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## **The Practices of Modern Criminal Defence Lawyers: Alienation and its implications for access to justice**

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### **Abstract**

This article marries two sets of independently gathered empirical data (observation and interviews) to argue that English criminal defence lawyers currently present as alienated workers. We seek to revive and revisit theories of alienation that are grounded in Marxism and use them as a lens through which lawyers behaviour can be viewed and understood. Building on a Marxist application of alienation, we offer a refined analysis premised upon a contemporary understanding of how alienation plays out in criminal defence work during the neoliberal era. We highlight that the way lawyers talk about their roles suggests that they have lost a sense of purpose, and feel powerless and undervalued. We argue that those feelings appear to have developed as a result of structural change – most notably funding cuts and demands for efficiency – which seem to be grounded in what can broadly be understood as neoliberal political ideology and austerity measures. We further suggest that such structural change and resultant feelings of alienation have implications for the quality of service that defendants receive.

### **Introduction**

The starting point for this article is that policies based on a neoliberal style of governance have negatively impacted the criminal justice process by undermining lawyers' ability to act as autonomous decision

making professionals (see e.g. Sommerlad, 2001 and 2008; Cape, 2004). We regard neoliberalism as a somewhat contradictory political doctrine which advocates roll back of state control in relation to public services yet heavily regulates (via managerial principles and cost/benefit analysis) services which remain under state control. The expansion of this economic rationality from the market into all spheres of public life, and resultant preoccupation with measurement and outcomes, infuses state institutions with instrumentalism. For these reasons, Brown (2016) describes neoliberalism as an economic variant of liberalism. Economic calculations become dominant in how areas of the state function, and underpin judgments as to whether they operate successfully or not. Our concern is in applying such principles to one aspect of the criminal process wherein loftier notions such as justice and fairness seem to have been supplanted by rational calculation about the efficiency of the system. In light of funding cuts across the criminal justice system and demands for ever greater efficiency in the criminal courts, the role of defence lawyers has become more important in ensuring equality of arms in an adversarial setting. However, empirical research suggests that criminal defence lawyers accept that their role has been compromised by structural change in the last decade, and that their ability to provide good quality defence services has been (further) hindered by relentless change in the context of constrained access to funds (Cape, 2004, Welsh, 2017). Through this paper, we will demonstrate how the role of criminal defence lawyers has been subverted to the directives of economics, and how this results in a de minimis standard of justice.

This paper marries two sets of empirical data about lawyer behaviour in the context of modern criminal defence work, particularly in the lower tier magistrates' courts, where solicitors spend most of their working life. The datasets were obtained in two distinct, but theoretically similar, studies. Both datasets raised similar issues about lawyers' understanding of their role, and how that role has been compromised in recent years. Interestingly, both datasets presented findings which indicated that the profession is demoralised but also indicated that lawyers appeared to accept their fate as members of an undervalued part of the welfare state rather than actively counteract, in their day-to-day practice, structural change which further challenged their role and professional identity. The vice chair of the Criminal Law Solicitors' Association recently told the Justice Committee

Although funding is part of it, it's about making these people feel valued and appreciated for the contribution they make. Ultimately we are a quasi-public service; we are providing a service on behalf of the government... but we don't feel we are appreciated in the way other public services are. (Bonich, 2018)

In this paper we seek to analyse, and offer a possible explanation for, defence lawyers' passivity about challenges to their role by drawing on and developing theories of alienation which are grounded in a Marxist tradition, which we believe to be a novel application of that theoretical framework.<sup>1</sup> Marx (1975) developed a theory of alienation that documented and explained how workers become detached from the product of their labour, and lose track of why it is they work at all thus curbing people's ability to reach their potential or lead a satisfied life. Axelos (1977) is one of the foremost interpreters of this alienation, who links it to technological advances that mean people understand the world to be calculable, measurable and controllable. Though Marx wrote long before the neoliberal era, and Axelos at its commencement, the concept of alienation they espoused should be brought back into analytical usage to help understand the experience of being as a worker in this heightened age of free market capitalism. The socio-economic understanding of alienation offers great, yet largely untapped, analytical power when applied to contemporary lawyers under neoliberal austerity and, while we specifically consider criminal legal aid lawyers, we want to help set the groundwork for analysing other areas of legal practice by providing a methodology for the field of study. Newman (2016b) was the first study to bring the concept of alienation into analysis of criminal legal aid lawyers and this paper builds on that work, taking its strict application of Marx's four types of alienation further in a way that corresponds more authentically to current working practices. We bring in additional insight from social scientific studies of work and, latterly, engage with a recent paper by Boni le Goeff *et al* (2017) that offers a sophisticated application of alienation to lawyers working in areas other than criminal, and which is based on a fresh series of indicators that show the applicability of alienation at a time of neoliberal capitalism. In order to do so, we begin with an explanation of the methods employed to gather and analyse data. We then discuss the findings of previous studies and our theoretical outline to contextualise the presentation of data that

follows. Thereafter, and framing our discussion around concepts of powerlessness, purposelessness and unfairness, we theorise about the attitude criminal defence lawyers seem to have towards their fate, and the coping strategies that may manifest through other practices. We tentatively develop that analysis to suggest that feelings of alienation lead to base standards of justice in which speed is prioritised over traditional adversarial principles.<sup>ii</sup>

## **Method**

Both studies, which were conducted independently, took the form of a case study; one focused on the practices of criminal defence lawyers in South West England, and the other of magistrates' court practices in South East England. Case study research generates in-depth findings in relation to the complexities of specific situations (Bryman, 2012), and it is important to acknowledge at the outset that local practices and procedures may result in behavioural variation. As noted by Young (2013), local workgroup practices significantly affect how courts operate. Alge (2013) further warns against homogenising lawyers based on an analysis of the behaviour of particular groups.

Despite that limitation, both datasets produced evidence of trends previously noted in other case studies, such as those conducted by Carlen (1976), McConville *et al* (1994), and Young (2013), as well as demonstrating the emergence of common themes between the two studies in discussion here. Given that the findings resonate with previously identified themes, as well as with each other, the findings have some potential to stand for processes as a whole.

### *Case Study One*

Study one explored the health of the lawyer-client relationship at a time of perceived crisis in legal aid funding. This data collection took place in 2008 and 2009, prior to the Coalition's austerity policies taking hold but amidst cuts to the legal aid budget of £600 million and in the shadow of sharp critical comment from New Labour politicians, whereon lawyers were facing pressures such as from contracting into the new Criminal Defence Service, the threat of competitive tendering and the potential rivals of salaried

defence services. The data from this case study provides grounding (depth) and context (breadth) for the more recent data collected in Case Study Two meaning this paper can identify, and explore persistent trends in criminal practice.<sup>iii</sup>

The empirical research involved a 12-month fieldwork split between the three largest law firms specialising in legally-aided criminal defence in one medium-sized English city. It involved a year accompanying lawyers from three criminal defence firms, followed by a series of formal interviews with the practitioners. The firms each had between ten and twelve lawyers conducting criminal work and the city housed the main courts for its wider region. Observation of nine months was split equally between the firms, followed by a month each of semi-structured interviews with the same lawyers. For the observation, lawyers were selected on an ad hoc basis and followed for a day at a time, capturing a variety of clients and cases, occurring naturally and in real time. Thereafter, interviews, informed by observation, were conducted (serving also to achieve closure). This compared how they saw their practice with the way it appeared to an outsider. All interviewees had also been followed in observation and the interviews comprised all fee earners working criminal legal aid during the duration of the fieldwork. The research was analysed using thematic analysis: a method for identifying, analysing and reporting patterns across a dataset (Braun and Clarke, 2006), which has been further developed for usage alongside study two in this paper.

### *Case Study Two*

The data in case study two was gathered in 2013, updating Case Study One, although it seems (as will be evident below) that little had changed in the five years since the first dataset was gathered.<sup>iv</sup> Local criminal justice areas are designated by the Ministry of Justice, and this study took place in one such designated area which consisted of four magistrates' courts.<sup>v</sup> In the year to end September 2013, the local justice area which was the subject of this study had the fifteenth largest criminal legal aid spend of 62 procurement areas nationally (KPMG, 2014).

The empirical research consisted of observations followed by semi-structured interviews. Observation took place in the magistrates' courts operating in the area at the time, and occurred over several stages over

the course of several months on the premise that observation of court processes can help to reveal the nature of relationships within the courtroom (Baldwin, 2000). It should also be noted that, as a former defence lawyer in the area of study,<sup>vi</sup> the sense of exclusion that can arise in a research setting (Baldwin, 2000) did not occur in this study. Conducting observations also removed the researcher from her usual involvement in summary criminal cases, allowing for a more distanced assessment of courtroom behaviour. The findings of observation assisted in framing and developing the interviews that followed.

The interview strategy was one of fixed purposive sampling; the research questions and parameters provided the guidelines about which categories of people needed to be the centre of attention (Bryman, 2008). A total of 19 advocates (12 defence lawyers and seven prosecutors) were interviewed using a semi-structured interview questionnaire which contained questions about magistrates' court practices and funding. Semi-structured interviews were appropriate to ensure that the data produced comparable results while also allowing sufficient space for the interviewee to expand upon matters which he or she felt to be of particular significance. Data was analysed thematically in an attempt to understand how lawyers interpret information and behave in their working environment in the context of legal aid cuts (Lange, 2005).

### **The 'ideal' representation of the defence lawyer**

In the context of prevailing welfarist ideology of the 1960s and early 1970s, government policy tended to be receptive to professionalization<sup>vii</sup> in public institutions, and criminal defence services burgeoned. As Marshall (1973; 13) noted, during a period in which government policy was interventionist by nature, protecting individuals from the forces of institutionalism was largely dependent:

'on the intervention of the professional, or the expert, between the bureaucratic machine and the individual client...The bureaucrat tends to assign cases to appropriate categories...this has a depersonalising effect on the relationship. The professional, by contrast, claims the right to judge each case on its own merits and then to prescribe or recommend, what is, in his opinion, the best treatment for it'.

During this phase of development in the legal profession, lawyers were expected (by officials and the public) to make autonomous decisions about what would be in the best interests of any given case based on their expert knowledge and ethical guidance issued by their regulatory bodies. Indeed, the primary duty of solicitors remains that they must act in their clients' best interests (Solicitors' Regulation Authority, 2011) which can only be overridden in limited circumstances. As such, they occupied an esteemed position grounded in ideas of civic morality which privileged united ideas about access to justice (Sommerlad, 1996).<sup>viii</sup>

Smith (2013) describes how the traditional understanding of professionalism in defence lawyers as 'zealous' advocates consists of three sets of duties; those owed to the client, to the court and to the public. Of those three duties, the primary obligation is owed to the client, which requires defence lawyers to use their expertise to protect and advance that person's interests, while also remaining emotionally detached from cases. The duty to the court places expectations on defence lawyers to behave in such a way that will facilitate an efficient, cost-effective process. The duty to the public is embodied in the opaque principle of fairness. Arguably, it is the framework of zealous advocacy in criminal defence work which contributed to the creation of a profession which traditionally identifies with symbolic (individualised, procedurally rigorous) approaches to justice (Tata, 2017), the principle being that true access to justice must reflect the needs of each case rather than homogenised procedural justice.

Numerous studies, particularly since the late 1970s, have demonstrated that defence lawyers have not always acted as the zealous advocates that one might expect. In one of the first such studies, Baldwin and McConville (1977) reported that the network in which lawyers operate means that breaches of due process provisions often occur unchallenged. In her extensive research on this subject, Sommerlad (2008) demonstrates how the proliferation of managerialism since the 1980s – when Thatcherite neoliberal political philosophy took hold in the UK - has (further) damaged lawyers' ability to act as autonomous professionals.



As UK government policy shifted, from the 1980s, away from interventionist strategies and towards laissez-faire (yet, contradictorily, heavily regulatory (Larner, 2000)) approaches, the traditional role of the professional generally, and the defence lawyer specifically, has been significantly undermined. Detailed case management duties and the introduction of the Criminal Procedure Rules in 2005 (require lawyers to evermore co-operate with court processes in ways that may further undermine their primary duty to act in their client's best interests (Smith, 2013). Both authors have separately, elsewhere, demonstrated that while defence lawyers may view themselves as performing a professional public service (and place high personal value in that role), they do in fact struggle to balance competing duties towards their clients, the courts, their funders and their businesses (Newman 2017; Welsh, 2017).

However, aside from bringing a (successful) claim against the Ministry of Justice about the legality of proposals to restructure funding,<sup>ix</sup> and recent protest action by the Bar (Bowcott, 2018), lawyers have been relatively complicit in allowing their role and professional identity to be undermined. Given that lawyers' professional image is crucial to analysing approaches to practice (Newman, 2017), it is important that we try to understand why lawyers have largely been co-opted into processes which seem to damage not only their clients best interests but also their own. It is only when faced with the threat of 'extinction' that lawyers have acted (Fouzder, 2018), despite the fact that they have faced funding cuts in the context of increased workloads for many years. We suggest that an analysis of the work practices of criminal defence lawyers through the lens of Marxist theories of alienation may provide some assistance in understanding this phenomenon. However, we must first begin to understand how lawyers traditionally operate as a workgroup.

### **The lawyer workgroup**

Criminal defence lawyers have consistently demonstrated an inclination to bind together to form a generally cohesive courtroom workgroup (Carlen, 1976; Young, 2013), despite the fact that they often operate in direct competition with each others' firms, and despite the traditionally adversarial nature of English criminal justice. Carlen (1976) demonstrated how defendants in magistrates' courts are excluded

from active participation in the process because high levels of professional co-operation therein operate to exclude the vast majority of those who are usually 'outside' the process. Carlen's study was conducted at a time when, although numbers were rising, defence solicitors remained a minority member of the court workgroup. As the defence lawyer community has burgeoned since that time, and defence legal representation became the norm in the 1980s (Legal Action Group 1992), McConville *et al* (1994) demonstrated that the problems of co-operative behaviour at the expense of adversarialism had only worsened, with lawyers often compromising their clients' interests for the sake of accepted workgroup behaviour; cooperative rather than zealous advocacy.

It seemed, therefore, that defence lawyers had been co-opted into the pre-existing pattern of conciliatory workgroup behaviour as their numbers gradually increased. Moving forward, Young (2013) also noted high levels of co-operation existed among the magistrates' court workgroup. Contrary to Bourdieu (1987), who considered that the field of legal practice was characterised by competing forms of professional judgement, magistrates' courts appear to operate with high degrees of co-operation and negotiation among personnel. As relative latecomers to feature in summary criminal proceedings (see, e.g. Smith and Cape, 2017), defence lawyers appear to take the view that co-operation, as opposed to confrontation, will be in their long term business and, by default, client interests. Furthermore, the competitive nature of the structure of criminal defence services discourages firms from working together to collectively undermine policies which challenge their ability to provide services which create the best conditions for access to justice.

As part of their indoctrination into the profession, lawyers appear to be introduced to a culture which favours co-operation and cohesion over challenge of politically driven practices. This, we suggest, begins the process of undermining lawyers' ability to refuse to act in accordance with the demands of policy, even in the face of significant challenge to traditional professional values. This, in turn, leaves them in a weakened ideological position, meaning that further challenges to their professional identity are even

more difficult to defy, particularly in the context of a political tendency to favour neoliberal approaches to criminal justice policy.

### **What has neoliberalism done to the modern lawyer?**

As managerialism proliferated the criminal justice system, levels of regulation and bureaucratisation increased. Consequently, lawyers move ever further away from a role in which they had been afforded autonomy where the application of rules is reliant on professional judgement (Welsh, 2017). As the recent Bach report notes, increased regulatory controls in criminal procedure mean that 'hundreds of hours that should be spent helping people are instead spent filling out forms' (Fabian Policy Report, 2017; 34), which adds to demoralisation in the profession. As result of such bureaucratisation, actors' activities are directed towards those that are considered valuable by the state level bureaucrat (Nash, 2018), and away from individualised forms of justice based on the street level bureaucrats' analysis of the situation; t lawyers perform the role of street level bureaucrat in this context. Consequently, traditional understandings of professionalism are disintegrating, particularly in criminal defence work. Francis et al (2017) express concern that lawyers' traditional understanding of professionalism is undermined by the global neoliberal turn in the late twentieth and early twenty-first centuries, and we aim to highlight the impact of this change through the lens of Marxism.

In this context, neoliberal interpretation of the theory of Pareto Efficiency has been used to argue that allocating resources to public services – relied on primarily by the poor – can only ever be a drain on society (see Berry, 2014). By this line, any allocation of resources in a free market necessitates some consumers being made worse off in order that others might be made better off. The rich are considered to have more utility than the poor as they can make use of the resources provided in more effective ways. State services represent wealth redistribution downwards, leading to an overall drag on the economic development of society. In contrast, Harvey argues that neoliberalism facilitates a form of wealth redistribution called capital accumulation by dispossession, in which wealth and power is funnelled upward, away from the poor (Harvey, 2006). This concept involves removing economic rights or power and

thus underlines the neoliberal process of reducing and/or removing away key state services, as is being witnessed with elements of the welfare state (united with cuts to the criminal justice system in the curbs to criminal legal aid provision). Criminal justice spending fell by 12%, with the Ministry of Justice budget reduced by 29% and the Home Office by 19%. The impact these cuts have had include creating justice deserts (Newman, 2016a); but, fundamentally, such over-simplified dichotomies used to justify cuts make promoting robust defence rights in a climate of efficiency drives challenging as suggested by Newman (2013) and Welsh (2017). The impact of such austerity on criminal legal aid lawyers has been explored by Dehaghani and Newman (2017) who show that the institution of criminal legal aid and the profession of the criminal legal aid lawyer are vulnerable to such dispossession.

The modern austerity narrative – and its preoccupation with shrinking the size of the state and reducing public sector spending – should be understood as the latest manifestation of neoliberalism and, as such, as a form of dispossession. Krugman argues that this approach is popular in neoliberal ideology: using the alleged dangers of debt and deficit as justification for cuts whilst representing a blade with which to cut the welfare state down to size. Klein (2007) argued that this rationale represents a neoliberal shock doctrine – a scare tactic, providing ample excuse for appropriation of social resources by the rich. The poor, as public service users, represent an encumbrance on the state who must be deprioritised to avoid the economic ruin of society and the deprivation of supposedly more deserving citizens who do not use such state services. A case in point is the response to the global financial crisis of 2007-8, responsibility for which elites attributed to those who overuse and misuse public state provision rather than any internal problems in the capitalist economic model or specific issues of financial market deregulation.

Green (2016) has discussed how easy it is for the rule of law to be undermined in an austerity drive, with the legal system easily written off by politicians playing up to reductive popular sentiment that the law is the domain of out of touch judges, fat-cat lawyers and undeserving criminals. Coalition austerity saw £35bn cut from public services, with plans for a further £55bn by 2019. As a result, a third of citizens were plunged into poverty between 2011 and 2014. A recent IFS report showed that austerity benefits the

richest in society at the expense of the poorest. In such circumstances, Levitas (2012) has described austerity as 'the progressive destruction of our collective provision against risk'. She sees the increasing concentration of wealth in the hands of an elite as accompanied by an ever more punitive attitude towards the poor and the destruction of public services, all of which impinges directly on the poor and vulnerable (Levitas, 2012). Wacquant (2009) specifically links these trends to contemporary criminal justice, in which economic deregulation creates an insecure underclass who are cast outside society by welfare state retraction. That underclass is, via the cultural trope of individual responsibility, blamed for its failures and is punished for those failings by an expansive, intrusive penal apparatus. In such a situation, legally aided criminal defence merely exists to process these individuals in and out of the system, hastening their progress towards a guilty plea. Cutting legal aid (compelling lawyers to spend as little time on a case as they can justify) and the development of the Criminal Procedure Rules (edging defence lawyers toward behaviour that assists the police and prosecution) are congruent with this trend.

Effective access to criminal justice is an often overlooked bellwether for the condition of the relationship between citizen and state, and provides an important indicator of the influence of broader political and economic meta-narratives on the lives of ordinary people, particularly the poor, vulnerable and socially immobile. The influence of neoliberal ideology on criminal justice has been heightened by austerity; for example, the unrelenting privatisation of services such as probation and forensic science, the managerialism introduced to the police service and prison estate but is also seen in attempts to introduce price driven competition into the legal aid sector and generally run down the service provided by legal aid lawyers. The increasing drive for swift, economic criminal justice has arguably created a barrier to effective access to justice; austerity has accelerated this, pursuing reform which tacitly accepts services that are merely good enough and in some cases below this standard.

In terms of defence services, the deprioritisation of investment in state services has arguably meant both the quantity and the quality of the representation available is compromised; the brave new world of criminal legal aid is one in which fast and cheap representation is encouraged because it ensures survival.

The resulting audit culture which exists in criminal justice directs lawyers' time in a way that undermines autonomous decision making. Access to justice therefore remains a vital area of research; Albiston and Sandefur (2004; 102) claim that scholarship in this area is undergoing a renaissance but that 'like any renaissance, to be fruitful this one must include important rediscoveries alongside theoretical and empirical innovations'. In this spirit, we have applied the historic but often ignored Marxist theory of alienation to the experience of legally aided criminal defence lawyers in the era of neoliberalism and austerity.

### **Alienation**

We follow the lead of Shantz *et al* (2015) who have called for the recovery of an old philosophy from the field of political economy to help explain current labour trends under neoliberal austerity. This paper uses the concept of alienation to understand contemporary criminal defence practice, building on a wider literature of research into alienation and work. Theories of alienation emerge from the early, humanist work of Marx (1975), for whom alienation refers to how workers are separated or estranged from what they produce in their work. At its core is a humanist sentiment of ensuring that people can lead dignified lives and achieve their maximum as human beings: everyone has potential within them but this is held back by the structures of the capitalist system. The essence of what it is to be human is to be found in a person's ability to transform the world around them through their labour. Alienation meant loss of control, specifically the loss of control over labour. As 'justice' is the defence lawyers' product, alienation experienced by this group leads to loss of control over 'access to justice'.

In its nineteenth century origins, Marx focused on objective work alienation, with workers alienated when they do not own the means of production. As Tummers (2011) has identified most of the work that builds on Marx by applying alienation in the social sciences has focused on subjective alienation: alienation as perceived by the worker. Nair and Vohar (2009; 2010) have captured how this perception has been allied to the characteristics of the job or the work context in a small amount of management literature emerging

from the second half of the twentieth century. Kohn (1976) saw alienation as the combination of the loss of control over the product of one's labour and the loss of control over the work process. For Mottaz (1981), a lack of control over tasks and a surfeit of meaningful work could bring on feelings of alienation. While the leading works are several decades old (e.g. Blauner, 1964; Miller, 1967), Swain (2012) has recently identified the absence of contemporary work on alienation in any discipline, suggesting that some older works on alienation may be out of date and in need of updating. He identifies a surge in popularity for Marx's work, and thinks that the number of books about Marx's (1983) *Capital* reflects an understandable desire to re-engage with political economy after the global financial crisis; however, Marx's earlier writings tend to be ignored despite their holding much potential. The benefit of engaging with the alienation at the heart of this early work is that it shows how contemporary working practices are organized in such a way that is radically bad for those people who are working, not simply due to inequality or material poverty, but because this work prevents people from living a fulfilled life. Specifically in the context of defence lawyering, contemporary working practices impact upon the quality of representation and therefore the quality of justice, which impacts the quality of life for both lawyers and their clients (and families etc.)

There needs to be greater attention given to the relevance of alienation for contemporary work and for understanding the reality of those who work. The value of alienation as a theory for exploring the experience of those who work is that it is a theory that makes recourse to structural factors so, rather than treating workers in isolation, it recognises the wider influences of politics, economy and culture.

McConville and Marsh (2014) have shown the need to take into account such structural factors to reach an understanding of criminal justice practitioners, a concern that should be especially heightened in the austerity era for the UK in which (neoliberal) ideological choices have taken on a powerful, yet often little articulated relevance. As such, for Shantz *et al* (2015: 383):

We argue for the revival of alienation. This is because, unlike more commonly used management theories (e.g., engagement, motivation), alienation is not just about workers' experience of

employment. The concept of alienation invites scholars and practitioners to engage in dialogue regarding the influence of the political and social structure of the employment relationship ... Bringing the political and social nature of employment back to the forefront of analysis is crucial given today's current context, including the global recession of 2009-2011.

In academic scholarship, the theory of alienation has typically been applied when considering manual labourers despite the decline of physical work in industrialised nations that accompanied the rise of the service economy. Nair and Vohar (2009;2010) have shown that research on alienation among professionals is extremely limited. They identify a gap in the literature for work on alienation in the 21<sup>st</sup> century and, in particular, work on alienation that looks at professionals. So, despite the problems identified in the foregoing sections about criminal legal aid, defence lawyers in England and Wales have not been considered as alienated workers despite increasingly appearing as a relevant case study for furthering the application of alienation. This paper suggests that the academic literature on criminal legal aid work – and, thereon, such legal practice – should be understood through the lens of alienation. This paper seeks to make an argument for doing so, which can be developed in future empirical work specifically considering the alienated nature of legal practice – and doing so in the heightened neoliberal austerity that currently determines what and how lawyers can practice.

The first academic analysis raising the prospect of considering lawyers as alienated was offered in Newman (2016b), wherein Marx's four types of alienation were applied to criminal legal aid lawyers in England and Wales.<sup>x</sup> The first is alienation of the worker from the work produced: that is, from the product of their labour, i.e. justice. Workers cannot determine the design of a product or the nature of a service and have no control over how it is produced. Defence lawyers operate under a particularly complex employment regime – in private practice (i.e. employed by a firm) but that practise is likely to rely on government funding for income. This means that lawyers not only have to act in their clients' best interests but also in accordance with working practices determined both within their firm and by the government. Lawyers thus face limitations to their autonomy in directing a case, which have caused criminal legal aid lawyers to



become detached from, what in Marxist terms would be labelled, the product of their labour and, in this specific example, would refer to their having full control over a case such that they feel free to do what is best for their client. The burdens of increasingly regulatory procedure (such as embodied in the Criminal Procedure Rules) and restrictive funding have affected defence lawyer behaviour to the extent that the balance of power is effectively tilted in favour of agents of the state (the police, prosecution and the court). As the system becomes increasingly complex through regulation, those operating within it become increasingly disoriented, which can prevent members from formulating ideas for and giving effect to change (Ferretter, 2006). This feeds into the second form of alienation: from the act of production. Without autonomy, the pattern of work becomes monotonous, unsatisfying and, ultimately degrading, characterised by repetition and triviality. The defence role has become increasingly mechanical and routinized, with familiar processes and patterns of behaviour (Welsh and Howard, 2018). The drive for guilty pleas and the internalisation of systemic crime control messages (that convicting the guilty is paramount) pressures and encourages defence lawyers to view clients through this lens and to process them accordingly. Such contributes to the third form of alienation: from the species being, whereby workers are alienated from themselves as producers. The explicit and implicit denigration of this area of practice has reinforced the impression that it lacks social value; defence lawyers are not valued as they should be thus alienating them from their species being. Traditionally, the legal profession is of high social status; moreover, legal aid lawyers consider their work to be virtuous and important but lawyers feel patronised as the poor relations of lawyers in better-remunerated branches of the profession (Welsh, 2017), lumbered with socially undesirable clients who brought down their reputation further. The previous three forms of alienation lead to the fourth: alienation from other workers. Defence lawyers appear to have internalised the culture of efficiency and economy, with the primary goal to process the client; just one of several names on a list, part of a workload to be managed. The human element of the lawyer-client relationship is reduced or lost altogether; the end-point of the process of alienation sees defence lawyers detach from their humanity, struggling to retain sight of any common cause they might share with their clients. Previous work uses a purposefully rigid approach that transposes Marx' four types of alienation

onto criminal defence lawyers to highlight its applicability as an heuristic device and encourage further study to develop such ideas. In that light, it need be recognised that a different set of indicators of alienation has been offered by le Geoff *et al* (2017), which should be read as an alternative means to develop an analysis of alienation in regards to criminal lawyers. Such would provide a more sophisticated consideration of how alienation functions in 21<sup>st</sup> century criminal defence practice, at once more flexible and attuned to the current age of legal practice. Where Marx can provide the grounding, it is possible to move further beyond his work to improve understanding of contemporary working practices by considering the work of Boni le Geoff *et al* (2017) on the legal profession.

Boni le Goeff *et al* (2017) recently conducted comparative research across large law firms in mainland Europe which examined the impact of neoliberalism on legal workplaces. They found that neoliberalisation has led to increased inequality and precarity for lawyers in terms of professional security and career progression. Consequently, lawyers experienced increased levels of stress and depression, which damages working relationships and creates a fragmented profession with high attrition rates. Boni le Goeff *et al* argue, expanding on Marxist theory, that there appear to be four types of alienation experienced by lawyers in neoliberal markets; powerlessness (dependence on bosses/clients meaning autonomy is lost), purposelessness (lack of social utility), unfairness (unfair treatment) and work/life conflict (long hours etc.). Tensions between these issues cause conflict with a traditional model of a lawyer's unbending dedication to his/her clients and to the law. Boni le Goeff *et al* examine structural forces in the neoliberal private sector of lawyers, and therefore do not deal with concerns about adversarialism, or the tensions between due process and crime control values that are explored in Newman's analysis based on the modelling of the criminal justice system offered by Packer (1968). Of course, regulation and funding issues are very different in the circumstances faced by the lawyers considered by Boni le Geoff *et al* (2017). Criminal legal aid lawyers often work in relatively small, specialist practices. As such, while a similar analytical framework can be applied between different branches of the legal profession, there will be specific variation depending on the area of law with, for example, issues of inadequate remuneration being much more prominent as a cause of the powerlessness felt by criminal legal aid lawyers. Furthermore, the codified and

inquisitorial nature of most continental European legal systems may mean that the working practices of lawyers differ from those in adversarial common law jurisdictions (see, e.g. Legrand, 1996).

The analysis in this paper focuses on three of the four issues in Boni le Geoff *et al's* model; highlighting how powerlessness, purposelessness and unfairness manifest amongst criminal legal aid lawyers. The fourth aspect of alienation that those authors identify - work/life conflict - was not a focus of our studies, which concentrated more on issues directly related to professional practice. The projects for which data was gathered were focused more on the impact of legal aid cuts on defendants through a lens of practice. This meant that the impact on lawyers' work/life balance was not a feature of data collection for either researcher. Issues such as the long hours worked by the lawyers and the resultant impact on their lives are, of course, important. They will have knock on impacts into their practice, and have been duly studied by other scholars (for example, Collier, 2016). Future research that builds on the analysis we have offered here should incorporate the area of work/life conflict to provide for a fuller – holistic – understanding of the criminal defence lawyer as an alienated worker.

We believe that the findings of Boni le Geoff *et al's* research can be transferred to the modern era of criminal defence practices as a way to build on and expand Newman's (2016b) previous analysis. The analysis in the present paper can be distinguished from Newman's (2016b) work in the manner that it departs from the strict Marxist application of alienation, simply using that as a starting point for an examination of how alienation presents itself in the legal profession of today. Rather, the three themes we focus on in this paper represent an account of legal practice that speaks to the reality of this work as experienced under neoliberalism, developing a new application of alienation that provides an account recognisable to legal scholars and practitioners. In so doing, we also bring in a second data set to highlight the wider applicability of these insights, thereby drawing out a fuller and more practical understanding of how alienation can be identified in contemporary criminal defence work in such a way that claims about the pervasive nature of the identified issues can be strengthened. As Smith (2013), Newman (2016b) and Welsh (2017) argue elsewhere, defence lawyers in adversarial systems have also lost their ability to act

autonomously in the face of greater regulation. In this context, a sense of purposelessness can arise from oversimplification, which occurs when lawyers experience boredom in conducting routine work which is combined with feeling that they are not making any real difference – i.e. when newly qualified, idealistic lawyers are confronted with the realities of practice. This can arise as a result of disillusionment about the ability of the law to facilitate change (Boni le Goeff *et al*, 2017). Given the pressures on criminal defence lawyers to process cases at speed in light of increased demands for efficiency, which leads to greater reliance on routine procedures (Welsh and Howard, 2018), it is conceivable that those lawyers do feel a sense of purposelessness. Powerlessness arises when lawyers feel undermined by heavily bureaucratised procedures. Defence lawyers are undervalued by both governments that have perpetuated the notion of defendants having too many rights and by fellow lawyers who view legally aided criminal defence work as work of last resort. Consequently, lawyers feel they are treated unfairly both in terms of status and in terms of remuneration, particularly in relation to other professionals. In both datasets we can see how the neoliberalisation of criminal justice appears to have resulted in feelings of powerless, purposelessness and unfairness in the practice of criminal legal aid lawyers. Detail from each study that speaks to these three indicators of alienation will be considered in turn so as to highlight the relevance of this heuristic device of alienation before considering the wider implications in analysis.

## **The Data**

### *Dataset one*

This research set out to offer lawyers more of a voice than they had in previous research while still maintaining an academic analysis, thus reconciling a debate between two competing previous studies who claimed that research either did not give lawyers enough of a say or gave them too much (Bridges *et al*, 1997; Travers, 1997). The research revealed two distinct images of criminal practice, with a disjuncture between interview and observation. In short, the lawyers did not feel able to act in the ways that they felt they should. This discrepancy manifests itself in displaying alienation in terms of powerlessness, purposeless and unfairness as explored under the following headings. In short, all three types of alienation

are evident from the way lawyers' actual practice diverges from their stated values. We shall further see that this has implications for access to, and standards of, justice.

### *Powerlessness*

At the heart of legal practice was the lawyers' own views on what was important in order to be successful at their job. In interview, the lawyers talked about there being a fundamental need to give clients time. The basis of the lawyer-client relationship as they understood it was premised upon developing rapport between lawyers and their clients – and this rapport took time to develop. As lawyer 15 said in interview, 'you need time to build up that trust – they need to be able to talk to you'. The lawyers talked about time with regards to the specific case preparation in hand but, more broadly, also discussed the need for building bonds with clients over a significant period of time – as they become, what were known as, regular clients. For lawyer 10 in interview, 'our clients know us, we've always been there for them and that's why they come back'. Key in the narrower and wider understanding of relationship formation, though, was the idea of consistency for clients.

While lawyers professed the importance of the lawyer-client relationship, their firms did not deem themselves able to offer consistency in representation because they were operating in a wider *judicare* model that required them to run profitable businesses in a criminal justice system that demanded quick, efficient processing of cases. This meant that the organisational practice of discontinuous representation was implemented as standard, so lawyers were allocated to cases on an ad hoc and, primarily, cost-effective basis, often swapping cases during a busy day. Such language and behaviour is familiar to the neoliberal practice of performance management and target setting in public institutions. Lawyer 3 referred to this as 'the numbers game' under observation, as he would frequently laugh about how they had so many cases that he would have to pick them up and deal with them without knowing anything about them: the game was blagging it and not getting found out. Such practices undermine the ability of clients to act as autonomous decision-makers in relation to their case; they are simply being processed without necessarily being able to truly express their wishes about how a case proceeds.<sup>xi</sup> As a result, many clients

failed to develop rapport with their representative, engendering anxieties that their lawyer did not know them or their case. Despite this disgruntlement, practitioners were coming to affect the need to move towards more business-centred approaches to their time. Lawyers felt ever more pressure to spend less time with clients and, effectively, push them through, as lawyer 24 commented in observation, 'we don't have time to waste with him, I have four cases that I just need to finish'. Lawyers are given financial encouragement to persuade clients to plead guilty early but will lose money if cases go to trial and would talk about the importance of 'getting the client to plead guilty', as commented on by lawyer 9 in observation. These risk guilty defendants becoming products to be churned out rather than human beings with needs and rights. In feeling compelled to act in this way, there is the very real possibility that even the most principled lawyers will come (consciously or not) to internalise such systematic imperatives thus highlighting their lack of resilience in being able to make decisions that reflected their own beliefs in how criminal practice should be carried out.

### *Purposelessness*

Having to compromise on their practice had a knock on effect upon lawyers' internalised values and motivations. In the formal interviews, lawyers demonstrated the positive attitudes they held toward their clients. Lawyers identified a social agenda as fundamental to their practice. For example, lawyer 4 said in interview that 'what we do is a social good', while the interview with lawyer 8 saw them explain that 'we stand up for the people that nobody else cares about...we do something worthwhile'. Every lawyer perceived their role to be important for the way they upheld access to criminal justice, functioning to protect some of the most vulnerable in society. There appeared to be a sense of self-importance in these statements as with lawyer 16 stating that 'I'm proud to stand for justice'. This social agenda was cited as the main reason that these lawyers entered practice. They not only felt a calling for the law but were attracted by the opportunity to help those less fortunate than themselves, which legally aided criminal work offered.

Sadly, for these lawyers, their ideals were tested by the reality of working within an increasingly challenging system of legal aid remuneration. They found it increasingly difficult to put their client-centred philosophies into practice, perhaps resulting in a sense of disillusionment as identified by Boni le Goeff *et al.* In the process of discontinuous representation and the lawyers' co-option into a system in which they were expected to push clients through towards as early a guilty plea as possible, it seems as though the humanity of the clients was lost. Every lawyer in this study was observed both belittling clients (e.g. lawyer 19, 'what an idiot') and condemning them (e.g. lawyer 2, 'a piece of shit'). The general attitude was that clients were guilty even if they pretended otherwise, clients were looked down upon and thought the worst of. As lawyer 18 joked in observation, 'did I look like I believed him?' Thus, while the interviews were full of lawyers talking about their commitment to the client, the observations showed an antipathy toward the client and a stronger sense of solidarity with the prosecutors. The lawyers would invariably meet with the prosecutors before the clients, would typically use the accounts provided by the prosecutors as the basis for their understanding of events and would often argue against client accounts for their deviance those of the prosecutor as, observed with lawyer 7; 'no, let me tell you what happened'. There are reasonable explanations for such approaches that may benefit the clients in practice such as charge bargaining and the sentence discount scheme. However, taken together with the overall antipathy displayed towards clients and the overwhelming drive to push all clients towards guilt, there seems a clear undermining of the lawyers' social utility if, as they suggested, it was premised on making clients feel that they were supported.

### *Unfairness*

Lawyers thought it unfair that they were doing something so devalued. The social agenda talked about by the lawyers in interview, then, seemed to have been rejected in practice, which has the potential for undermining the self-worth of these lawyers and creating a situation where the hard work they put in is undermined by not representing anything much of value. In interview, lawyers were quick to identify different parties who were to blame for debasing the nature of criminal practice. This includes the media

who created a populist anti-defendant line and sought to make their work seem immoral, the public that bought into this and derided lawyers and their clients as contemptible, and the government that reflected this in their policy-making that undercut the ability of lawyers to do their jobs properly. In addition, lawyers were angry at judges who convicted innocent defendants or sentenced them too harshly, prosecutors who brought unjustified charges and police who may lie. All these groups were seen to undermine the social status of lawyers and lawyering, as lawyer 23 said in interview: 'I'm sick of being treated like shit because I work with criminals'. Far from being recognized as a vocation doing important work, lawyers felt looked down upon and they did not think this was fair.

The lawyers' belief in their social value was further undermined by the relatively low remuneration they received, especially compared to other branches of the legal profession. There was widespread resentment among these lawyers that all their years of training and their specific expertise married to the important social role they considered themselves to play did not merit higher financial reward. In observation, their supposed low remuneration was by a distance the most popular topic of conversation for the lawyers: amongst one another and with me. There was much frustration at the lower pay that lawyers perceived themselves to earn in relation to peers and other professions but especially with regards to tradespeople (lawyer 22 in observation was recorded as making the common complaint about being on duty overnight; 'I earn less than a plumber would'). There was anger as the lawyers went about their practice but, rather than blame other parties – such as the government for ultimately setting their remuneration – lawyers took out their frustration at the apparent unfairness of their situation on their clients. Clients were seen to waste their time, thus lawyers had fully internalised the systematic imperatives for efficiency and lost track of their social agenda, with clients now accepted as an encumbrance on their times, as lawyer 1 lamented in observation, 'does he think I have time to waste on him?'

Taken together, the interviews and observations from this study point towards these lawyers and their practice exhibiting signs of alienation.

#### *Dataset Two*



This research was conducted in the acknowledgment that the high levels of co-operation appear to exist among defence lawyers, which appears to mean the courtroom workgroup adapts to formal changes of law or policy and dilutes them in order to maintain the status quo (Young, 2013). Further, feelings of alienation seemed to lead lawyers to become complicit (by their acquiescence) to changes which have a detrimental effect on lawyers and their clients. This seemed to be the case even though these lawyers also felt that there were not able to act in ways they should, and implicitly recognised that this means a de minimis standard of justice was achieved. Again, participants in this study seemed to exhibit signs of alienation which could undermine their collective identity, and therefore their ability to provide a defence service of the highest quality.

### *Powerlessness*

The most conspicuous example of lawyers feeling powerless can be found in the way that defence lawyers spoke about the courts' prioritisation of speed over ensuring that lawyers are properly funded. Changes to legal aid often result in delay and uncertainty about whether a particular client's case will be publicly funded, and, therefore, whether the lawyer will be paid for their services (Welsh, 2017). However, in describing the court as having no choice but to refuse to allow cases to be adjourned for payment to be secured, advocates displayed reluctance to criticise the workgroup itself. Instead, there was a sense of resignation about the way the system operates. Interviewee A said 'It's tough because you just get used to it and it is what it is'. Interviewee I also betrayed the view that there was little point in arguing with the system in saying 'you could sort of argue 'til you're blue in the face that the work you do and the fees haven't gone up since, what, 1997 but there's simply not going to be more money.' Similarly, Interviewee R displayed a sense of resignation, which betrays powerlessness, when he said 'The cuts have been made, the legal aid budget is going down. End of.'

Advocates seemed to accept that their continued co-operation enabled efficiency drives to succeed, even though they later expressed the view that premature decision-making reduced the quality of representation. They appeared to justify their complicity on the basis that the court had no choice but to refuse applications to adjourn proceedings. Clearly, however, advocates could have refused to represent clients unless they were sure of payment, which would have caused significant disruption to the courtroom and its level of efficiency. There may be many reasons for advocates' failure to disrupt the system by refusing to act, including loyalty to the workgroup, loyalty to clients (by causing as little disruption as possible) and a desire to maintain their reputation by being seen to assist the court. Interviewee F provided an example of these issues, in which a sense of frustration was clear, when he said:

You complete the legal aid application form. You then have to send him [the client] off to get his copies of his wage slips. What are you going to do if he doesn't send them back? Sue him? You're not because you know he's got no money and so you've done that case for free... You've no idea where he is... you have done 200 quid's worth of work for absolutely nothing at all... cases where you are taking that risk happen every day.

The result of all of this is that defence lawyers took on the problem of obtaining legal aid but defendants still needed prompt advice about their cases. For example, interviewee B said 'some of the recent changes have forced us to make decisions that aren't necessarily in the best interests of the clients in the long run.' The use of the word 'forced' was common among defence lawyers when asked about how funding cuts and efficiency drives have affected their work. The word itself betrays a sense of powerlessness; a sense that resistance is pointless. Defence solicitors have, for a range of reasons, done little to challenge that process since they continue to represent people even when it is unclear that payment will be forthcoming... Solicitors displayed some awareness of this in accepting that they have

acquiesced in the changes. Interviewees were also alive to the fact that such behaviour weakened their professional standing. Interviewee D described the position as:

You're *required* to represent more and more people with less and less staff in order to balance the books ... people spend less time actually doing what they are actually there for, which is to provide advice and assistance and representation, and the work inevitably has to suffer. (emphasis added)

Such weakening of their professional standing resulted in further powerlessness in asserting decisions with force. For example, Interviewee O was also concerned that his professional decision making was being subject to ever more challenge by the courts. He said 'They grill you as to why you want a witness [to attend court] and you don't want to section 9 them'.<sup>xii</sup> Such comments indicate that lawyers also feel that their decision making powers in relation to their cases are being undermined.

It was not, however, just the courts that interviewees revealed a sense of powerlessness in relation to. Interviewees were clear that they felt that the government had introduced policies which had undermined the role of the defence lawyer without appropriate consultation. For example, Interviewee O said 'They should consult the people who are in the system and ask us how they can cut cost if that's what they really want to do', while Interviewee R said:

The ridiculous administration process doesn't help. Idiots make the decisions based on pre-policy documentation or by some moron at the top basically.... They are just half-baked policy ideas to try and alter targets and figures but they never work.

It was through these narratives that lawyers revealed a sense of being unable to assert themselves in a way which was consistent with their professional standing. It seems, however, that this sense of

powerlessness came from two particular features of summary criminal justice; funding cuts and demands for efficiency.

### *Purposelessness*

The way that defence lawyers spoke about funding changes betrayed not only a sense of powerlessness, but also indicated that funding changes have affected the way that they conduct cases; primarily by drawing time away from client-centred activities (advising and case preparation) which form the foundation of professional identity and more towards business-centred practices. For example, interviewee D complained:

If you're representing four or five clients, as you will frequently do, with legal aid you spend half the time that you are physically in court filling in legal aid forms when that time could be more profitably put to actually sitting down and advising the clients.

Interviewee G expressed similar sentiments when he said 'the problem for me is that you spend more time chasing legal aid, chasing means testing, chasing that than you do actually preparing the case and what's the point of that'. It became clear that lawyers were frustrated with the situation brought about by neoliberal political agendas, and the perceived threat to their professional standing and role. Such frustration affected the way that cases were conducted, including the way that lawyers engage with clients, access to justice and the quality of service delivered. For example, Interviewee A complained:

You think what is the point in going through this in any detail when odds on it won't pan out that way, whereas before you would be able to fine toothcomb as one ought to.... It's not that people suddenly don't want to do their jobs properly it's just that you can't...and we probably don't even notice that that sort of jaded approach is creeping in.

Coupled with changes to the way lawyers use their time is the inextricable link to demands for efficiency. Lawyers suggested that they felt such demands had further undermined their purpose as adversarial advocates. On demands for efficiency, Interviewee A said 'it's kind of an affront to the whole notion of representation. Representation is not just about getting someone through a court hearing', while interviewee B reported that demands for efficiency have led to a dilution in the quality of defence lawyers' work.

Three interviewees took this a step further, suggesting that the whole adversarial process is being undermined by demands for efficiency, which will almost inevitably affect how lawyers view their role. Two quotes are worth considering in full given that they demonstrate a sense of frustration among lawyers about the way their role has altered, and it almost does not matter what they say. Interviewee F reported:

The impression I get that Court clerks, magistrates and indeed the Crown and sometimes the defence deal with these cases is overly prescriptive and doesn't allow sufficient flexibility, and the old mantra of whether your client knows he did it or not. Well yes he may well know whether he did it or not but that's not really what the criminal procedure's about is it? Otherwise they would just put people into the dock and say "hello what have you done?" That's not the way it works. You've got to know and understand the case against your Client and be able to advise your clients as to whether or not the Crown can prove the case.

Interviewee G said:

You know that person sometimes, often is not represented in the [police] interview so you don't know what the CCTV says and you know they'll [the court] say 'your clients knows if he did it'. Well my client says he didn't do it, shall we just walk out of Court and dispense with you lot? Because if

you're saying that's how much trust you put in my client's word well let him go, drop the charges because he said he didn't do it. Off we go.

However, as indicated above, lawyers actually appear to be complicit in the operation of policies that demand efficiency in spite of their concerns, which may betray an inability to manage the senses of powerlessness, purposeless and unfairness which can lead to alienation. For example, interviewee C went on to say that defence lawyers have, in relation to policies which negatively affect both themselves and their clients, 'jumped into line and we do it' because that is what is expected of them. These comments suggest that lawyers feel that their role (and its purpose) has been fundamentally altered by funding changes alongside demands for efficiency. It seems that they feel their purpose has been affected in two ways; a need to be more economically efficient and a devaluation of traditional adversarial principles.

### *Unfairness*

Participants also seemed to express a sense of unfairness in relation to funding cuts, suggesting that they have been 'lumbered' with the problems and receive little sympathy from their professional colleagues about these difficulties. Lawyers tended to believe that the procedure for obtaining funding is 'overly onerous' (Interviewee A). Interviewee C said 'the burden of completion of the forms has been left upon us for no payment and I just think the imposition is an absolute disaster.' Interviewee D similarly spoke about the way that funding problems have been 'passed on' to defence lawyers.

Interviewee G felt that the magistrates' courts under study were aware of the willingness of advocates to comply with policy and take advantage of that behaviour. Seven of the 12 defence solicitors who were interviewed complained that the court has no sympathy with the problems that defence solicitors face in obtaining funding. For example, interviewee A said 'I think they're perfectly aware of it but they choose to ignore it because they've now got a guideline that says "crack on".'

Not only was the application process a source of resentment for lawyers, but the payment rates also seemed to result in a sense of unfairness. Defence lawyers tended to express that they felt devalued and therefore demotivated. Interviewee A, in stating that payment rates are an 'all-round demotivater', went on to explain 'practising law is something specialised and it ought to be paid appropriately.' When asked about the payment fee structure, Interviewee B said 'I think it's terrible. I cannot think of another profession that would allow itself to be paid in the way that we are; on the basis of not in proportion to the work that you've actually done'. Interviewee C also described a general sense of demotivation as a result of funding cuts. He said 'I think that everyone's demotivated and the court is in a worse situation than I've ever known it'. Interviewee G expressed his sense of unfairness in more forthright terms, stating:

I don't understand how the Government expects you to work without being paid. You wouldn't say that to a doctor would you? ... It's like what your parents say to you when you're a kid 'if you don't like it, it's my house, it's my rules, you'll get what you're given.

The use of the parent/child relationship was particularly interesting, in that it was suggestive of an argument between a teenager who felt unfairly put upon and an authoritarian parent (or, in this case, a paternalistic state), which suggests that this lawyer regarded his relationship with the funding agency as fundamentally unfair.

Other defence lawyers expressed similar sentiments, in that they clearly felt that their work was undervalued. Interviewee B said

I think that we have become devalued by the Government, I think we have become devalued by the courts, I don't think we're shown the respect that we used to be shown... I think the

profession is generally demoralised... I think we are a profession and we should have been treated like a profession and I don't think we are any more. I think we're treated like a commodity.

This comment is significant. It suggests that this defence lawyer (at least) was aware that his status had changed from an autonomous professional to an object that has been reconfigured for market use (see e.g. Holborow, 2018; Marx, 1983). While defence advocates bemoaned that situation, nearly half expressed the view that magistrates appeared to have no choice but to refuse applications to adjourn proceedings as a result of guidance contained in the provisions of policies designed to increase efficiency.<sup>xiii</sup> It seems that advocates expressed sympathy with the court, even though their own interests suffered and the interests of their clients were put at risk. Interviewees tended to blame problems on the externally introduced policy rather than workgroup members. For example, interviewee C said 'I think that the people who impose those systems do so in the flawed belief that delay in the court is caused by defence solicitors.... So I worry that there's an agenda against firms.'

The tendency to blame externally produced policy (which we do not suggest is blameless) may again, be symptomatic of alienation which disempowers the workgroup. Furthermore, workgroup co-operation may be a way of maintaining professional identity in an otherwise devaluing setting, in which defence lawyers have become associated with their socially undervalued clients. This may have the potential to create a cycle in which co-operation becomes a default behaviour, which causes them to be complicit in the face of change that is detrimental to them and their clients. However, by failing to undermine the difficulties they encounter, solicitors also become complicit in their own subordination.

## **Analysis and Conclusions**

This paper has brought together two empirical studies to show that criminal legal aid lawyers can be understood as alienated workers. The alienation of the lawyers evidenced in this paper can be attributed



to organizational practices and the environment in which lawyers operated; the social welfare quality of legally aided criminal defence has been subverted to a neoliberal standard of cheap and speedy justice which is both the cause and effect of an alienated workforce. The Marxist theory of commodification explores how people are commodified when working, they are turned into objects. In the German Ideology, Marx and Engels (1970) ascribe alienation in capitalist societies to the privately-owned means of production meaning that the individual operates as an instrument of capital rather than a social being with discrete agency. The capitalist system debases the act of work to the level of a mere economic practice, it is nothing more than a commodity to be traded and exchanged. Marxist theory, though, is premised upon the idea that work is so much more than just economic worth, it should about giving people self-fulfilment and bringing people together. Alienation occurs because the social elements inherent within the act of production are lost. Where work should have value to the individual (through giving them a sense of worth) and, thereon, to the wider community (by combining to bring about the betterment of society), it only has the pure economic value dictated by the market. Work under the present system invariably means workers are estranged from their humanity as capitalism mediates social relationships and denies workers' ability to change the world around them. There thus emerges system of commodity fetishism – also known as thingification - wherein the things people produce (commodities) take on a life of their own to which humans merely respond.

The paper has shown, in both data sets, a situation in which criminal legal aid lawyers have become detached from the potential for their work to serve justice and to help people, instead degrading what such lawyers are and can do as the quest for efficiency sublimates their practice. This is a culture that that Sommerlad (2001; 315) labelled 'the factory model of practice', and Newman (2012; 3) labelled a 'sausage factory'. Such practice is underpinned by the assumption that firms should churn out a mass of clients like a production line. Sausages are the most appropriate metaphor as they are a standardised product wherein a range of different pieces are squeezed together into an amorphous whole for mass production akin to the production line originally analysed by Marx. As such approaches came to dominate

professional practice, the public service ideal has been superseded by a more pragmatic sense of business imperatives, which appears to have undermined the sense of purpose lawyers felt about their role.

In criminal justice, Bell (2011) highlights an urgent need to humanise those who appear as suspects and defendants to help people understand that they are more than just their crime. There is an urgent need to change the narrative around criminal defence practice, with the well-worn stereotypes of lawyers getting criminals off and riding the gravy train (perpetuated under neoliberal governments such as New Labour – see Hynes and Robins, 2009). Promoting understanding that properly functioning legally aided criminal defence is something worth fighting for as a social good seems an important means to push back against the neoliberal ideology that allows practice to be degraded – but lawyers, as we have shown, may be relatively powerless to perform that task.

Considering this, lawyer motivations can be understood in economic terms using contract theory – the lawyer's various work tasks are to be conceptualised as inputs into a system (Fenn *et al*, 2007). Under a fixed fee system as presently operates, lawyers will reduce their supply of inputs when the fee no longer rewards it. As such, lawyers are induced to offer 'a different product' to what they otherwise might, with the likelihood being the difference is a negative one (Fenn *et al*, 2007; 17). The service could deteriorate further as the value of the fee paid declines, (further) reducing both access to, and the quality of, justice. As the service that lawyers provide declines, they seem to lose their professional standing and, therefore, their power because their status no longer holds value. This could produce further feelings of unfairness that alienate lawyers further from their clients, and from the public service ideal that they once stood for.

The sum of the research offered and cited in this paper is that criminal legal aid emerges as a degraded practice, with these lawyers' professional status debased and their socio-cultural standing reduced as the nature of their work is significantly compromised. Crucially, these trends to undermine legal practice can be identified as the result of a wider political project. It has been shown that the presence of defence lawyers facilitates speedier case progression (Young, 1996), but perhaps alienated lawyers facilitate an

even speedier process as work becomes ever more automated, and the will to challenge regulation and automation decreases. Tata (2007) has developed the notion of ethical indeterminacy as an explanation for substandard legal practice in times of challenging financial remuneration. For situations in which lawyers are faced with two courses of action – both carrying advantages and disadvantages – they might compromise their professional ideals and the good of clients or society. In making difficult and evenly balanced judgements, greater weight is placed on advantages that flow from one course of action that is in one's own interests. Less weight is placed on those that flow from actions that run contrary to one's interests. In this way, lawyers are able to justify (to themselves and others) taking the course of action that is in their own commercial interests. As lawyers face harsher economic circumstances, the concept of ethical indeterminacy can be used to show that corners are being cut, meaning clients could lose out (Tata and Stephen, 2006). The by-product of this seems to be greater feelings of alienation among defence lawyers. There has been limited but excellent literature that analyses the politics of criminal legal aid funding and practice to trace this professional decline, most notably Cape (2004) who identified a growing antipathy toward adversarial principles and the adversarial role of lawyers. There seems a need to take this further and embed legal practice in an analysis of work in its political context that is at once deeper and broader, giving a more general reasoning of political economy, hence this paper forwarding an understanding of these lawyers and their practice through the lens of alienation.

In a time before defence lawyers routinely appeared at the magistrates' court, Carlen (1976) and McBarnet (1981) identified that defendants were alienated from and by the criminal process. The research reported in this paper suggests that the situation may be little better now, so work is needed to better understand if and how the alienation of lawyers infuses into their practice, those who rely on it and the wider the system. Understanding criminal legal aid lawyers as alienated lawyers may call for a reappraisal of how we understand the criminal justice system; the professionalization of the system, and the emergence of the lawyer as rundown, browbeaten worker, is a trend that will have implications for what we champion – or accept – as justice.

This paper has built on two previous exploratory works to provide for a more sophisticated understanding of the impact that legal aid cuts are having on the practice of criminal defence lawyers and, by implication, the effect on access to, and standards of, criminal justice. It has developed and applied the concept of alienation to a pair of separate but complimentary research studies in criminal practice and, in so doing, has deepened the analysis of how criminal lawyers work under the current legal aid regime and, also, broadened the scope of how we can understand criminal legal practice through developing this novel analytic approach. The methodological approaches adopted (ethnographic case studies) further mean that the approach adopted by these two examples could be transferred to other areas of legal practice, thus providing a method for analysing the field of study. More research should be conducted that specifically explores criminal practice through the alienation lens, with a methodology designed drawing on some of the classic studies of business and organisation discussed above. These issues could also usefully be examined through the Foucauldian lens of power and (lack of) resistance, but such an analysis is beyond the scope of this paper.

Our work unites, for the first time, two of the leading recent qualitative studies thus moving beyond the individual fieldwork toward more generalisability. A future study should build on this by offering a multi-site research that covers differing geographical, economic and demographic variables, including both urban and rural, to bring out different experiences of legal aid cuts with issues such as advice deserts and centralisation. Future work should also seek to cover a variety of age ranges amongst the lawyers studied to explore any potential differences between those who practiced before the more recent restrictions and those who have only know practice under austerity.

## Notes

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<sup>i</sup> Marx and Engels' (1970) alienation differs from similar conceptions found in the other of the three 'founding fathers' of sociology, Durkheim (2006) (with his focus on normlessness in the concept of anomie) and Weber (2004) (developing the iron cage of rationality to address the rise of legal rationality). All concerned the disconnect between individuals and society but

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Marx' analysis was specifically class-based and, as such, rooted in the experience of the person at work, and citizen as a worker thus has most relevance for this paper considering the experiences of a particular group of workers.

<sup>ii</sup> Billingsley and Ahmed (2016) have shown how austerity can be implicated in the shift from adversarialism in the civil justice system.

<sup>iii</sup> There are potential limitations that stem from the age of this data set, chiefly that the content may be outdated; however, the premise of this paper is that structural trends that have developed over the past few decades are being displayed in criminal practice thus the paper necessitates taking a longer-term view. The symmetry of the two data sets, and the greater insight into criminal defence work provided by seeing the same issues arise five years apart, justify the bringing together of both data sets in this paper. Some things may have changed, the initiative may have new names and the drives fresh objectives, but it seems likely this is more of the same, and this is a matter that should hereafter be brought out in new research purposively exploring lawyer alienation in neoliberal austerity.

<sup>iv</sup> It is important to acknowledge that the world of criminal defence work is fast paced, and yet more initiatives designed to increase efficiency have been introduced since both case studies, such as *Transforming Summary Justice*, which was introduced in 2015 (see Ward, 2016). Notably, particularly when discussing feelings of alienation among defence lawyers, concerns about graduate willingness to work in criminal defence services, and the consequent ageing profession, have only increased since these data were collected (The Secret Barrister, 2018; Bowcott, 2018a), suggesting that the problems that were uncovered have actually worsened.

<sup>v</sup> At the time of study, there were 42 criminal justice areas across England and Wales which are further divided into 144 local justice areas. A local justice area is 'a group of one or more magistrates' courts which are administered together' (Open Justice, 2012).

<sup>vi</sup> That role did have implications for the way research was conducted. For example, former colleagues were not interviewed for a number of ethical reasons, and use was made of informal networks when arranging interviews, albeit that all data collection was conducted within appropriate ethical boundaries.

<sup>vii</sup> Professionalization in this context refers to respect for expert knowledge held by professionals (including lawyers), and allowing such professionals broad scope to make autonomous decisions about their work on the basis of that expert knowledge.

<sup>viii</sup> Access to justice is a nebulous concept which is socio-culturally situated. Here the term refers to the ability of defendants to understand and meaningfully participate in the criminal justice process.

<sup>ix</sup> *The Queen on the application of London Criminal Courts Solicitors Association and Criminal Law Solicitors Association v The Lord Chancellor* [2014] EWHC 3020 (Admin)

<sup>x</sup> See also the development of these ideas in Newman and Smith (2017).

<sup>xi</sup> While relevant as a consequence of issues that we raise, concerns about client choice and their ability to act as fully autonomous agents in the criminal process are beyond the scope of this paper; our focus is in analysing the reasons why the quality of defence services might be (further) diminishing. The inability of defendants to properly participate in the criminal

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process as a result of interaction with and between their lawyers, prosecutors and the courts has been well documented and discussed by, among others, Carlen (1976), McConville et al (1994), Newman (2013). For an exposition of how rules of criminal process and evidence similarly hinder autonomous defendant participation, see further Owusu-Bempah (2017) and Quirk (2017).

<sup>xii</sup> Section 9 is, in this context, a reference to s.9 Criminal Justice Act 1967 which provides that uncontested statements can be read out to the court rather than a witness being required to attend and give evidence in person.

<sup>xiii</sup> The relevant policies are *Delivering Simple, Speedy, Summary Justice* (Department for Constitutional Affairs, DCA 37/06, 2006) and *Swift and Sure Justice* (Ministry of Justice, *Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (Ministry of Justice Command Paper CM 8388, 2012))

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