Management responsibilities,[44] and the circumvention of the voluntary nature of the Defence Case Statement (via the Case Management Forms) is analogous to the CPIA 1996 provisions.

These requirements are further assisted by the shift in judicial culture. In the *Chorley Justices*[45] case Thomas LJ indicated that if the "defendant refuses to identify what the issues are … he can derive no advantage from that or seek … to attempt an ambush at trial. The days of ambushing and taking last minute technical defences are gone". In order to assist the court with its active case management, both sides have to complete a Case Management Form, which includes, inter alia, the identification of the real issues, and which enables the monitoring and progressing of the case. In 2015 it was found that there was "undoubted room for improvement" (Gross, 2011: 6) in the sphere of case management. Sir Brian Leveson's *Review of Efficiency in Criminal Proceedings* (Leveson, 2015) found that all parties needed to work to "identify the issues so as to ensure that court time is deployed to maximum effectiveness and efficiency" (Leveson, 2015: 12). With this Review the goals of efficiency and effectiveness were further consolidated with the genesis of the Better Case Management Initiative (hereafter, "BCM") (Courts and Tribunals Judiciary, 2015a), which links a number of initiatives aimed to increase the efficiency with which cases are processed through the criminal justice system. The overarching aims of BCM are as follows:

- robust case management;
- reduced number of hearings;
- maximum participation and engagement with every participant within the system; and
- efficient compliance with the CrimPR, Practice and Court Directions (see Courts and Tribunals Judiciary,

[40] *Newell*, above n. 36.
[41] [2010] EWCA Crim 1928.
[42] CPIA 1996, s. 11. See also McEwan (2011: 528), which states that trial judges seem reluctant to discipline the defence through measures such as adverse inferences which penalise the defendant.
[43] *R v Writtle* [2009] EWHC 236 and *R v Bryant* [2005] EWCA Crim 2079.
[44] CrimPR Rule 3.2.
[45] [2006] EWHC 1795 (Admin).

2015b).

On the first anniversary of the initiatives implementation the Judiciary of England and Wales suggested the programme had been a success, with "data showing some positive indications, such as a reduction of hearings prior to disposal" (Courts and Tribunals Judiciary, 2016). To further assist in fulfilling these goals, BCM introduced a new case management initiative, the uniform Early Guilty Plea Scheme. The CPS state that obtaining a guilty plea at the earliest opportunity has "huge advantages" (Crown Prosecution Service, 2016), one being efficiency, as the police, court and prosecution will make economic savings. There is a benefit to a defendant entering an early guilty plea--should they do so, they will be entitled to a sentence discount.[46] The concept of the Early Guilty Plea Scheme is not, in itself, an offensive one. Where a case is straightforward, a defendant accepts their guilt and the evidence is substantial and undisputed, it seems justifiable to encourage a guilty plea at the initial stages; so long as the circumstances of the defendant do not negate his free and informed choice. In circumstances where these conditions are not met, the scheme poses problems. The scheme states that the discount are not a reward but an incentive, but this is arguably a matter of semantics rather than substance (see Johnston, 2016b). In reality, a defendant may view the discount as neither a reward for "doing the right thing" nor an incentive to assist those prosecuting them. However, it could be viewed as a temptation to reduce the risk of conviction for an offence the defendant has not committed or an inducement to sacrifice their legitimate fair trial rights. Rights such as the privilege against self-incrimination and the fact it is the duty of the prosecution to discharge the burden of proof.

There is a clear problem between insufficient disclosure and the pressure to enter a plea at the earliest opportunity. Some lawyers interviewed expressed great dismay about entering a plea and disclosing the real issues at the earliest opportunity, whilst not necessarily knowing what evidence was already in the possession of the prosecution.[47] Often the lawyers would only be meeting their client on the morning of trial and they sometimes had to complete the Case Management Forms within 20 or 30 minutes of meeting the defendant. A difficulty emerges because of the potential loss of sentence discount for a guilty plea. McEwan states that prosecution evidence is frequently not available at the first instance (McEwan, 2013: 216). In Lawyer 002's words:

A fundamental problem with these forms is that you are expected to fill them in on the first occasion which is often when you have been given the evidence for the first time and had an opportunity to speak to the client for the first time. You are in court; it is not the appropriate environment so solicitors should be saying "I want an adjournment; I don't want to deal with case management issues today" but the courts don't really allow that. So, the solicitor then has to decide – am I going to push ahead anyway notwithstanding and make sure I get it right or am I going to advise the client that I don't feel in a position to properly represent you today and withdraw from the case. [021] (Solicitor, 12 years' experience).

As Lawyer 003 (Solicitor, 7 years' experience) stated: "[the speed creates great difficulty] you're making decisions with only a partial picture [of facts]." Another lawyer (Senior Partner, 30 years' experience) gave an example that highlighted the inherent dangers of advising a client without a full picture of the facts. The lawyer highlighted that the culture change is not just about the notion of cooperation; there has been a change in culture from the judiciary and magistrates as well. When complaining to a judge that he could not adequately advise their client owing to a lack of information, the judge retorted quickly, "well, your client knows if he's done it". What muddies the water further is the fact the defendant might not know he is guilty, a view that was not always accepted by magistrates. Four lawyers commented that they had heard magistrates proclaim words to the effect of "your client knows if he's done it or not".[48] Lawyer 006 (Senior Partner, 40 years' experience) intimated that this approach is "pretty much universal" in his/her region. These research findings corroborate Edwards' suggestion of aggressive judicial behaviour regarding the completion of statements: the judges and magistrates have evolved a long way from their original purpose of assisting in the identification of relevant material for further prosecution

[46] Depending on what stage of proceedings the plea is tendered, the maximum sentence discount is one-third. See Sentencing Council (2017).

[47] This was not universal but 20/24 interviewed participants highlighted this as a concern.

[48] Although this was not an explicit question on the pro forma, four lawyers, from three different firms, in three different regions of England and Wales, suggested that they have either encountered such a question of a magistrate.

evidence (Edwards, 2011).

Furthermore, any guilty plea should be grounded in sound legal advice based on the weight of evidence the prosecution holds. However, the interviews point out that pre-trial disclosure by the CPS is often inadequate in practice and this poses great difficulty for defence lawyers. All 24 lawyers commented that the prosecution does not adhere to the disclosure regime and is effectively left unchecked. In contrast, when the defence does not adhere to the regime, the defendants and their lawyer are frequently threatened with sanction by the court. This disparity in treatment is rather concerning and has serious consequences. One may legitimately ask why the defence are consistently threatened with the stick and the prosecution are not given the same treatment. At present, there is little regulation of disclosure prior to the first hearing and this lack of regulation is important as it is the only point at which a defendant would be eligible for the maximum discount. The prosecution is only required to disclose Initial Details of the Prosecution Case (IDPC) if the defence requests it (Rule 8.2(2)). The scope of this disclosure is narrow (particularly for defendants brought to court in custody): prosecutors are mandated to share details of circumstances of the offence and the criminal record of the defendant, and little else. This poses a very serious question: how are defence lawyers expected to give sound legal advice as to plea when they are only advising on a partial picture of the evidence?

If entering an early guilty plea falls under “robust case management”, it is difficult to see a lawyer being able to adequately advise on plea with such little information. Arguably, the overriding objective could be viewed as a management tool in a system that assumes guilt and wants to process guilty cases. The assumption of guilt is something that is deeply non-adversarial and if the assumption is true, it reduces the due process protections of the adversarial process. Traditional theory holds that the truth emerges where two sides present their own version of events and are pitted against each other on equal terms (Jackson, 1991). However, in the 21st century there is a distinct lack of a level footing. Disclosure was designed to even out the equality of arms between the prosecution and defence. By completing the Case Management Forms, there is an inherent danger of making an incriminating admission which the prosecution could try and use against the defendant.[49] Lord Sankey classed the presumption of innocence as the golden thread; it is one that is unbreakable,[50] perhaps the pursuit of efficiency has broken this.

Pressure to enter a guilty plea

The disclosure has attempted to make trials more efficient, if each side knows the arguments of the other, there should be a less of a time-consuming battle. However, the process has attempted to become even more swift by reducing the number of cases that get to the trial stage by offering inducements to plead guilty at the earliest possible stage. The Sentencing Council offered guidance that the maximum sentence discount for an early guilty plea would be one-third off the defendant's sentence (Sentencing Council, 2017: 5). There are, however, stark dangers in being pressured to enter a guilty plea are stark and were demonstrated in the case of *R (on the application of the DPP) v Leicester Magistrates' Court*.[51] The claimant applied for judicial review to re-open his conviction for common assault. The offence had allegedly been committed against a 14-year-old boy, in the care of the defendant as an agency worker in a care home. At his first appearance in court, he intended to enter a not guilty plea on the basis of self-defence. However, he changed this on the first day of his trial. He asserted that his solicitor had pressured them into entering an early guilty plea; he was convicted, and, as a result, was no longer able to find work in the social care sector. Whilst the magistrates' court can make an order to re-open a conviction when it is in the interests of justice (under s. 142, Magistrates' Courts Act 1980) it can only be exercised where there has been a mistake or a situation akin to a mistake. A subsequent change of heart or regret at entering a guilty plea will not suffice as a mistake and as such the defendant's conviction was confirmed. This is arguably a matter of interpretation. One could feasibly argue that “regret” over changing a plea due to inappropriate pressure from lawyers is tantamount to a mistake. Clearly, the defendant's first inclination was to plead not guilty, but he was persuaded to plead otherwise. In the same way that false confessions are subsequently considered to be mistaken when extracted under police pressure, there seems no logical reason why a “change of heart” about a

[49] See *Firth*, above n. 33.
[50] *Per* Lord Sankey in *Woolmington*, above n. 25 at 481.
[51] Unreported, 9 February 2016.

guilty plea in such circumstances should be considered any differently. In contrast, where a defendant pleads guilty and has a vague or ill- defined "regret" based on nothing more than the desire to avoid conviction, it seems more reasonable to prevent the overturning of convictions.

Newman painted a rather bleak picture of what he witnessed in terms of lawyer-client interactions (Newman, 2013: 30). In fact, most lawyers whom he observed held a presumption of guilt in respect of their clients; the lawyer "assumed" the client would enter a plea of guilty and the lawyer helped facilitate such a plea (Newman, 2013: 112), even when the client wanted to enter a not guilty plea.[52] None of the participants interviewed for this study suggested that they would pressurise a client to enter a plea which suited their own needs for quick pleas. However, Leicester Magistrates' Court[53] suggests that undue pressure may not only come from the judiciary but from the client's own lawyer.

The Legal Aid cuts and the pressure to plead guilty

As illustrated in the *Leicester Magistrates' Court* case above, the pressure to enter an early guilty plea may not only come from the court and the CrimPR but also from the client's own lawyer. It is well known that the Legal Aid budget has seen a number of drastic cuts over the last 30 years. In short, the fees paid to Legal Aid lawyers have been frozen for decades and successive governments have attempted to reduce the cost of the Legal Aid budget through a number of cuts and reforms. Legal Aid remuneration is so poor that lawyers are criminal lawyers have voted to strike in a protest against low-fees. The Guardian reports that some lawyers are paid as a little as £46.50 for a day in court (Bowcott, 2019). The Criminal Bar Association of England and Wales are looking to raise the minimum fee from £46.50 to £100.00 and to increase the fees for examining evidence released through disclosure. With such low fees available for work, it is hardly surprising that some lawyers might help facilitate an early guilty plea from the client.

Active case management and an early guilty plea stands at odds to the due process nature of the adversarial criminal procedure, coupled with the low fees of defence representation, it is no surprise to see cases dealt with an expediated manner. However, the speed which cases are dealt with sits at odds with traditional adversarial systems, which are focused on the protecting the fair trial rights of the defendant (McEwan, 2011: 520). The goal of active case management and the guilty plea is to undoubtedly increase the efficiency of the criminal process. In Herbert Packer's Due Process Model (DPM), a central component of the adversary process is the accused's opportunity to have "his day in court", should he elect to do so and have the evidence against them tested by his defence lawyer (Packer, 1968: 157). The model looks much like an obstacle course with each successive stage designed to present formidable impediments to carrying the accused any further through the process (Packer, 1968: 163). Packer's opposing model, the Crime Control Model (CCM), is almost managerial in nature. The metaphor used by Packer was a conveyor belt, moving an endless stream of cases smoothly through the system, never stopping. Traditional trial elements such as cross-examination have no real value in this model; facts are more easily established at the police station and the procedures followed need to be uniform. Furthermore, the earlier a case can be disposed of, the better (Packer, 1968: 163). Arguably, the case management and guilty plea system reflects the conveyor belt approach suggested by Packer and encourages the defendant to forgo "his day in court".

Disclosure failings: Inadequate sanctions for the prosecution

The pressure to enter a plea is often given in circumstances where the defence lawyer is not in full possession of the relevant evidence and so timely disclosure by the prosecution would vastly improve the legal advice offered by the defence. However, there is no suitable stick that the court can level at the prosecution, should they fail to disclose evidence in a timely manner.

In contrast, should the defence fail to comply with the disclosure provisions under the CPIA 1996, the court is

[52] Newman (2013: 115), where the client says he's not guilty and the lawyer says "Look, if you plead guilty, then I'll explain why later, okay?"

[53] Unreported, 9 February 2016.

permitted to make adverse comment and/or to draw adverse inferences. Section 39 CJA 2003 inserted an amended s. 11 into the CPIA 1996. The statutory sanction available to the court for disclosure faults is that of drawing inferences. Should the accused fail to provide the defence statement,[54] provides one outside the prescribed time limits,[55] fails to give any updated version of the statement required by s. 6B of the CPIA 1996,[56] gives the updated statement outside of the prescribed time period[57] or sets out inconsistent defences in his statement, then the court will make such comment that appears appropriate,[58] or the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned. [59]

Whilst the inadequacy of judicial sanctions has been well debated. Auld LJ noted the problem of creating an enforcement mechanism for compliance with case management orders or other procedural orders. Auld stated that "[He had] anxiously searched here [in England and Wales] and abroad for just and efficient sanctions and incentives to encourage better preparation for trial … we are not alone in this search and that, as to sanctions at any rate, it is largely in vain" (Auld, 2017: para. 231). It appears clear that the court does have the power to sanction defence failings. Rule 3.5(2) states that should a party fail to comply with a rule of direction, the court may fix, postpone, bring forward, extend, cancel or adjourn a hearing.[60] The court has the power to make a costs order[61] or the court can impose any sanction as may be appropriate.[62] The final provision appears to give the court a great deal of latitude in administering and ensuring an effective enforcement mechanism. However, with no statutory weight behind the rules, it is difficult to envisage anything other than the court administering a financial penalty in respect of costs being ordered. This sanction was the one that concerned the majority of lawyers in the study:

The threat of wasted costs hangs over everything. Just very much the fact that if you get something wrong at the early stage and your client says, why can't that evidence go in and it is because you have cocked up early on, I think the worry that you are going to have to apply for an adjournment and might be refused or an application might be refused does play on my mind actually at the case management stage. [003] (Solicitor, 7 years' experience).

Although costs seem the most likely enforcement mechanism for breaching the rules, Auld LJ did highlight the difficulty of using such tools. He believed that orders of costs, wasted costs orders, the drawing of adverse inferences or depriving one side or the other of the opportunity of advancing an aspect or all of their case, are not "apt ways of encouraging and enforcing compliance with criminal pre-trial procedures" (Auld, 2017: para. 229).

There are a number of enforcement mechanisms that are available to the court. However, their application is fraught with difficulty. A direction to draw adverse comment for breaching the disclosure provisions only affects the defendant and at times the defence lawyer may have difficulty in obtaining instructions from his/her client. Furthermore, Denyer indicates that courts are unlikely to allow adverse comment for late disclosure unless it was "very very late indeed" (Denyer, 2009: 343). Furthermore, it is not appropriate to draw inferences should the fault lie with the lawyer. Costs orders against the defendant are unlikely: first, owing to his lack of means; secondly, as Auld LJ stated, it is difficult to establish who was at fault. Wasted costs could be imposed on the lawyer, but again the difficulty is found in establishing who was at fault. The courts could refuse to grant an adjournment or allow certain evidence to be adduced. These provisions would surely undermine the overriding objective of dealing with cases justly. However, in terms of issuing wasted costs against the prosecution, the notion is rather unlikely as it will be a case of simply moving money from one public purse to another.

[54] CPIA 1996, s. 11(2)(a).
[55] CPIA 1996, s.11(2)(b).
[56] CPIA 1996, s.11(2)(c).
[57] CPIA 1996, s.11(2)(d).
[58] CPIA 1996, s.11(5)(a).
[59] CPIA 1996, S.11(5)(b).
[60] Rule 3.5(6)(a) Criminal Procedure Rules 2011.
[61] Rule 3.5(6)(b) Criminal Procedure Rules 2011.
[62] Rule 3.5(6)(c) Criminal Procedure Rules 2011.

However, the need for an adequate sanction for prosecution failings is stark. The Justice Gap reports that the number of rape prosecutions in England and Wales that has collapsed because of a failure by the prosecution and police to disclose evidence has risen by 70 per cent in the last two years (McRae, 2018). However, no evidence exists regarding what sanctions, if any, the court make against the prosecution, should the case not collapse. Furthermore, should the prosecution fail to comply with its disclosure obligations, the case may not automatically be stayed. In *Salt*[63] the court suggested that despite the "reprehensible conduct of the CPS and police", the gravity of the charges were so severe that there was a strong public interest in the offences being tried; despite the untimely disclosure, a fair trial was still possible. Further, *R v R*[64] suggests that any untimely disclosure could be remedied by a reduction at the sentencing stage rather than allowing a stay. The approach adopted by the court in both *Salt* and *R* suggests that a stay of proceedings will be the absolute last resort and the court will tolerate failures unless they are so untoward that they render the process unfair.

In light of the collapsed *Allan* case (Metropolitan Police and CPS, 2018), the Metropolitan Police made a series of recommendations in order to counter any future miscarriage of justices. The force suggested it was "unfortunate that one prosecutor had the responsibility for this case …" (Metropolitan Police and CPS, 2018: 6) and suggested that a "Disclosure Champion" should be appointed for "Complex Casework" (Metropolitan Police and CPS, 2018: 7). After an analysis of the available sanctions, it appears there is not one "fix-all" sanction that the court can apply and therein lies the difficulty faced by the courts and points that reform is urgently required as the aforementioned sanctions only relate to defence failings with the disclosure regime, there are no appropriate sanctions to prosecutorial failures and the recent collapsed cases of Liam Allan, Isaac Itiary, Samson Makele and Oliver Mears (Metropolitan Police and CPS, 2018) suggest that prosecution failure may not be rare. However, as highlighted above, there is a distinct need for an adequate sanction for disclosure failings, although a suitable one is yet to be identified.

The role(s) of the defence lawyer in the CrimPR Era

This article has charted the fundamental change in the pre-trial process. The adversarial environment has been replaced with an environment of cooperation, where the defence discloses a vast array of information in advance of trial and effectively show their cards to the prosecution, which, to some extent, has better cards as it is difficult to force them to disclose information in a timely manner. McConville and Marsh argue that lawyers have misread the extent to which their duty to the client has been overridden in the cause of efficient court administration (McConville and Marsh, 2015). This misreading has led to a fundamental departure from adversarial values and has given rise to lawyers who either (a) claim to be adversarial but illustrate elements of conflict, or (b) prioritise the managerial goals of the CrimPR ahead of their client's interest. This contention is supported by the small study conducted for this paper. The study found that there has been a distinct change in adversarial culture. This culture shift has the potential to impact on the role of the defence lawyer; a thematic coding of the empirical research gave rise to three types of criminal defence lawyer that practice in the post-CrimPR era:

- the Classic Adversarial Lawyer (4/24 participants);
- the Conflicted Adversarial Lawyer (17/24 participants);
- and the Procedural Lawyer (3/24 participants).

The Classic Adversarial Lawyer is a lawyer who is fundamentally clear on which obligations compete for priority. He is single-minded and believes that the duty to the client is prioritised over any other duty. In this empirical study, only 4 of the 24 interviewed lawyers could be described as coming within this category. Lawyer 007 [Senior Partner, 21 years' experience] was an example of the Classic category and was steadfast in explaining his duties: "I'll ignore what it says in the Procedure Rules, we are there to protect the legal interest of the client." The lawyer effectively excludes all other duties in order to advance the best interests of his client. Lawyer 006 [Senior Partner, 40 years' experience] was another who explicitly prioritised the duty to the client. The lawyer suggested that having competing duties "fudged" the issue; the single duty taking priority is to the client. The four Classic

[63] [2015] 2 Cr App R 27.
[64] [2016] 1 Cr App R 20.

Adversarial Lawyers had a combined 123 years of criminal defence experience. They all qualified and practised in the pre-CPIA 1996 era and therefore had experience of working in a time before the defence had to disclose any information, save for alibi and expert evidence. They had the adversarial weapon of an ambush defence and they could put the prosecution to proof without making an affirmative defence. The very notion of cooperation between the opposing sides would be shunned; prosecution and defence lawyers were adversaries, battling to advance the best interest of their respective clients. It is perhaps unsurprising to discover that the category most akin to the classic conception of the adversarial lawyer contains the fewest number of participants.[65]

As illustrated above, the vast majority of the lawyers in the present study fell into the second category, the Conflicted Adversarial Lawyer. Fifteen of the twenty-four participants could be placed in this category. They are "conflicted" because they want to prioritise their duty to the client but, for a number of reasons, the impact of doing so is greatly diluted. The lawyers use terms such as "paramount", "prime" or "main". These terms suggest that the duty to the client takes priority, but it is quickly given a caveat that other obligations also exist that require a great deal of attention. Lawyer 008 [Solicitor, 6 years' experience] provides an illustration of the Conflicted Lawyer. The lawyer suggested that their duty was "mainly" to the client; this was not as explicit the Classic Lawyers as it recognised the existence, and importance, of other duties. Lawyer 009 [Senior Partner, 29 years' experience] felt that the duty to the client was "paramount" but accepted it was "coloured" by the professional obligations to the court. These lawyers gave the impression that they are zealous advocates who are the shield of the accused, but, unfortunately, their other obligations dilute the impact of this shield. Lawyers in this category have a vast amount of experience; the most experienced lawyer qualified 32 years ago whereas the most recently qualified lawyer has four years' experience. The experience range of this group makes for some very interesting results when compared with the Procedural category.

The final category is the Procedural Lawyer, who ultimately sees no issue or conflict with the obligations placed upon the defence lawyer by the CPIA and the CrimPR. Lawyer 022 [Solicitor, 6 years' experience] illustrated this point by explaining that the obligations were merely an "occupational hazard". These lawyers placed a heavy emphasis on the notion of cooperation; Lawyer 023 [Solicitor, 7 years' experience] admitted they had an explicit duty to "their opponents". Perhaps unsurprisingly, two of the three lawyers in this category had less than 10 years' experience; therefore, they have only practised in an era when the CPIA and the CrimPR have been in operation. What was surprising was the remaining two lawyers, who had 13 and 18 years' experience respectively. These advocates did not think the CrimPR or CPIA 1996 held many ramifications for the role of the defence lawyer. What is interesting is that the most recently qualified lawyers who took part in the study, both of whom had four years' experience, provided responses that put them in the "Conflicted" category. Two of the three Procedural lawyers have less than 10 years' experience and because they may have been socialised into an era that prioritises efficiency and cooperation, it might be expected that the most recently qualified lawyers would also occupy a space in the Procedural category, but that is not necessarily the case as the two most recently qualified lawyers were placed in the "Conflicted" category. However, the most senior partner at their firms were both in the Classic category and the adversarial culture that permeates those firms may have an impact on how they view their role and obligations.

Recommendations: The future of disclosure

This article has established that a combination of the disclosure regime and change in judicial culture has led to the dilution of the adversarial process and ultimately renders the defence lawyer a cog in the criminal justice machine; a stark difference to the gladiator of the accused. Further, it highlights the discrepancy of disclosure practices between defendant lawyers and the prosecution. Whilst admittedly some lawyers disclose bare minimal detail concerning their defence, the real problem is the prosecution disclosure: it is incomplete, not forthcoming or it is served at a late stage. Unfortunately, there appears to be no suitable sanction for such failings and the failings represent a real threat of allowing a miscarriage of justice occurring. Arguably, a complete overhaul of the

[65] However, as already advanced in this paper, the adversarial lawyer may never have existed. Studies undertaken over the last 25 years suggested that some defence lawyers do not advance the client's best interest; they want them to enter a plea of guilty at the earliest possible stage and process them through the system.

disclosure regime should be made. A radical redesign of the regime, as suggested by Smith and Johnston (2018), is no doubt warranted. Smith and Johnston offer two new ways to tackle the problems with disclosure.

First, "full disclosure", i.e. the entire prosecution case, save for sensitive material, should be made to the defence. The authors accept that this may leave the defence with an "over-load of haystacks, and few tools for finding needles" (Smith and Johnston, 2018). Secondly, the post of a Judicial Disclosure Officer could be created. There are clear resourcing requirements, but this approach of plugging the issues of a broken regime with piecemeal changes needs to stop. A more assertive change is required and the JDO would focus on:

- determining what, if any, exculpatory evidence exists;
- determining what is non-disclosable on the basis of irrelevance;
- withholding sensitive material; and
- continuing with this duty for the life of the case.

Smith and Johnston contend that this will create an entirely new figure into the criminal justice system and may draw parallels with the investigative judge of inquisitorial jurisdictions. They advance that this has the "most potential" to ensure the long- term fairness of the process. This would reassert the classic disclosure position, of balancing the quality of arms. Instead of the defence showing their cards to the prosecution and allowing them to plug gaps in their case, this would re-establish Denning's "spirit" of the disclosure regime.[66] However, this approach is unlikely in light of the current economic climate, even if the improvements would save money in the longer term.

Truth or proof: The dilution of the adversarialism in pursuit of the overriding objective

This paper has illustrated a clear desire that the criminal justice process needs to be more efficient; this was a clear goal of the CrimPR and its overriding objective. The mechanisms of disclosure and case management provisions are the enabling factors that allow the court to pursue the objective of a more efficient trial. Undoubtedly, the criminal trial has always evolved through time, and to preserve resources is not to be immediately derided, though the cost of this pursuit could be viewed as something mirroring 18th-century trial process. The amount of disclosure and participation forced upon the accused is rendering them akin to the "informational resource" of the "accused speaks" trials. This form of trial reflected the notion that the trial was designed to establish the truth of a particular accusation. The implementation of the CrimPR, alongside the judiciary assuming a more interventionist role, could suggest that the pendulum is moving toward re-establishing the importance of the truth in criminal trials as opposed to proof. The goal of the criminal trial is to reconstruct historical events in respect of which neither party is in possession of all the facts (Moisidis, 2008: 250). Mosidis believes it is the problem of fact possession that reveals the tension between truth and proof in a criminal trial. He states that the essence of a criminal trial is a search for the truth rather than a sporting contest between the prosecution and defence (Moisidis, 2008: 250). It is this sporting contest that the CrimPR has assisted in eradicating. The criminal trial of England and Wales arguably reflects some of the values contained within the "accused speaks" trial, where the defendant is an informational resource of the court (Hawkins, 1721, cited in Langbein, 2003: 171) as the defendant "knew if he did it". The modern-day informational resource is forced to identify the "real issues" of his case. Should the defendant delay, the court will exert pressure in order to extract a plea, even if the defence lawyer does not hold all the facts. The truthseeking nature of the trial is also exemplified by the case management provisions of the CrimPR and its extension, BCM, which is designed to ensure that the case management provisions are strictly adhered to. Never before has the judiciary or magistracy had such explicit directions as to what constitutes their role of active case management. Furthermore, the voluntary nature of the defendant's participation has dissipated and he is effectively compelled to make disclosures in "pursuit of efficient fact-finding" (Owusu-Bempah, 2017: 163).

There has been no official recognition that adversarialism ought to be abandoned. However, this has been

[66] Lord Justice Denning sought to broaden the disclosure obligations of the prosecution. He suggested it would be "reprehensible" for the prosecution to conceal material facts that tends to the defendant's innocence. See Dallison v Caffery [1965] 1 QB 348 at para. 369.

suggested implicitly through piecemeal changes to the criminal justice process. The interventionist judiciary and the disclosure regime are forcing the accused to talk by having them "identify the real issues" at an early stage. The culture shift does not represent a swing toward inquisitorialism. Instead the swing is toward managerialism, and at the heart of this shift is the interventionist judge who is not merely a guiding pilot (Silverman, 1973: 63). The pendulum has swung, and the judiciary is now also the controller of the trial process. With the adversarial landscape shifting, the role the actors play also changes. What has not yet been recognised but has been highlighted in this article is the impact the managerial agenda has on the role of the defence lawyer.

Conclusion

Although the CrimPR has "an upside in that they consolidated many procedural rules, they also have a sinister downside by putting the acquittal of the innocent and conviction of the guilty at the heart of the Rules" (Richardson, 2015: ix). The Rules ultimately confuse procedure with outcome and fundamentally undermine adversarial criminal process. The sole objective of the process should be to provide a fair means to trying a criminal charge, but as it is at the moment it leaves the defence lawyer in a position of great tension: how does one balance the duty to the client against the duty to the court?

Andrew Keogh intimated that the "clever, technical lawyer had died" (Keogh, 2001). However, the empirical interviews suggest that is not necessarily the case. The clever technical lawyer, who would zealously defend their client and act as the client's "white knight" is alive and well--at least for now, and in a small fraction of the interview sample. These four lawyers represent the Classic Adversarial Lawyer, but are a dying, rather than an extinct, breed of lawyers in England and Wales.[67] The tension created by the managerial agenda from the CrimPR is clear and the lawyer is required to positively contribute to the efficiency of the system; this is clearly identifiable by having to enter a guilty plea at the first hearing (Leveson, 2009). Those in the Classic category thought the rule was an aberration and that zealous advocacy and an active defence cannot be undertaken adequately within a short period of time. Lawyer 002 [Senior partner, 32 years' experience] suggested that the courts were "asking you to nail your colours to the mast without operating with the full facts"; it is in this example where the technical lawyer is allowed to showcase their talents and offers up enough information to satisfy the courts but not at the expense of the client's rights. However, what needs to be tackled is the fact that the defence are all too frequently advising clients without full disclosure from the prosecution. With continued failings with the prosecutorial regime, it is time to start reform that particular area of the process. With the competing pressures of the managerial era, underscored by an overriding objective of "dealing with cases justly", the defence lawyer is simply not permitted the time to wait for disclosure. In order to reassert the adversarial values, defence lawyers must be presented with full facts.

Although the managerial landscape means that Classic Adversarial Lawyers could be viewed as a dying breed, there is some semblance of traditional adversarialism in the Conflicted lawyers, even if they were not as zealous in their pursuit of adversarial goals. They wanted to highlight the importance of the duty to the client but were quick to intimate that they had other duties such as fulfilling the overriding objective. The Procedural lawyer saw no problem with the rules and often thought they benefited the system in terms of speed and efficiently, albeit not necessarily their client.

In the modern managerial era, the need for adequate and timely prosecution disclosure is clear. The lack of timely disclosure impacts the ability of the defence lawyer to advise on an appropriate plea. Equally, a defendant may be pressured by his lawyer to enter a guilty plea or be tempted to do so because of the sentence discount. In such cases, there is a risk that the overriding objective of the CrimPR will be undermined--that is, to deal with cases justly, which includes acquitting the innocent and convicting the guilty.[68] Whilst it is important to consider the effects of lengthy criminal proceedings on victims and witnesses, it is often the defendant who is forgotten in any reform. The rise of the CrimPR and its implicit goals of managerialism have the potential to weaken the adversarial protections of the criminal justice. The accused is coopted into the process and is almost compelled to participate

[67] 4/24 lawyers were categorised in this way.
[68] Rule 1.1 CrimPR 2016.

in proceedings to satisfy the overriding objective. Whilst the criminal trial is not a game, nor is it a single-minded pursuit for a conviction. The defendant is entitled to have the evidence against him tested and should they not wish to say anything, the defendant should not be compelled to participate; regardless of whether the court believes that "he knows if he has done it". This approach, highlighted by Lawyer 007, shows scant regard for the cornerstones of the adversarial process which encapsulate Packer's Due Process protections. The disregard of safeguards has given rise to a process of cooperation accompanied by the common goal of efficiency. However, these goals all seem to slanted against the defendant.

There is undoubtedly an agenda, for better or worse, to encourage defendants to enter early guilty pleas, and it seems that should the defendant regret doing so, a remedy will rarely be offered by the courts.[69] It is therefore imperative to ensure that any decision to enter a guilty plea is based on full and accurate evidence from the police and prosecution, made available at an early stage. This is arguably commensurate with the objectives of the CrimPR and the general culture change that has seen a drift away from pure adversarialism. If cooperation is to be encouraged, it should be done on an equal basis. This would ensure that the defence lawyer in the modern era can adequately advise the client as to plea. Moreover, it would re-assert the adversarial tradition of English and Welsh criminal justice by moving away from a system that is reliant on a defendant entering a guilty plea because he "knows if he has done it" and moving towards a system which reaffirms the due process cornerstones of adversarialism by requiring the prosecution to discharge the burden of proof, without any assistance from the defendant.

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[69] Above n. 52.

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