International Journal of the Legal Profession

ISSN: 0969-5958 (Print) 1469-9257 (Online) Journal homepage: www.tandfonline.com/journals/cijl20

Exploring the (crisis of) working culture of English and Welsh criminal defence lawyers through autopoiesis

Lucy Welsh & Daniel Newman

To cite this article: Lucy Welsh & Daniel Newman (30 Apr 2025): Exploring the (crisis of) working culture of English and Welsh criminal defence lawyers through autopoiesis, International Journal of the Legal Profession, DOI: 10.1080/09695958.2025.2489656

To link to this article: https://doi.org/10.1080/09695958.2025.2489656

Published online: 30 Apr 2025.

INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION
https://doi.org/10.1080/09695958.2025.2489656

Routledge
Taylor & Francis Group

Exploring the (crisis of) working culture of English and Welsh criminal defence lawyers through autopoiesis

Lucy Welsh[a] and Daniel Newman[b]

[a]School of Law, Politics, and Sociology, University of Sussex, Brighton, UK; [b]School of Law and Politics, Cardiff University, Cardiff, UK

ABSTRACT

This paper examines the working culture of defence lawyers through the lens of autopoiesis. While this lens is criticised for being tautological, we suggest that applying autopoiesis to the messages that might influence working cultures can allow us to identify conflicts between cultural practices, or conditional programmes developed via communication, which threaten the sustainability of publicly funded criminal defence lawyers. With their day-to-day work managing environmental stimuli at the intersection of political and legal (and – to an extent – economic) systems, the communications received by lawyers about their working environment are replete with challenges. We suggest that application of autopoiesis to pre-existing observed characteristics of criminal defence practice increases our understanding of a criminal defence profession in crisis, and enables us to identify tensions in messaging that warrant further examination to assist sustainability in the profession.

ARTICLE HISTORY
Received 13 December 2024
Accepted 2 April 2025

Introduction

In a recent UK Parliament podcast, Joanna Cherry, Joshua Rozenberg, Sir Bob Neill and Dame Diana Johnson discussed whether the English and Welsh criminal justice system is in crisis (Cherry, 2023). They discussed dwindling recruitment and retention among criminal law practitioners, significant court backlogs, exceptionally high numbers of prisoners being detained on remand awaiting case resolution, and the poor state of court buildings. Rozenberg's description of the English and Welsh criminal justice system as being *in a pretty bad way* seems apt, if not an understatement (Cherry 2023). Popularly characterised as "broken" in the best-selling book by The Secret Barrister (2018), the English and Welsh criminal justice system has, arguably, been

CONTACT Lucy Welsh l.c.welsh@sussex.ac.uk
This article has been corrected with minor changes. These changes do not impact the academic content of the article.

devastated by over three decades of neo-liberal reforms.[1] Rupturing the post war consensus around legal aid (Smith and Cape 2017), New Public Management measures have transformed the working practices of criminal defence lawyers, altering their scope and remit (see Johnston 2020), while the impact of austerity has dramatically eroded their capacity to provide quality services (Thornton 2023; Mant et al., 2025). Lawyers practising in both the English and Welsh parts of the jurisdiction have reported these ill effects of decades of underfunding and bureaucratisation (e.g. Thornton 2023; Newman and Dehaghani 2022). There is, therefore, an acute need to analyse the working culture of criminal justice lawyers.

Since the turn of the twenty-first century, there has been a growing body of empirical case studies of criminal defence lawyering (e.g. Cooke 2025; Thornton 2023; Newman and Dehaghani 2022; Welsh 2022; Johnston 2020; Smith 2013; Tata 2007) which we have, elsewhere, sought to synthesise (Welsh and Newman 2023). Here we suggest using systems theory as an alternative frame for understanding publicly funded criminal defence lawyer working culture. The concept of autopoiesis emerged from the biological sciences to describe the capacity of living cells to reproduce and organise themselves (Varela and Maturana 1972) and was then introduced into sociology by Luhmann (1986) to capture his conception of society as composed of closed systems of self-referential communication that reproduce and evolve through the repetition of their own operations. It was subsequently applied by Teubner (1993) to law to explain its self-organising character – or autonomy – as deriving from the self-reproduction of a communication network that relates to other autonomous communication networks across wider society.

We suggest that publicly funded defence lawyers' working culture is one example of an unstable yet distinctive communication system which exists within the criminal justice process. The process of applying the law occurs within the legal system as a form of communication within that system (Luhmann 1982). We suggest that publicly funded defence lawyers have a distinct communication system on the basis of our view that publicly funded defence lawyers operate as a particular subsection of the legal profession more broadly. Like family lawyers, defence lawyers "have a crucial role to play in constructing an environment amenable to decision-making by courts" and in constructing case narratives appropriate to criminal law (Barnett 2017, p. 228). When compared with lawyers engaged in privately funded and commercial legal practice, defence lawyers are (again like many family lawyers) subject to greater state intervention and regulation of their practice through funding regimes. This has implications for the messages that feed into their communicative system, and thus potentially renders publicly funded defence lawyers communications more contingent than some other branches of the legal profession, which might impact their ability to reproduce practice norms. We suggest that this occurs because lawyers conducting

publicly funded criminal defence work exist in the legal system but are also stimulated by "second-order autopoietic social systems", i.e. politics and economics (Lourenço 2010, p. 6). Empirical studies of defence lawyer working culture reveal it to be replete with friction and tension. This is exemplified by the fact that, in interviews conducted by Newman (2013), lawyers both articulated a traditional conceptualisation of their role, and described it in a range of divergent ways. We suggest that examining this apparent cognitive dissonance from the perspective of autopoiesis offers a novel alternative way to envisage a working culture operating in crisis as shifts in the working environment challenge the operation of the legal/illegal code in this area of legal practice.

In making this claim it must be acknowledged that the working environment for defence lawyers is constituted of different, yet overlapping, communicative networks, and different actors with the criminal justice system will operate in environments that will communicate differently within the legal system. For example, in police stations, officers might frame their behaviour through existing narratives that can shape investigations, including whether an incident merits intervention, and what type of resources should be directed towards it (Weir 2022). Judicial decision-making draws on distinct narratives (conditional programmes) to assess whether the decision or outcome accords with current legal values and binding precedent (Dias 1980). At different points of a particular case, or simply at various times of the working day, lawyers will be required to orient themselves within a particular communicative environment in different ways.

The paper progresses our argument about the conflicting environmental stimuli which lawyers receive from different systems as follows. We begin by setting out our understanding of autopoiesis and how it might offer insight into the environment of working practices. Next, we examine the modern and shifting role, and image, of publicly funded defence lawyers, before using the typology developed in Welsh and Newman (2023) to highlight points of tension and conflict with traditional understandings of lawyers' role. In doing so, we highlight the relationships between the different characteristics of the typology to illustrate the competing messages received by lawyers who attempt to reproduce their working culture. Our argument is that these perturbations – differing communications external to the legal system – destabilise the working culture of publicly funded defence lawyers, thereby contributing to the sense of crisis described through our typology and experienced in the profession.

The relevance of autopoiesis

Autopoiesis offers "a theoretical approach to the operations of social systems and their relationships with each other and with the general social environment" (King 1993, p. 219). As above, Luhmann (1988 p. 136) defines an

autopoietic social system as one that "produces and reproduces its own elements by the interaction of its elements". Teubner (1993) developed Luhmann's theory to conceptualise law as a closed social system. Law interferes with other systems in society but retains its autonomy. This understanding of systems theory suggests that "with increasing social complexity, a system comes to possess its own rationality, separate from the rationality of those subjects who interact within it" (Webb 2005, p. 230).

Engaging with such autopoietic ideas in other legal studies, Barnett (2017, p. 224) explained that systems theorists understand that "modern society's identity, its conception of itself, is the product of the operations of its normatively closed, differentiated systems, which provide the authority and justification for social communications". Social systems are (re)produced via those communications to create a particular social world (Barnett 2017). Thus, to become part of a system, familiarity with its language and mode of communication is required. As Barnett said, "[s]hared meanings produce tighter structural coupling, for example, between communications of the legal system and the consciousness of those familiar with its meanings such as judges and lawyers" (2017 p. 226). Differentiation between those within and those outside the system is illustrated by the tension and fear that legal professionals experience about the mistakes that unrepresented defendants or litigants in person will make because they do not understand the communications used in courts (Leader 2024; Barnett 2017). The insider/outsider distinction is fundamental to the wider sociology of the professions, and the perceived need for professionals to exert boundary control through such things as specialist discourse (Francis 2020). The insider/outsider differentiation is thus illustrated by extant literature which has examined the closed nature of legal professional language in various jurisdictions (e.g. Charrow and Charrow 1979; Luhmann 1988; Tiersma 1999; Smejkalová 2017; Bourdieu 1991).

Using those shared meanings to differentiate themselves from the environment within which they operate, systems create binary codes to structure their operations (Luhmann 1986). In law, that binary is legal/illegal, but in the practice of law, that binary might be acceptable/unacceptable behaviour. Although Luhmann asserts that something does not belong to the legal system unless the binary considered via communication is legal/illegal, it can include communications which consider the idea of legal validity or invalidity (Lourenço 2010). We therefore propose the acceptable/unacceptable binary because legal practice – as we shall see below – receives stimuli from not only the legal system but also from the political system and the economic system and must then determine whether those communications can be constituted into legally valid behaviour.

Political system coding can be government/opposition and statal power/powerlessness about legitimising authority to make binary decisions, while economic system codes can be having/not having property and payment/

non-payment (Mattheis 2012). Drawing distinctions among communications makes systems selective and reduces their complexity. The selective nature of systems means, however, that the norms developed become contingent on information received (Teubner 2009). In what follows, we identify the source of the communication, highlighting where communicative events conflict and make more contingent the code within the legal system. Autopoiesis is, therefore, "best understood as a matter of degree" (King 1993; 224). Law may develop as a social system that operates independently of individual psychic systems, but the norms developed via those systems may "become psychic phenomena to the extent that they are internalized and serve to determine people's expectations as they move into and within the legal system of meaning" (King 1993, p. 228). Where systems are unable to absorb information in a way that contributes to its world understanding, autopoietic reproduction may fail (Lourenço 2010).

The above propositions can, though, give rise to theoretical tension. The hyper circularity of autopoiesis ("because the law says so") suggests that the system remains closed, and unable to communicate with the environment even though it communicates about the environment (King 1993). King does, however, emphasise the communicative nature of autopoietic systems, noting that

> the theory does not deny the possible influence of other social systems – political, economic, religious, and so on – upon the content of legal communications, but does refute suggestions that these systems are able to determine legal communications in any direct way or in a way that is possible to predict. (King 1993, p. 226–227)

In other words, through their processes of self-referential coding, systems may not be able to effectively communicate with, let alone steer, the environment within which they operate (Barnett 2017, p. 225). To us, this offers an interesting point at which tension might develop between norms in legal systems and the codes developed and used by another system (politics and economics), with these lawyers' working environment receiving communications across these systems. Lawyers who feel unable to influence the environment in which they are practising (see below regarding pessimism) also rely on communicative events across systems for how they envisage their duties. As Barnett explained, systems may be "irritated by their observations of the environment and in this way are able to learn and remain responsive to the 'external' world. In particular, social systems are dependent on other social systems producing authoritative communications on which they are able to rely" (2017, p. 225). When the different social systems produce conflicting communications, it is – as King indicated above – not possible to predict how those communications will be integrated within a particular system. The crucial dilemma in seeking to apply autopoiesis to social subsystems is in distinguishing the social practice of law from the social arena in which it operates (Teubner 2002).

For proponents of the value of using autopoietic theory to comprehend social organisations, it offers at least a partial explanation for the reproduction of self-sustaining systems. As meaning is produced through communication within the networks of the social systems, autopoiesis can help us to identify how the interfaces of internal operations of the legal profession and different environments, such as the organisational needs of the courts, might influence the overall working culture of defence lawyers. Self-referential social systems are reproduced via people's interpretation of signals within that system (Brønn *et al.* 1993), so autopoietic theory can highlight where the traditionally understood working culture of lawyers conflicts with the demands of a legal system responding to pressure from political and economic systems. Lawyers clearly occupy an important position in the reproduction of communication systems in the criminal justice process, and their working culture can thus highlight where some of the communications operate in tension with each other. That conflict potentially challenges the ability of the system to reproduce itself, deepening the sense of crisis in the publicly funded defence profession. Autopoiesis can, therefore, appear to offer a way of analysing the fragility of a system which predominantly operates within the boundaries of the legal system.

Goodrich has described autopoiesis as "undoubtedly the most radical" contemporary social theory (1999; 199) because of its understanding of a society grounded "exclusively in terms of communicative events rather than actions or persons" (1999, p. 199). To us, this begs a question about where communicative events originate and how they perpetuate to sustain systems. Teubner, according to Goodrich (1999, p. 199), resolves this issue by understanding society as existing as a result of numerous intersecting rationalities that remain "epistemically blind to each other, without subjectivity or totality" such that society consists of a series of systems which evolve in response to environmental "noise". In this understanding, the law pays no heed to social systems that operate around it (Goodrich 1999, p. 200). Goodrich thus understands that law and society "evolve in states of mutual blindness or systematic betrayal" (1999, 200). It might be that mutual blindness which causes conflicting communications to develop between systems, and therefore undermines the stability of the environment in which defence lawyers operate.

Teubner (2002) later explained that the practice of law is extra-legal and operates only as a system of normative facts. As such, the process of examining the legal world (in broad terms) requires more than the closed binary system that Luhmann's understanding of autopoietic systems allows. However, because social systems interact, the norms governing the practice of law do need to be referenced by the legal order in order to maintain the legitimacy of the legal process. Teubner (2002) refers to this as a process of framing. In the world of legal practice, norms arise through "legal rule production in structural coupling with politics" (Teubner 2002, p. 207) which shifts the frame of

law between centre and periphery. In an increasingly globalised world, the frames in which law operates might be particularly prone to shifting across political frames (Teubner 2002). This might demand a revision or reframing of autopoiesis in the context of law, moving it away from a positivist ontological approach. For Teubner, such approaches are "a strange compromise which allows law and society to 'contain' elements of each other" which ultimately undermine each other because "one language game does not and cannot 'exchange' elements with another one" (2002, p. 209). This suggests that we might view the construction of legal practice, and rules surrounding it as a political, not legal, pursuit. As Teubner said, though, intersecting environmental stimuli ultimately lead systems to undermine each other. This might be a result of the different possibilities of communication (and therefore conditional programming) that occur across the different social systems that lawyers are required to navigate. For example, to maintain state power and the legitimacy of its authority, the political system appears to favour speedy case progression and early guilty pleas. The adversarially driven environment of the criminal justice system might favour more due process considerations and strict adherence to the burden and standard of proof. These communications might cause lawyers to feel conflicted about their role, as we discuss in the following sections on this paper.

Teubner does, however, acknowledge that the "boundaries between the legal and the social are always blurring" (2002, p. 210), locating the conceptual difference as between frames which adopt either philosophical or sociological standpoints. All of this leads us to an analysis of how far autopoiesis can be applied to develop knowledge and understanding of the working cultures of legal professionals. For us, with our own epistemological understanding rooted in socio-legal approaches to law, autopoiesis "plays at society in the sense that it judges social and administrative actions without the means of fully appreciating the social subsystems that it seeks to regulate or govern" (Goodrich 1999, p. 207). This play has the potential to bring us full circle in our argument. Perhaps the criminal defence profession is in crisis because, in part, the political system in which it operates is incompatible with the legal system that the profession operates within, thus eroding the environmental reproductive capacity of the social system. Our issue is how to separate the rationality of the subject within the system from the rationality of the system itself (Webb 2005). In an effort to draw out these differences in communication, we turn to socio-legal understandings of the legal profession.

Traditional beliefs about what the lawyer role "should" represent

King explained "[i]f social systems are systems of meaning, people 'exist' within systems only according to the meaning that each system assigns to them" (1993, p. 220). We are concerned, here, with what happens as the meaning assigned to

the criminal defence lawyers' role changes across systems. As Nobles and Schiff note, "what the organisation attributes to itself internally is not necessarily what is attributed to it as an actor by law, politics or the economy" (2020, p. 671). We later draw out such tensions, but first explore the traditional conception of lawyer identity.

As Sommerlad illustrated, the legal professional paradigm could historically be linked to three Weberian value spheres; a commitment to an "ethically comprehensible and just order" located in the religious sphere, a claim to the "rationality and universality of legal concepts" located in the intellectual sphere, and an interest in maximising "financial gains in competitive markets" located in the economic sphere (2013, p. 189). However, late twentieth and early twenty-first social developments, including the development of the welfare state, presented challenges to the traditional location of the lawyer in society. After the Legal Aid and Advice Act 1949, and development of the access to justice movement of the 1960s (Garth and Cappelletti 1978), society required (more) lawyers to become more responsive to public need and develop an ideology that was more in line with the public sector (Sommerlad 2013). Nelson *et al.* (2003) identified operational distinctions between corporate and "people" law, the former of which might be less vulnerable to perturbations resulting from the external stimuli of political systems (though we do not have the data to discuss this). Sommerlad also described how lawyers engaging in "people" or social justice oriented legal work tended to shift "most notably in a rejection of commercial motivations and a claim to a distinctive value rationality which entailed a commitment to democratic forms of practice organization and a more equal relationship with clients" (2013, p. 189).

For lawyers who adopted this model, including – we say – at least some publicly funded criminal defence lawyers, their motivation appeared to be primarily political, perceived as characterised by a desire to assist underprivileged sections of society, rather than to make money. This was exemplified by their rejection of the traditional trappings of the legal profession, such as expensive suits and wood panelled offices (Sommerlad 2013). Cooke (2022) demonstrated how such characteristics have developed into a shared orientation among some publicly funded lawyers, including those in criminal defence practice. Although these lawyers developed their own understanding of what the role would represent, in common law jurisdictions such as England and Wales, professional autonomy is also integral to the rule of law.[2] That professional autonomy enabled self-regulating practices to develop that resisted politicised state inference, and hence conflict, with the profession's self-conception as lawyers (Sommerlad and Hammerslev 2020). Recent developments across the legal profession, such as the "unbundling" of different elements of legal services have, however, contributed to a decline in professional autonomy and altered the traditional understanding of what it means to be a legal professional (Sommerlad and Hammerslev 2022). In the publicly funded criminal defence sector

in England and Wales, this is demonstrated by the loss of professional control over legally aided cases (Smith 2013; Thornton 2023; Newman and Welsh 2019). This development is related to

> the loss of legal professional monopolies on the provision and definition of access to justice; concerns about legal aid lawyers' relationships with their clients and the quality of their services; obstacles to the social reproduction of legal aid lawyers; and the fragmentation and marketisation of access to justice. (Sommerlad and Hammerslev 2022, p. 25)

The introduction of politicised NPM models, which espoused business models in case management and fee generation through legal aid contracting provisions, played a significant role in the changes highlighted by Sommerlad and Hammerslev (2022).

Sommerlad (1996, p. 295) identified a "classical paradigm" of legal professionalism, rooted to a public service model. She also, however, picked out a discrepancy between the ideal and the practical reality. Such divergence and discrepancy, though, need not be understood as grounds for dismissing the public service model as simply an ideological construct. Rather, her work picks out two central arguments for its continued application. First, it presents a benchmark with which to monitor historical change in the legal profession. While in truth, practice may never have completely conformed to the ideal, what reality is can be measured through relation to that ideal. Second, she invokes Weberian social action theory through highlighting that ideologies possess material reality for those who profess them. Despite the contradictions that may operate, this means something to those who believe it. In the language of autopoiesis, the ideology represents a communicative process through which lawyers develop their self-perception and ability to sustain themselves as professionals. Such an approach highlights that the classical paradigm of a legal profession premised upon public service ideals was, necessarily, never a reality in practice.

Tension and conflict in the lawyers' role

King suggests that viewing the autopoietic process as a matter of degree enables us to identify people "as epistemic subjects within different social meaning systems and also, simultaneously, as psychic systems through their own internal thought processes" (1993, p. 228). Legal professionals in publicly funded practice sit in the legal system but receive messages and stimuli from political and economic systems because of the way that they are funded and regulated. Such lawyers, therefore, receive communications about expectations from each system. This has the potential to result in tension because these lawyers have to operate in an environment which requires them to simultaneously situate external system stimuli instead of, or in addition to, applying the code of the

legal system (Nobles and Schiff 2004). As Nobles and Schiff further state "humans internalise (to different degrees) communicative systems in a manner that allows them to give some predictability to the meanings that will be generated by their actions" (2020, p. 672). When the stimuli from different systems conflict, lawyers might struggle to reconcile the stimuli from the political system with the legal/illegal code and find that predictability, which might increase contingency and, therefore, vulnerability.

This approach allows us to examine the different social meanings that are ascribed to lawyers' roles, and locate these as possible sites of tension. Lawyers' self-referential communications about who they are might be grounded in a (limited) public service ideal, and challenges to that identity brought about by neoliberalism and NPM might be described as representing challenges to those internalised communications. In this way, differing social meanings about the lawyers' role might operate as irritants to lawyers' traditional understanding of their role. Conditional programmes created by that irritation might challenge the resilience of lawyers' identity. This would suggest that we can understand NPM as representing a contemporary political system of communication, interfering with the processes of self-reproduction that is central to the legal system. As Sommerlad discussed, the way in which law accomplishes its aims is "contingent on particular social environments" (2013, p. 88). Indeed, Teubner (2009) acknowledged the problem of contingency in the legal process's continuous search for justice.[3] In the world of practice, Sommerlad (2004) identified that the structure, culture and ethos of the profession has altered because lawyers have become subject to greater levels of surveillance by the state as it seeks to assert legitimised power over the legal system. These processes have arguably eroded lawyers' autonomy and professionalism. This appears to be especially the case in circumstances that render the work group powerless to affect change because they are unable to determine or steer the messages received.

Several studies have recently identified how legal aid lawyers feel powerless in terms of challenging some of the negative circumstances in which they now practice (e.g. Cooke 2025; Newman and Welsh 2019; Thornton 2023). As Cooke illustrated, "the occupational identity of the legal aid lawyer has undoubtedly been challenged by cuts to legal aid funding. […] Increased levels of regulation have disrupted working practices and have interfered with existing work-based identities which, traditionally, were client-focused" (2022, p. 705). The problems created by this political steering of law for the publicly funded criminal defence representative community exist in tension with distinctive legal environmental steers, such as the expert knowledge required to determine whether an act is determined to be legal/illegal. These mixed messages have the potential to destabilise professional identity. This destabilisation is exacerbated by the profession's relative inability to steer its environment due to the erosion of its autonomy. We further suggest that this

destabilisation results in professionals that experience precarity about the meaning of their role (Cooke 2025).

Our working typology of the organisational culture of publicly funded defence lawyers in England and Wales (Welsh and Newman 2023) identified seven characteristics within the working culture of modern lawyers practising in criminal legal aid. Those characteristics are camaraderie, expertise, economisation, standardisation, conflict, social justice and adversarialism, and pessimism. Here we seek to draw out the points of conflict between these characteristics to illustrate the tension that permeates the messages received by lawyers who attempt to reproduce their ideal type working culture. It is our suggestion that the tension results in a process which challenges the development of a stable working environment. There are distinct modes of communication, such as those held by groups of activist lawyers, which may clash with, or irritate, the communications that come from managerialism (Kinghan 2021; Cooke 2025). The resultant inability to reproduce stable understandings of the environment which the law – as a self-determining system – requires, challenges these lawyers' professional identity. We argue this because our research (Welsh and Newman 2023) indicates that the absence of stable communicative events in this environment creates a sense of professional anomie – the breakdown in values and rise of normlessness (Durkheim 2013). Thus, rather than undermining the value of autopoiesis to our understanding of such working practices, this anomie underscores how the absence of the conditions necessary for autopoiesis to occur represents a significant challenge to the ability of an organism or organization to maintain itself. For Teubner (2002), this process might highlight the political, rather than legal, nature of professional rules, and the differing conceptual standpoint between law and professional rules.

The seven characteristics that fit together to comprise our typology of modern criminal defence lawyering in England and Wales are designed to be flexible: different weight being given to various aspects depending on the specific context, while the categories interlink and overlap, to provide an holistic overview. This is not an attempt to homogenise this sector of the legal profession; the typology is a heuristic device that acts to convey the coherence needed to engage in a discussion about the realities of publicly funded criminal defence practice. A contingent aspect of the relationship between the parts is the friction that endures across the model and the resultant tension that exists in their comparative positions to one another. We are, therefore, using the typology to draw out how the working culture of criminal defence lawyers must be understood as infused with tension that practitioners must work through. For example, while the ideal type professional model might valorise expertise and – separately – adversarialism, these characteristics are threatened by NPM's economisation of legal practice,[4] and its consequent embrace of speed. These characteristics provide examples of lawyers' need to

balance the communications received from systems outside law in order to assimilate them into the legal process.

The first two aspects of the typology that we explore can be cast as positive in nature. They refer to such features of criminal defence work as expertise, adversarialism and a commitment to social justice, that our research (and that of others such as Cooke (2025), Thornton (2023) and Johnston (2020)) indicate lawyers valorise and which prescribe constructive and productive roles for the lawyers. In other words, they represent important building blocks in professional self-identity.

Claims to specialist knowledge are a key component of this typology, in that it is core to the privileged professional identify of criminal defence lawyers. For the neo-Weberian sociologist of the professions (e.g. Saks 2016), lawyers' assertion of expertise underpins their claim to the privileges that come with professional status such as independence and access to guaranteed markets (Sommerlad 1995). In order to employ the legal/illegal binary, lawyers must draw on their expertise and knowledge of adversarialism to determine on which side of the binary behaviour falls. These behaviours appear, then, to fit within the communications expected of the legal system, and criminal defence lawyers lay claim to the importance of their specific expertise to resist attempts to undermine their authority by external sources such as politicians. In Newman and Dehaghani's work, for example, lawyers frequently complained that outside interference by non-experts is undermining the criminal justice system, and that uninformed policy decisions mean that "the whole sector, from prisons to probation to everybody, has taken an absolute hammering" (2022, p. 56). This comment appears to evidence a clash in communication between legal and political systems.

We can also see assertion of professional authority in the manner in which these lawyers deploy the criminal justice system's technical language, which can be disempowering to outsiders and which, in turn, ensures that clients will be reliant upon criminal lawyers to function as translators. For example, lawyers in Welsh's study spoke of concerns that unrepresented defendants (i.e. those without expertise) would make errors and "stitch themselves up and probably say something that they shouldn't" (2022, p. 97). This exemplifies the insider/outsider differentiation and how language can sustain a system as discussed above and by Barnett (2017). These criminal lawyers, then, understand themselves as legal experts and such an elevated self-conception is an important part of their self-identity.

While McConville *et al.*'s (1991) study of criminal defence lawyers led them to question the extent to which they practised adversarialism, other studies indicate that their self-perceptions as committed to social justice and adversarialism remain important elements of defence lawyer identity. For example, with some caveats, Johnston (2020) found that more than half of his 24 lawyer participants wanted to prioritise their duties towards their clients over those to the

court, suggesting that they see themselves as working for the benefit of clients who would otherwise be overwhelmed by the might of the state. The public funding devoted to this role has, in turn, elevated an ideal of client-centeredness, as the legally aided criminal defence lawyer performs a public service role to the vulnerable and marginalised (Smith 2013; Cooke 2022. For a similar discussion in relation to probation services, see Tidmarsh 2025). Seeing themselves as enacting a social justice agenda and realising adversarialism (thus performing socially valuable work), can infuse the identity of criminal defence lawyers with meaning, which Cooke (2025) found to be a vital element of publicly funded lawyer identity. This sense of the importance of adversarialism could be regarded as part of what it means to be an authentic criminal lawyer. Indeed, Batesmith (2025) reports that living and practising authentically as lawyers is especially important for job satisfaction among criminal lawyers. This, again, appears to be an important element of communication between legal practitioners who ground themselves more in the roles expected by the legal system than the political or economic system as discussed below.

While the two parts of the typology thus far considered are affirming in that they construct criminal defence as an institution of great merit and individual practitioners as of great societal value, it also includes negative aspects. The economisation and standardisation of legal practice represent key challenges faced by these practitioners. They are negative features of criminal defence lawyer working culture which might deleteriously affect their desired self-understanding.

The economisation of practice, primarily the result of legal aid cuts and managerialism, has effectively commodified defence work. These challenges exist in political and economic systems because the payment regime and rate is determined in the political system but lawyers then have to assess whether work will result in payment /non-payment. The decision to stagnate, cut, and redistribute public funding was a political one, with potential impacts for how cases are processed within the legal system itself. Very low pay and the resulting constraints on lawyer discretion, exacerbated by managerialism, simultaneously undermine claims to the expertise required to operate in the legal system's environment, and the capacity to deliver quality services (Newman 2013). One lawyer in Welsh's research explained "It's not that people suddenly don't want to do their jobs properly, it's just that you can't and it's incremental and we probably don't even notice that sort of jaded approach is creeping in" (2022, p. 137). Criminal defence lawyers may also find it harder to maintain the social justice agenda that many would stress as their motivation for entering their sector since the structural barriers they face have impeded their capacity to fight for their clients. Thornton (2023), for example, illustrates how inadequate funding regimes and demands for efficiency lead publicly funded defence lawyers to regard limited or late engagement with cases as a sad fact of life rather than a conscious decision to prepare cases poorly.

Standardisation follows from the process of commodification, as criminal lawyers are obliged to adopt increasingly mechanised work processes. Criminal defence lawyers have thus become alienated workers as courts and policy makers increasingly expect them to construct a practice that revolves around speed and volume – analogised as factory production methods (Newman 2013) – in order to make sure their work is profitable and meets regulatory expectations. For example, lawyers regard plea negotiations as a useful tool for case progression, and note that such negotiations meet (political) will to increase the speed of proceedings (Welsh 2022). In the same way that Barnett (2017) identified increased legal attention on meditation after the Legal Aid, Sentencing, and Punishment Act 2012 as a challenge to, or development of, stimuli in the (family) law system, standardisation of practice might reflect the impact of political decision making on the reach of the legal code in criminal law (Welsh and Howard 2019). Like meditation in family law, plea negotiations in criminal law play a significant role in determining which cases are adjudicated upon and therefore which cases reinforce the legal system's code. Criminal defence lawyers have expressed frustration at these demands for efficiency within the criminal justice system, particularly in the lower courts, and the zealous advocacy model has been undermined as lawyers work to speed. Johnston illustrated the resulting tension, noting 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" (2020, p. 42). This example illustrates the competing communications received by lawyers from different systems which are both relevant to their role.

The positive and negative aspects of the typology, then, generate friction and tension. The measures alluded to above mean that the current environment makes it difficult in practice for the lawyer to live up to the positive aspects of their role, which might traditionally be better located in the legal system than the political system. Tensions arise through the messages received from their working environment, such as from policy makers, which lawyers cannot effectively steer. This discord which now pervades the lawyer's role manifests in the conflict part of typology. The competing interests that pervade criminal practitioners' work, such as their duties to the court and the public as against the need to prioritise those duties owed to clients, undermine these lawyers' efforts to realise the full potential of the role (Smith 2013) and have the potential to irritate their working environment. The conflicts further highlight the conflict between a closed autopoietic understanding of law and politically and economically infused aspects of legal practice. The interaction between two conflicting (legal and political) systems might destabilise the working environment, representing a threat to the ability of these lawyers to maintain and reproduce their social system.

The tension that results from the competing interests discussed under social justice and adversarialism and the drive to economisation and standardisation has increased the personal and professional conflicts faced by criminal defence lawyers. This has led to ever greater levels of ethical indeterminacy and accentuates the complexity inherent in navigating the criminal defence role (Tata 2007). Thus, we see growing levels of anxiety and stress amongst criminal defence lawyers, since, as in many areas of legal aid work, they try to balance their ideals and expectations with the practical demands of the job they must undertake (Denvir *et al.* 2023).

The conflicts faced by criminal defence lawyers can lead to a related aspect of this typology; pessimism. Pessimism increasingly pervades criminal defence practice due to the difficulties practitioners face in navigating their role in an increasingly hostile criminal justice system. This debasement of the work has generated declining morale (Thornton 2023), and – lawyers fear – increased the difficulty of attracting future generations of criminal defence lawyers because this sector of the profession has lost its way (Newman and Dehaghani 2022). Lawyers might be feeling pessimistic in consequence of their inability to reconcile the communications received from the political system with the legal system's traditional conception of their role as actors who are supposed to be focused on helping to determine the legality or illegality of actions. This has a clear impact on the ability of the system to perpetuate itself, and so the pessimism experienced by publicly funded defence lawyers might indicate that tensions of the nature discussed here have the potential to threaten the long term sustainability of this branch of the profession.

In contrast, a combination of these elements, positive and negative – and the frictions faced – come together in the camaraderie aspect of the typology. Criminal defence lawyers are bound together, in part due to the content of their work but more markedly through the shared sense of the precarity resulting from the vagaries of publicly funded work (Cooke 2025). However, these binds go further, and criminal defence lawyers are also linked in with other criminal justice professionals – most notably prosecutors, judges, and the police – who share a workgroup culture, accentuated by the managerial turn taken in criminal justice. The camaraderie aspect of the working typology might represent a strong element of the conditional programming developed by lawyers in the conduct of their work, while recognition of the interactive nature of legal practice between these actors within the system (police, prosecutors, the judiciary) suggests that to we do need to view the practice of criminal legal defence professionals as operating in a complex environment. Autopoiesis can help us see that lawyers operate in an environment that receives messages from legal and political systems, that the codes in these systems might exist in tension with each other and that this can create perturbation which reinforces their innate contingency. However, development of the communication itself is a highly socialised and interactive practice. It is not only

the communications received from the environment, but also lawyers' responses to environmental stimuli that shape their practice (Murray *et al.* 2018). The unpredictability of both the messages received and responses to those messages mean that it is difficult for a system to appreciate its own complexity, and for anyone to predict future forms of a system (Murray *et al.* 2018).

We recognise that a discussion about legal practice invokes consideration of the system through which lawyers receive communication about their role. The seven features of our typology are in competition with one another: the reality of professional identity will be such that there are contradictions and struggle between varying elements. It is precisely this interplay between the varying demands faced by criminal defence lawyers that means our analysis has the potential to capture the complex nature of their work. The competing values that make up the experience of criminal practice affect the messages received, and modes and content of communication among publicly funded criminal defence lawyers. In autopoietic social systems, those communications create the codes from which behaviour is reproduced. If, therefore, the messages received are replete with tension, it seems likely that the code will be extremely contingent and unstable. Teubner (2009) identified that maintaining a reconcilable relationship with the environment required systems to evolve; legal cases must respond to both legal rule and factual account. Through this process, the law is contingent on what is being claimed (Nobles and Schiff 2024). Beyond law itself, Webb noted, "[a]ll individuals, all social institutions are confronted by conditions of contingency, uncertainty and risk" (2005, p. 241). In the case of publicly funded defence lawyers, this lack of stability has the potential to contribute to the precarious nature of the role and sense of crisis experienced by such practitioners. If this is right, it has ramifications for the morale and sustainability of the profession, (Thornton 2023; Newman and Welsh 2019; Newman and Dehaghani 2022; Clarke and Welsh 2022). This uncertainty might tell us that criminal defence lawyering is not (yet) a "functional subsystem" of the legal or the political social system (Barnett, 2017, p. 237). Given its place at the intersection of stimuli across social systems, the publicly funded criminal defence profession appears especially vulnerable to contingency and modern political steering which is incompatible with its role in the legal system.

Conclusions

There is a growing collection of studies on criminal defence work in England and Wales, referenced throughout this paper, which is beginning to coalesce into something of a legal professional sub-discipline. A theoretical underpinning of this subdiscipline could prove useful to future research. Drawing on our typology developed from this collated work on criminal defence working cultures, and being open to insights from autopoiesis can, we suggest, help us understand the shared experiences of lawyers within this sector. In that

spirit, this article has sought to examine the applicability of autopoietic theory to our understanding of a criminal defence profession which is – and has been for some time – in crisis as the professional community ages while recruitment and retention both dwindle.

Neves (2001) has shown the empirical limits of applying autopoiesis to legal systems, while Beck (1994) has criticised the idea that law should be conceptualised as a distinct entity. As Goodrich said, "[a]utopoesis transpires to be something of a wild science" (1999, p. 201).

While we recognise the shortcomings of autopoietic theory and have not offered a reading of law as an autopoietic system, reflecting on the insights it can bring to law and legal practice is stimulating in conceptualising developments in the criminal justice field. We have therefore used it to consider what happens when the communications received and processed by a particular group – i.e. publicly funded defence lawyers – shift in their environment, and how these lawyers might seek to distinguish themselves and create conditional programmes that serve their working practices. We have therefore sought to drive discussion further by examining the working practices of criminal defence lawyers by illustrating where tension between communications in different systems might operate to challenge the sustainability of this distinct groups of actors in the legal system.

We present these challenging ideas in order to contribute to discussion of the frictions and tensions currently faced by criminal defence lawyers. While we agree with Murray that "it would be a mistake to think we could ever fully understand complex systems because of the limits of our knowledge of their working and the unpredictable consequences of seemingly small events on the system" (2018, p. 11), that does not mean that we cannot better understand the system through these lenses. Applying autopoietic theory to our understanding of how systems reproduce themselves can allow us to explore, from another angle, what is happening within systems in crisis. This is not the only way to understand the modern criminal defence lawyer, but we believe it does add a new exploratory potential to scholars who want to analyse these practitioners and their work in the twenty-first century.

Notes

1. Due to some inconsistency about deregulation in some sectors and increased regulation in others, precise definition of 'neoliberalism' is difficult to achieve. Peck, though, neatly summarised the ideology as an "open-ended and contradictory process of politically assisted market rule" (2010, xii). See further Harvey (2005).
2. Professional autonomy might also be integral to rule of law in civil law jurisdictions, but this is beyond the scope of our work. See, for example, Sellers (2008).
3. That is, as the law seeks incontestability, new contingencies are revealed (Teubner, 2009).
4. See further Brown (2015) on the neoliberal dissemination of the market to all spheres of rationality.

Disclosure statement

No potential conflict of interest was reported by the author(s).

References

Barnett, A. (2017) Family law without lawyers – A systems theory perspective, *Journal of Social Welfare and Family Law*, *39*(2), pp. 223–245.

Batesmith, A. (2025, this volume) Our "authentic" professional selves: experiences of identity formation, power relations and EDI among aspiring and junior barristers, *International Journal of the Legal Profession*.

Beck, A. (1994) Is law an autopoietic system?, *Oxford Journal of Legal Studies*, *14*(3), pp. 401–418.

Bourdieu, P. (1991) *Language and Symbolic Power* (Cambridge, MA, Harvard University Press).

Brønn, P. S., Von Krogh, G. & Vicari, S. (1993) Auto-what? A new perspective on corporate self-awareness, *European Management Journal*, *11*(3), pp. 342–346.

Brown, W. (2015) *Undoing the Demos: Neoliberalism's Stealth Revolution* (Brooklyn, NY, Zone Books).

Charrow, R. & Charrow, V. (1979) Making legal language understandable: A psycholinguistic study of jury instructions., *Columbia Law Review*, *79*(7), pp. 1306–1374.

Cherry, J. (2023) A criminal justice system in crisis? Committee Corridor [Podcast]. Available at: https://www.parliament.uk/business/commons/committee-corridor-podcast/a-criminal-justice-system-in-crisis2/, accessed 15 August 2024.

Clarke, A. & Welsh, L. (2022) F**k this game … I'm off: financial and emotional factors in declining legal representation in miscarriage of justice cases, *Journal of Law and Society*, *49*, pp. 518–541.

Cooke, E. (2022) The working culture of legal Aid lawyers: developing a "shared orientation model", *Social and Legal Studies*, *31*(5), pp. 704–724.

Cooke, E. (2025) *The Hidden World of the Legal Aid Lawyer: Upholding the Heart of Justice* (Bristol, Bristol University Press).

Denvir, C., Kinghan, J., Mant, J. & Newman, D. (2023) *Legal Aid the Future of Access to Justice* (Oxford, Hart Publishing).

Dias, R. W. M. (1980) Autopoiesis and the judicial process, *Rechtstheorie*, *11*, pp. 257–282.

Durkheim, E. (2013) *Division of Labour in Society* (London, Palgrave MacMillan).

Francis, A. (2020) Law's boundaries: connections in contemporary legal professionalism, *Journal of Professions and Organization*, *7*(1), pp. 70–86.

Garth, B. G. & Cappelletti, M. (1978) Access to justice: the newest wave in the worldwide movement to make rights effective' 27, *Buffalo Law Review*, *181*(1978), pp. 181–292.

Goodrich, P. (1999) Anti-Teubner: autopoiesis, paradox, and the theory of law, *Social Epistemology*, *13*(2), pp. 197–214.

Harvey, D. (2005) *A Brief History of Neoliberalism* (Oxford, Oxford University Press).

Johnston, E. (2020) The adversarial defence lawyer: myths, disclosure and efficiency – a contemporary analysis of the role in the era of the criminal procedure rules, *International Journal of Evidence and Proof*, *24*(1), pp. 35–58.

King, M. (1993) The "truth" about autopoiesis 20(2), *Journal of Law and Society*, pp. 218–236.

Kinghan, J. (2021) *Lawyers, Networks and Progressive Social Change: Lawyers Changing Lives* (Oxford, Hart Publishing).

Leader, L. (2024) *Litigants in Person in the Civil Justice System* (Oxford, Hart).

Lourenço, A. (2010) Autopoietic social systems theory: the co-evolution of law and the economy, Working Papers wp409, Centre for Business Research, University of Cambridge.

Luhmann, N. (1982) The autonomy of the legal system, in: *The Differentiation of Society* (New York, Columbia University Press), pp. 122–137.
Luhmann, N. (1986) The autopoiesis of social systems, in: R.F. Geyer & J. van der Zouwen (Eds) *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* (Los Angeles, Sage Publications), pp. 122–138.
Luhmann, N. (1988) The third question: the creative use of paradoxes in law and legal history, *JL & Soc'y*, *15*, pp. 153–165.
Mant, J., Newman, D. & Cooke, E. (2025) Lived realities of legal aid: austerity, the pandemic and beyond, *International Journal of the Legal Profession*, pp. 1–22.
Mattheis, C. (2012) The system theory of Niklas Luhmann and the constitutionalization of the world society, *Goettingen Journal of International Law*, *4*, pp. 625.
McConville, M., Sanders, A. & Leng, R. (1991) *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (Oxford, Routledge).
Murray, J., Webb, T. E. & Wheatley, S. (2018) Encountering law's complexity, in: *Complexity Theory and Law* (Oxfordshire, Routledge), pp. 3–22.
Nelson, R., Dinovitzer, R., Garth, B., Sterling, J., Wilkins, D., Dawe, M. & Michelson, E. (2003) *The Making of Lawyers' Careers. Inequality and Opportunity in the American Legal Profession* (Chicago, University of Chicago Press).
Neves, M. (2001) From the autopoiesis to the allopoiesis of law, *Journal of Law and Society*, *28*(2), pp. 242–264.
Newman, D. (2013) *Legal Aid Lawyers and the Quest for Justice* (Oxford, Hart Publishing).
Newman, D. & Dehaghani, R. (2022) *Experiences of Criminal Justice: Perspectives from Wales on a System in Crisis* (Bristol, Bristol University Press).
Newman, D. & Welsh, L. (2019) The practices of modern criminal defence lawyers: alienation and its implications for access to justice, *Common Law World Review*, *48*(1–2), pp. 64–89.
Nobles, R. & Schiff, D. (2004) Introduction, in: N. Luhmann (Eds) *Law as a Social System* (Oxford, Oxford University Press), pp. 1–52.
Nobles, R. & Schiff, D. (2020) Taking the complexity of complex systems seriously, *Modern Law Review*, *83*, pp. 661.
Nobles, R. & Schiff, D. (2024) "But his sense of justice turned him into a brigand and a murderer." On Gunther Teubner's "self-subversive justice: contingency or transcendence formula of law?", *Zeitschrift für Rechtssoziologie*, *44*(1), pp. 3–21.
Peck, J. (2010) *Constructions of Neoliberal Reason* (Oxford, Oxford University Press).
Saks, M. (2016) A review of theories of professions, organizations and society: The case for neo-Weberianism, neo-institutionalism and eclecticism, *Journal of Professions and Organization*, *3*(2), pp. 170–187.
The Secret Barrister. (2018) *Stories of the Law and How It's Broken* (London, Picador).
Sellers, M. (2008) *Autonomy. Comparative Perspectives on Law and Justice* (Dordrecht, Springer).
Smejkalová, T. (2017) Legal performance: translating into law and subjectivity in Law 22, *Tilburg Law Review*, *62*, pp. 62–76.
Smith, T. (2013) The "quiet revolution" in criminal defence: how the zealous advocate slipped into the shadow, *International Journal of the Legal Profession*, *20*(1), pp. 111–137.
Smith, T. & Cape, E. (2017) The rise and decline of criminal legal aid in England and Wales, in: A. Flynn & J. Hodgson (Eds) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Oxford, Hart), pp. 63–86.
Sommerlad, H. (1995) Managerialism and the legal profession: a new professional paradigm, *International Journal of the Legal Profession*, *2*(2–3), pp. 159–185.
Sommerlad, H. (1996) Criminal legal aid reforms and the restructuring of legal professionalism, in: R. Young & D. Wall (Eds) *Access to Criminal Justice* (London, Blackstone Press Ltd.), pp. 292–313.

Sommerlad, H. (2004) Some reflections on the relationship between citizenship, access to justice, and the reform of legal aid, *Journal of Law and Society*, *31*(3), pp. 345–368.
Sommerlad, H. (2013) Socio-legal studies and the cultural practice of lawyering, in: D. Feenan (Ed) *Exploring the 'Socio' of Socio-Legal Studies* (London, Palgrave MacMillan), pp. 181–202.
Sommerlad, H. & Hammerslev, O. (2020) Lawyers in a new geopolitical conjuncture: continuity and change, in: R.L. Abel, O. Hammerslev, H. Sommerlad & U. Schultz (Eds) *Lawyers in 21st-Century Societies: Volume 1: National Reports* (Oxford, Hart), pp. 1–42.
Sommerlad, H. & Hammerslev, O. (2022) Studying lawyers comparatively in the 21st century: issues in method and methodology, in: R.L. Abel, H. Sommerlad, O. Hammerslev & U. Schultz (Eds) *Lawyers in 21st-Century Societies Vol. 2: Comparisons and Theories* (Oxford, Hart), pp. 1–28.
Tata, C. (2007) In the interests of commerce or clients? Supply, demand, "ethical indeterminacy" in criminal defence work, *Journal of Law & Society*, *38*, pp. 489–519.
Teubner, G. (1993) *Law as an Autopoietic System* (Oxford, Blackwell Publishers).
Teubner, G. (2002) Breaking frames. Economic globalization and the emergence of Lex Mercatoria, *European Journal of Social Theory*, *5*(2), pp. 199–217.
Teubner, G. (2009) Self-subversive justice: contingency or transcendence formula of Law?, *The Modern Law Review*, *72*(1), pp. 1–23.
Thornton, J. (2023) *Criminal Justice in Austerity* (Oxford, Hart).
Tidmarsh, M. (2025, this volume) "We'll always go back for more"? Probation, precariousness, and professional identity, *International Journal of the Legal Profession*, pp. 1–22.
Tiersma, P. (1999) Legal Language (Chicago, University of Chicago Press).
Varela, H. R. & Maturana, F. J. (1972) *Autopoiesis and Cognition: The Realization of the Living* (Dordrecht, D. Reidel Publishing Company).
Webb, J. (2005) Law, ethics, and complexity: complexity theory & (and) the normative reconstruction of law, *Cleveland State Law Review*, *52*, pp. 227.
Weir, D. (2022) Arbitrage and autopoiesis in police sergeants' stories: more than "canteen culture", in: T Vine & S Richards (Eds) *Stories, Storytellers, and Storytelling* (Cham, Springer International Publishing), pp. 195–215.
Welsh, L. (2022) *Access to Justice in Magistrates' Courts: A Study of Defendant Marginalisation* (Oxford, Hart).
Welsh, L. & Howard, M. (2019) Standardization and the production of justice in summary criminal courts: a post-human analysis, *Social & Legal Studies*, *28*(6), pp. 774–793.
Welsh, L. & Newman, D. (2023) Camaraderie and conflict: developing an occupational culture typology of publicly funded criminal defence lawyers in England and Wales, *International Journal of the Legal Profession*, *31*(1), pp. 21–52.