
NOTES

WELFARIST PROSECUTION

INTRODUCTION

Criminal justice reform advocates have long rallied against the criminalization of poverty in the United States. It's well established that criminal justice involvement disproportionately affects communities of color and low-income individuals. This is unsurprising given the historic tightening of the welfare state, coupled with the unprecedented expansion of the penal state over the same period. While some attempt to counteract these twin developments through legislation and grass-roots organizing, another actor is taking stock: the local prosecutor.

As plea bargaining began supplanting trials over the past half century, the power of the local prosecutor has grown; some prosecutors have embraced this newfound power to ends of combatting the criminalization of poverty. Many progressive prosecutors have defined their roles and prosecutorial philosophies in terms of holistic justice, recognizing that some activities labeled criminal are better understood as products of poverty, unaddressed mental health needs, or addiction. This inspires efforts to decarcerate — the main platform on which progressive prosecutors run. Some, however, have taken that holistic vision *further* — by enacting policies and programs aimed at redressing the criminalization of poverty, in step with the social work model of public defense. In so doing, they have focused on addressing the defendant's whole welfare, not just her alleged criminal activity. Deliberately or incidentally, these prosecutors have utilized their newly expanded powers to counteract the contraction of the welfare state through welfarist rehabilitation. This Note terms this nascent phenomenon — by which prosecutors affirmatively treat defendants holistically and center their welfare as a primary goal of the prosecution — “welfarist prosecution.” It argues that, despite institutional tensions in prosecutors undertaking this role, welfarist prosecutors are nonetheless mitigating the criminalization of poverty. Unless and until the U.S. social safety net achieves serious structural and legislative reforms, this is a welcome intermediate development.

Part I chronicles this historical development, as the United States's primary institutional body for redressing social problems shifted from a welfare state to a penal state. The welfare state transformed to a more restrictive work-based system, with greater procedural hurdles and lesser access to social services for the criminal justice-involved¹ especially. Concurrently, the American criminal justice system expanded

¹ This Note uses the term “criminal justice-involved” to acknowledge the breadth of individuals whose lives are touched by the criminal justice system. Beyond those convicted of a crime, the

dramatically, and the power of prosecutors rose commensurately. Enter progressive prosecution, a movement that aims to pursue justice in a society with mass incarceration and a relatively weak social safety net.

Part II explores the ways in which prosecutors have institutionalized the welfarist prosecution model — and in so doing, deliberately or incidentally, have helped counteract the contraction of the American welfare state and the criminalization of poverty. This mode of prosecuting is evidenced in mission statements and philosophical orientations, as well as in welfarist policies and programs — including, for example, efforts to secure employment for defendants, advocacy against money bail and monetary sanctions, comprehensive diversionary programming, and use of specialty courts to advance the holistic care of marginalized populations. Welfarist prosecutors have been functionally “filling in” for at least some of the lost social services made inaccessible to the criminal justice–involved by the shrunken welfare state.

Finally, Part III examines the merits of this development. Housing responsibility for holistic, welfarist care of the criminal justice–involved within the prosecutorial arm of the state may be justified as a logical extension of the public defense social work model. While the translation from the defense world to the prosecutorial context should not be taken for granted, given tensions respecting prosecutors’ role within the adversarial legal system, it nonetheless comports with their role as ministers of justice. And even if the current system of welfarist prosecution is inherently conflicted, it is nonetheless a mitigatory step in the right direction — and certainly preferred to the criminal justice–involved receiving *no* services, from the penal or welfare states alike.

I. FROM A WELFARE STATE TO A PENAL STATE

This Part explores the twin sociohistorical developments of a contracting welfare state in the United States and the coinciding expansion of the criminal justice system over the past fifty years, setting the stage for reformist prosecutors’ arrival.

A. *From a Needs-Based to a Work-Based Welfare State*

Over the past several decades, the American welfare system has, in many ways, substantially weakened.² The Personal Responsibility and

term also encapsulates arrestees, pretrial detainees, people who are incarcerated, people who were formerly incarcerated, and those subjected to the penal state through probation, parole, or other state-mandated forms of penological supervision.

² E.g., Alexandra Cawthorne Gaines et al., *How Weak Safety Net Policies Exacerbate Regional and Racial Inequality*, CTR. FOR AM. PROGRESS (Sept. 22, 2021), <https://www.americanprogress.org/article/weak-safety-net-policies-exacerbate-regional-racial-inequality> [<https://perma.cc/9GM2-6AWA>] (“America’s complex system of public benefits and supports — also

Work Opportunity Reconciliation Act of 1996³ (PRWORA), termed “welfare reform,” “ended welfare as we [had known] it” for the previous half century.⁴ PRWORA replaced the more effective direct cash assistance provided by Aid to Families with Dependent Children (AFDC) with the more restrictive cash welfare program, Temporary Assistance for Needy Families (TANF).⁵ While changes to the “food stamps” program — today, the Supplemental Nutrition Assistance Program (SNAP) — compensated for some of the loss in aid from TANF over this period,⁶ TANF (a state block grant program) nonetheless dramatically shrunk aid available to low-income families, due to its time limits and stringent eligibility and work requirements.⁷

Indeed, one of the most impactful antipoverty programs in the United States today isn’t a “welfare program” at all, but a tax credit administered through the Internal Revenue Service — the Earned Income Tax Credit (EITC).⁸ As the EITC (begun in 1975) expanded significantly in the 1990s, so too did constraints limiting its use.⁹ Taken together, the eligibility and term-time constraints expressed in TANF, the EITC, and SNAP fundamentally shifted the U.S. social safety net from a needs-based to a work-based model, cutting caseloads and shrinking the net.¹⁰

Moreover, welfare recipients are heavily policed by eligibility and participation requirements. Today’s work-based social safety net is arguably “first and foremost[] intended to deter welfare use, to guard against misuse, and to punish welfare cheating” — treating intended beneficiaries as “latent criminals . . . [,] presumptive liars, cheaters, and

known as the social safety net — has proven to be effective in reducing poverty . . . , but it has weakened substantially over the past several decades.”)

³ Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S. Code).

⁴ Sandra K. Danziger et al., *From Welfare to a Work-Based Safety Net: An Incomplete Transition*, 35 J. POL’Y ANALYSIS & MGMT. 231, 231 (2016).

⁵ See *id.*; see also Laura Tach & Kathryn Edin, *The Social Safety Net After Welfare Reform*, 43 ANN. REV. SOCIO. 541, 542 (2017). To be sure, the pre-PRWORA system was no utopia either. See, e.g., MELINDA COOPER, FAMILY VALUES 33–37 (2017) (describing its deficiencies).

⁶ Tach & Edin, *supra* note 5, at 542.

⁷ See generally LaDonna Pavetti et al., *TANF at 25: A Weaker Cash Safety Net Reaching Fewer Families and Doing Less to Lift Families out of Deep Poverty*, 74 NAT’L TAX J. 763, 763–64 (2021) (analyzing TANF’s twenty-five-year history and concluding that “TANF’s story has been one of greatly diminished access, low benefits, and states diverting funding away from cash assistance,” *id.* at 763); Frank Ridzi & Andrew S. London, “*It’s Great When People Don’t Even Have Their Welfare Cases Opened*”: TANF Diversion as Process and Lesson, 23 REV. POL’Y RSCH. 725, 725 (2006) (“From August 1996 to March 2002, the national welfare caseload declined by an unprecedented 57.6%.”).

⁸ See MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR 23–24 (2019).

⁹ *Id.* at 8, 14–17.

¹⁰ Tach & Edin, *supra* note 5, at 542; see also sources cited *supra* note 7.

thieves.”¹¹ Applicants and recipients of aid are routinely regulated, surveilled, and punished for failing to comply with confusing and complicated requirements.¹² Some states mandate drug testing.¹³ Others limit aid by imposing monetary sanctions on those who fail to fulfill welfare-to-work requirements, which may include, for no fault of one’s own, working fewer hours than required or failing to attend a caseworker meeting despite good reason.¹⁴ Welfare fraud investigations are routine and can result in civil or criminal penalties.¹⁵ As a result, today’s social safety net has become less robust and more punitive. Exacerbating the problem, the U.S. minimum wage has stagnated,¹⁶ student loan debt soars,¹⁷ and twenty-eight million U.S. adults lack health insurance.¹⁸

In addition to curtailing aid eligibility generally, this transition has especially harmed the criminal justice-involved. For example, individuals with outstanding felony warrants or probation or parole violations are ineligible for benefits — among them TANF, SNAP, Supplemental Security Income (SSI), and housing assistance — turning “the welfare system . . . [into] an extension of the criminal justice system.”¹⁹ Twenty-

¹¹ KAARYN S. GUSTAFSON, *CHEATING WELFARE* 1 (2011); *see also id.* at 51 (“Current welfare policies were designed to punish the poor; to stigmatize poverty, particularly poverty that leads to welfare receipt; and to create a system of deterrence to keep low-wage workers attached to the labor force.”); DAVID GARLAND, *THE CULTURE OF CONTROL* 196 (2001) (“[T]hemes that dominate crime policy — rational choice and the structures of control, deterrents, and disincentives, the normality of crime, the responsabilization of individuals, the threatening underclass, the failing, overly lenient system — have come to organize the politics of poverty as well.”).

¹² *See generally* GUSTAFSON, *supra* note 11.

¹³ *Drug Testing for Welfare Recipients and Public Assistance*, NAT’L CONF. STATE LEGISLATURES (Mar. 24, 2017), <https://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx> [<https://perma.cc/8KTV-AM8S>].

¹⁴ *See* GUSTAFSON, *supra* note 11, at 61.

¹⁵ *Id.* at 63–64; *see also id.* at 93–117 (documenting, through interviews with welfare recipients, the challenges of complying with complex antifraud rules); *id.* at 96 (“The welfare system prioritizes fraud prevention over poverty alleviation.”).

¹⁶ Matthew Michaels, *If the US Minimum Wage Had Kept Up with the Economy, Many Low-Wage Earners Could Earn Double What They’re Making Now*, BUS. INSIDER (Dec. 22, 2017, 1:15 PM), <https://www.businessinsider.com/how-much-higher-the-federal-minimum-wage-should-be-2017-12> [<https://perma.cc/69XP-MR94>].

¹⁷ Janet Lorin, *Student Debt*, BLOOMBERG: QUICKTAKE (June 26, 2019, 1:52 PM), <https://www.bloomberg.com/quicktake/student-debt> [<https://perma.cc/HD5B-CFKL>].

¹⁸ *See* KATHERINE KEISLER-STARKEY & LISA N. BUNCH, U.S. CENSUS BUREAU, *HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2020*, at 2 (2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-274.pdf> [<https://perma.cc/LN3K-SVHX>]; *see also* Krysten Crawford, *America’s Medical Debt Is Much Worse than We Think*, STAN. INST. FOR ECON. POL’Y RSCH. (July 20, 2021) <https://siepr.stanford.edu/news/americas-medical-debt-much-worse-we-think> [<https://perma.cc/5MRN-NWAD>] (noting U.S. adults’ \$140 billion of outstanding medical debt).

¹⁹ GUSTAFSON, *supra* note 11, at 52–53. This policy is not clearly tied to public safety, either: under the fugitive felon provision, an individual who “ha[s] a warrant issued for missing a meeting with a parole or probation officer, missing a substance abuse meeting, or being determined to be psychologically unstable” may be cut from the welfare rolls. *Id.* at 53.

five states impose a (full or partial) drug felony lifetime ban, by which adults with drug felony convictions are prohibited from receiving aid, including TANF and SNAP benefits.²⁰ Individuals with criminal arrests or convictions may be barred from Section 8 housing²¹ or denied other benefits, including TANF, SNAP, and educational loans.²² Having a criminal record is significantly associated with diminished employment opportunities²³ — which matters a great deal in a “welfare-to-work” system predicated on stringent employment requirements for applicants and beneficiaries alike. The welfare state has become increasingly inaccessible for the criminal justice-involved.

B. *The Expansion of the American Penal State*

Over the same period, the criminal justice system has swelled, in both the number of individuals whose lives it touches and the resources it consumes. The U.S. criminal justice population has ballooned 500% over the last forty years, with roughly two million people currently held in the nation’s jails and prisons²⁴ and over eight million “under some form of state control, including jail, prison, probation, parole, community sanctions, drug courts, [and] immigrant detention.”²⁵ War on Drugs-era policies led to a tenfold increase in incarceration for drug offenses from 1980 (40,900 individuals) to 2019 (430,926 individuals).²⁶ At the same time, mandatory minimums increased the average prison sentence for federal drug offenses nearly threefold: from twenty-two months in 1986 to sixty-two months by 2004.²⁷ Lifelong sentences, too,

²⁰ See *id.* at 55 (noting the policy’s removal of over 92,000 adults from the welfare rolls over a five-year period); see also Ali Safawi, *Remaining States Should Lift Racist TANF Drug Felony Bans; Congress Should Lift It Nationwide*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 19, 2021), <https://www.cbpp.org/blog/remaining-states-should-lift-racist-tanf-drug-felony-bans-congress-should-lift-it-nationwide> [<https://perma.cc/U6PS-E9NW>].

²¹ See Julia Dickson-Gomez et al., *Access to Housing Subsidies, Housing Status, Drug Use and HIV Risk Among Low-Income U.S. Urban Residents*, SUBSTANCE ABUSE TREATMENT, PREVENTION & POL’Y, Dec. 2011, at 1, 2.

²² See, e.g., MARIE GOTTSCHALK, *CAUGHT 2* (2015); ALEXES HARRIS, *A POUND OF FLESH* 8 (2016).

²³ See, e.g., Dickson-Gomez et al., *supra* note 21, at 2; Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 960 (2003) (“[E]x-offenders are only one-half to one-third as likely as nonoffenders to be considered by employers.”). This effect differs by race. See *id.* at 961.

²⁴ *The Facts: Criminal Justice Facts*, SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> [<https://perma.cc/Z4RN-7AQP>]; see also HARRIS, *supra* note 22, at 6 (“[I]n 1976, 1.17 million U.S. adults had received a felony conviction in their lifetime; in 1996 the number had grown by 285 percent, to 3.34 million, and in 2010 the number . . . had increased . . . to 5.85 million.”).

²⁵ GOTTSCHALK, *supra* note 22, at 1.

²⁶ *The Facts: Criminal Justice Facts*, *supra* note 24.

²⁷ *Id.* All fifty states had enacted mandatory minimums by the end of the 1980s. Alison Segler, *End Mandatory Minimums*, BRENNAN CTR. FOR JUST. (Oct. 18, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums> [<https://perma.cc/9AHE-5NFZ>].

have “nearly quintupled since 1984.”²⁸ The impact of punitive sentencing guidelines and penal codes has been disproportionately borne by Black and Latino men, who are, respectively, six and two-and-a-half times as likely as white men to be incarcerated.²⁹ Overall, “[o]ne in thirty-seven U.S. adults ha[s] spent time in state or federal prisons,”³⁰ and sixty percent of those currently in prison are people of color.³¹ At the household level, one in twenty-eight minor children — over 2.7 million — has a parent currently in jail or prison.³²

State correctional spending has likewise expanded dramatically.³³ Whereas total state spending thereon was \$6.7 billion 1985, it was \$56.6 billion in 2019 — a nearly tenfold increase in less than forty years.³⁴ Costs to run the criminal justice system have skyrocketed, and low-income individuals have borne much of the cost.³⁵ Legal aid budgets have declined, while the number of arrests and convictions has risen, leaving indigent defendants with a vanishingly meaningful right to counsel.³⁶

At the same time, fines and fees have risen, further exacerbating the criminalization of poverty.³⁷ Those convicted of felonies tend to have higher unemployment rates, lower levels of education, and lower incomes than do nondefendants; per one nationwide study, in the year prior to arrest “the earned annual income of two-thirds of jail inmates was under \$12,000.”³⁸ Indeed, criminologists have argued that one’s

²⁸ *The Facts: Criminal Justice Facts*, *supra* note 24.

²⁹ *Id.*

³⁰ HARRIS, *supra* note 22, at 5.

³¹ *Id.* at 6.

³² *Id.* at 8 (adding that “among children born in 1990, one out of every twenty-five white children and one out of every four black children had a parent imprisoned”).

³³ GOTTSCHALK, *supra* note 22, at 9 (noting that correctional systems have been “one of the fastest growing items in state budgets, second only to Medicaid” in recent years); *see also* HARRIS, *supra* note 22, at 9–10 (“Between 1986 and 2013, states increased spending on K–12 education by 69 percent, on higher education by less than 6 percent, and on corrections by 141 percent.”).

³⁴ *The Facts: Criminal Justice Facts*, *supra* note 24.

³⁵ SANETA DEVUONO-POWELL ET AL., ELLA BAKER CTR. FOR HUM. RTS., FORWARD TOGETHER & RSCH. ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 7–9 (2015).

³⁶ GOTTSCHALK, *supra* note 22, at 9–10; *see also* ANDREEA MATEI ET AL., URB. INST., ASSESSING A SOCIAL WORKER MODEL OF PUBLIC DEFENSE: FINDINGS AND LESSONS LEARNED FROM GENESEE COUNTY, MICHIGAN 4 (2021), https://www.urban.org/sites/default/files/publication/103811/assessing-a-social-work-model-of-public-defense_1.pdf [<https://perma.cc/RK4X-2CJF>] (“In Michigan, those who cannot afford counsel represent 60 to 90 percent of cases prosecuted in criminal courts across the state.”). Additionally, the availability and “quality of indigent defense ha[ve] a direct impact on racial disparities in the criminal justice system,” given that public defense clients are disproportionately Black. *Id.* at 6.

³⁷ *See generally* HARRIS, *supra* note 22; Beth A. Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY CRIM. JUST. L. & SOC’Y 22, 26–30 (2017) (arguing for the unconstitutionality of imposing excessive fines and fees).

³⁸ *See* HARRIS, *supra* note 22, at 7.

probability of being arrested is more greatly associated with characteristics of one's society (for example, whether one grew up in the War on Drugs era) than with individual-level traits.³⁹ And lower-income individuals are more likely to experience not only punishment, but also crime; the crime-poverty relationship is reciprocal.⁴⁰ Some scholars have argued that the decline of the welfare state and the expansion of the penal state occurred symbiotically: both were primarily "exclusionary policies" aimed at separating the "deserving poor" from the "undeserving poor," and the "law-abiding" from the "career criminal."⁴¹

Last, concurrent with the expansion of the criminal justice system was the decline in American jury trials — and with them, the rising power of the American prosecutor.⁴² Over ninety-five percent of all criminal cases in the United States today end in plea agreements.⁴³ This shift in the processing of criminal cases has dramatically expanded the power of the local prosecutor.⁴⁴

C. *The Rise of Progressive Prosecution*

This twin problem of a weakened welfare state coupled with an expanded penal state has provoked a number of responses. The U.S.

³⁹ See generally Robert J. Sampson & L. Ash Smith, *Rethinking Criminal Propensity and Character: Cohort Inequalities and the Power of Social Change*, 50 CRIME & JUST. 13 (2021) (demonstrating per the life-course model that probability of arrest varies by birth cohort — such that risk factors of one's *birth cohort*, or the society in which one grew up, matter more for predicting one's "criminal propensity" than do individual-level characteristics).

⁴⁰ Across the rural-urban continuum, for example, rates of violent victimization are highest among the lowest-income quartile. See, e.g., John M. Eason, L. Ash Smith, Jason Greenberg, Richard D. Abel & Corey Sparks, *Crime, Punishment, and Spatial Inequality, in RURAL POVERTY IN THE UNITED STATES* 349, 352–54 (Ann R. Tickamyer, Jennifer Sherman & Jennifer Warlick eds., 2017).

⁴¹ See generally Julilly Kohler-Hausmann, *Guns and Butter: The Welfare State, the Carceral State, and the Politics of Exclusion in the Postwar United States*, 102 J. AM. HIST. 87 (2015) (arguing that the twin developments, rather than merely concurrent, were mutually reinforcing).

⁴² Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged by Emily Bazelon*, 39 YALE L. & POL'Y REV. 218, 219 (2020) (book review); see also Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1070 (2016) ("One of the most significant consequences of sentencing guidelines and mandatory minimum sentences was the transfer of discretion and power from judges to prosecutors. . . . [As a result,] prosecutors ha[ve] become the most powerful officials in the criminal justice system.")

⁴³ *Vanishing Trials*, STRENGTHENING THE SIXTH, <https://www.strengthenthesixth.org/focus/Vanishing-Trials> [<https://perma.cc/2KL6-36FX>] (noting that ninety percent of criminal defendants in the federal system pleaded guilty in 2018); see also RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING 1 (2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf> [<https://perma.cc/8VUQ-85NS>] (stating that ninety-seven percent of criminal convictions in large urban state courts in 2009 were obtained via guilty pleas).

⁴⁴ See generally Bellin, *supra* note 42 (arguing for progressive prosecution as plea bargaining has skyrocketed, with the simultaneous erosion of checks and balances in the criminal justice system).

Department of Justice and the Council of State Governments, for example, began promoting service-providing reentry programs for formerly incarcerated individuals.⁴⁵ So have grassroots organizations, which attempt to fill the social services gap for the criminal justice-involved by furnishing access to employment and housing assistance.⁴⁶ Local policy-makers, too, have begun pushing for reforms — notably, at the prosecutor’s office.⁴⁷ A new social movement has taken hold over the last five years in American law enforcement — “progressive prosecution” — some of whose subscribers acknowledge the need for holistic reforms that pair the defendant with (generally) community-provided social services, in the midst of an era wherein *state-provided* services have become increasingly difficult for the criminal justice-involved to access.

“Progressive prosecution” refers to the wave of reform-minded prosecutors who have been elected in state and local chief prosecutor races nationwide over the past half decade, often on platforms of curtailing mass incarceration and its effects.⁴⁸ The movement began around 2016, with the elections of Kim Ogg (elected in November of 2016 as the District Attorney (DA) of Harris County (Houston)), Kim Foxx (November 2016, State’s Attorney (SA) for Cook County (Chicago)), and Larry Krasner (November 2017, DA of Philadelphia).⁴⁹ Progressive

⁴⁵ See GOTTSCHALK, *supra* note 22, at 3.

⁴⁶ See, e.g., Amy Barch, *A Better Way to Keep People from Going Back to Prison*, STAN. SOC. INNOVATION REV. (July 7, 2021), https://ssir.org/articles/entry/a_better_way_to_keep_people_from_going_back_to_prison [<https://perma.cc/P3B4-BT7L>] (describing “Turning Leaf, a prison reentry nonprofit,” which “focus[es] on helping men overcome external reentry challenges: securing identification, arranging transportation, finding a job, and setting up housing”); *Homeboy Industries*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, NAT’L GANG CTR. (Apr. 7, 2021), <https://nationalgangcenter.ojp.gov/spt/Programs/86> [<https://perma.cc/S47X-PPJS>] (describing the holistic approach taken by the nonprofit Homeboy Industries, which “provides job training positions and free social services for formerly gang involved and previously incarcerated” people, assigning them case managers to help ensure access to education and employment opportunities).

⁴⁷ See generally, e.g., David Garland, *The Road to Ending Mass Incarceration Goes Through the DA’s Office*, AM. PROSPECT (Apr. 8, 2019), <https://prospect.org/justice/road-ending-mass-incarceration-goes-da-s-office> [<https://perma.cc/6YZY-E9NX>].

⁴⁸ See Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 692 (2020); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019). See generally Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748 (2018).

⁴⁹ See Note, *supra* note 48, at 750; see also Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 739 (2020) (tracing the term to a 2015 interview). For more on the movement’s origins, see Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 707–08 (2020), which notes that some have attributed its rise to “(1) a growing recognition of the problem of mass incarceration, and (2) a gradual downward trend in crime”; and Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, THE GUARDIAN (July 23, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty> [<https://perma.cc/9FH6-ZRY9>], which calls the movement “a response to the will of voters who want to see [criminal justice] reform.”

prosecutors' political stances and approaches to the criminal justice system situate them in stark contrast to the traditional, tough-on-crime prosecutors that preceded them⁵⁰ — and position them well to pursue holistic reforms to counter the criminalization of poverty. They subscribe to a philosophy of holistic justice or, in then-DA Rachael Rollins's words, "represent[ing] not just the victim, but the *defendant* and the community," too.⁵¹ They are driven by a recognition that the law-and-order approach to crime and punishment is, at best, ineffective and, at worst, actively harmful.⁵² They acknowledge their unique power as prosecutors to redress mass incarceration and its accompanying social ills.⁵³

Progressive prosecutors espouse reform-minded policies that aim to, for example, reduce mass incarceration by declining to prosecute low-level offenses; mitigate racial and socioeconomic disparities by reforming or eliminating money bail; establish conviction integrity units; expand diversionary programming; decriminalize low-level drug offenses; promote police accountability; ensure greater public transparency; and the like.⁵⁴ Their holistic approach to crime and punishment

⁵⁰ See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 58–59 (1998); Del Quentin Wilber, *Once Tough-on-Crime Prosecutors Now Push Progressive Reforms*, *L.A. TIMES* (Aug. 5, 2019, 4:00 AM), <https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms> [<https://perma.cc/Z54D-5P67>] ("District attorneys used to brag about how many criminals they threw behind bars. Now an increasing number boast of how many they kept out of prison. . . . [P]rogressive prosecutors . . . [are] challenging long-held law-and-order conventions."); Green & Roiphe, *supra* note 49, at 720–21 (2020) (noting that progressive prosecutors "mark[] a significant break from the law-and-order approach to prosecution that dominated for decades," *id.* at 721).

⁵¹ Seamus Kirst, *These Progressive Prosecutors Want to Reshape Justice in Major American Cities*, *TEEN VOGUE* (July 29, 2019) (emphasis added), <https://www.teenvogue.com/story/meet-progressive-prosecutors-krasner-rollins-boudin-owens-caban> [<https://perma.cc/DK3F-WYR6>].

⁵² See sources cited *supra* notes 48–50; see also Flanders & Galoob, *supra* note 48, at 692 ("Nearly every progressive prosecutor [has] r[un] on ending mass incarceration."); cf. Ryan C. Meldrum et al., *Progressive and Traditional Orientations to Prosecution: An Empirical Assessment in Four Prosecutorial Offices*, 48 *CRIM. JUST. & BEHAV.* 354, 355–56, 366 (2021) ("[T]he traditional prosecutor focused on indictments, convictions, and lengthy sentences and the progressive prosecutor focused on reducing incarceration, increasing diversion, and addressing racial disparit[ies].") *Id.* at 366.; Flanders & Galoob, *supra* note 48, at 689 (describing "harsh justice," a traditional prosecutorial philosophy wherein "success was defined in terms of convictions and length of sentences").

⁵³ See Davis, *supra* note 50, at 67; see also, e.g., PAUL BUTLER, *LET'S GET FREE* 101–09 (2009) (describing the belief that prosecutors' offices should be the locus for criminal justice reform, given the great power they wield).

⁵⁴ See generally Note, *supra* note 48. See also Kirst, *supra* note 51; Green & Roiphe, *supra* note 49, at 741–42 (noting that progressive prosecutors' policies are often "meant to redress over-incarceration and racial bias," *id.* at 741, aiming to advance "fairness and reliability of . . . convictions" and transparency, *id.* at 741–42); Flanders & Galoob, *supra* note 48, at 690 ("[Progressive prosecutors] devote resources to resolving violent crimes rather than low-level drug, property, and 'quality of life' offenses."); Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System Is Fighting Back.*, *WASH. POST* (Nov. 9, 2019), <https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now->

takes the rights of the accused seriously, while simultaneously seeking justice for victims and fostering public safety — by recognizing that over-incarceration and overly penal policies may actually circumvent that goal. Progressive prosecutors thus aim “to transform the [criminal justice] system from the inside out,” and to do so with a holistic focus on the needs of communities, victims, and defendants alike.⁵⁵

Their reach is expansive: Emily Bazelon contends that “12 percent of the [U.S.] population[] live[s] in a city or county with a [DA] who . . . could be considered a reformer.”⁵⁶ Beyond Ogg, Foxx, and Krasner, about seventy other prosecutors subscribe to the “progressive prosecutor” label today.⁵⁷ They include Republicans and Democrats (though Democrats represent the lion’s share) in red and blue states, in the North and South, in big cities and in small municipalities.⁵⁸ While

the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html [https://perma.cc/ZB79-3WE4] (“[Their reforms] include[] abandoning cash bail [and] declining low-level charges . . . in efforts to reform a system that . . . over-incarcerates and disproportionately punishes poor people and racial minorities.”); Hao Quang Nguyen, *Progressive Prosecution: It’s Here, But Now What?*, 46 MITCHELL HAMLINE L. REV. 325, 340 (2020) (“Progressive [p]rosecutor[s] understand[] that bail should be set only when necessary in an [attainable] amount.”); Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989 (2019) (examining progressive prosecutors’ postconviction units); Davis, *supra* note 48, at 22 (“Progressive prosecutors are committed to reducing mass incarceration and racial disparities.”); Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1541 (2020) (“[Progressive prosecutors] have specifically championed or adopted prosecutorial practices that are intended to make the criminal justice system less punitive.”). Of course, not every progressive prosecutor shares an identical platform; these high-level prerogatives describe the archetypal “progressive prosecutor.”

⁵⁵ See Kirst, *supra* note 51. Under the progressive prosecution movement:

The defaults are no longer high bail requests, long sentences, and charging the most serious offenses with the hopes of getting a good plea deal. Perhaps not all defendants should go to prison . . . For those sentenced to incarceration, shorter sentences might improve overall welfare. The right kind of prosecution policies could lead to “less crime and less incarceration, to the benefit of victims and offenders alike.”

Flanders & Galoob, *supra* note 48, at 690–91 (quoting MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS 6 (2009)).

⁵⁶ EMILY BAZELON, CHARGED 290 (2019).

⁵⁷ See, e.g., Tony Saavedra, *LA County DA George Gascon Is Center Stage in National Revolution to Reform Justice System*, L.A. DAILY NEWS (May 2, 2021, 7:00 AM), <https://www.dailynews.com/2021/05/02/la-county-da-george-gascon-is-center-stage-in-national-revolution-to-reform-justice-system> [https://perma.cc/2JU8-2XR6]. To be sure, some dispute whether the label has independent salience. See, e.g., Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 790 n.120 (2020) and sources cited therein; Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 812–13 (calling the term “malleabl[e]” and alleging that it is used “opportunistic[ally],” *id.* at 813). Still others have questioned whether prosecutors can truly be “progressive” at all. See, e.g., Note, *supra* note 48; see also Romero, *supra*, at 817 (calling progressive prosecution “impossible”); Heather L. Pickerell, Note, *Critical Race Theory and Power: The Case for Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73, 79 (2020); Fryer, *supra*, at 778, 790–91.

⁵⁸ See, e.g., Emily Bazelon & Miriam Krinsky, Opinion, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/>

some hail from traditional paths (for example, former federal prosecutors), many are former public defenders, civil rights lawyers, or community activists,⁵⁹ who may be uniquely situated to understand the impact of prosecution on a criminal defendant's holistic welfare.

Importantly, progressive prosecutors arrive in an era of lessened — and increasingly eligibility-constrained — social safety net provisioning, permitting them to fill the gap. In this way, rather than purely bemoaning the expansion of the criminal justice system per se (although many certainly advocate against mass incarceration and the social ills that accompany it), progressive prosecutors have recognized that the greatness of their power can be used to pursue justice in the criminal justice system in atypical ways. For some, this includes reforms, policies, and programs enacted by prosecutors that more closely align with the objectives of antipoverty caseworkers and social service providers — a welcome surprise from what would generally be expected of criminal justice adversaries, and prosecutors no less.

II. INSTITUTIONALIZING WELFARIST PROSECUTION

This Part explores the ways in which some reformist prosecutors have embraced holistic visions and policy prerogatives that, deliberately or incidentally, help counteract the contraction of the American welfare state and the criminalization of poverty. This Note terms this new approach to prosecution — whereby prosecutors may see their role as aligned with that of caseworkers, mental health/substance abuse counselors, or social service providers, and treat their institutional work accordingly — “welfarist prosecution.” It refers to the way in which some prosecutors may be moving toward the “social work model” of criminal justice, similar to what we have seen in some public defenders’ offices.⁶⁰

To be sure, “progressive” prosecutors and “welfarist” prosecutors both share a commitment to holistic justice, but the terms are not co-extensive. Prosecutors may be self-proclaimed “progressives,” or aligned with the progressive prosecution movement, but not actionably welfarist

opinion/how-local-prosecutors-can-reform-their-justice-systems.html [https://perma.cc/GDB9-GKV8]; Meldrum et al., *supra* note 52, at 359–60 (describing a Republican progressive prosecutor); Savanna R. Leak, Comment, *Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution*, 111 J. CRIM. L. & CRIMINOLOGY 273, 307 (2021) (progressive prosecutors in more conservative districts); Green & Roiphe, *supra* note 49, at 738–39 (southern progressive prosecutors); Romero, *supra* note 57, at 804–06, 815–16 (progressive prosecutors in small, rural communities).

⁵⁹ See Kirst, *supra* note 51 (on DA Tiffany Cabán, a former public defender; then-DA Rollins, a former federal prosecutor; and DA Jody Owens, a former civil rights attorney); Elizabeth Weill-Greenberg, *Deadlocked San Francisco District Attorney Race Shows Strength of Progressive Prosecutor Movement*, THE APPEAL (Nov. 6, 2019), <https://theappeal.org/san-francisco-district-attorney-race-boudin-loftus> [https://perma.cc/M8FV-TYC3] (on DA Boudin, a former public defender); Medina, *supra* note 49 (on former community activist and protester Prosecuting Attorney (PA) Wesley Bell).

⁶⁰ See generally MATEI ET AL., *supra* note 36.

(for example, declining to prosecute low-level crimes, though not implementing welfarist programs). Likewise, prosecutors who disavow any association with the progressive prosecution movement could nonetheless promulgate concretely welfarist programs and policies. The welfarist phenomenon, however, has been primarily observed in progressive prosecutors' offices, which provide an apt trial ground for this higher-level redefining of the prosecutorial role. This Part thus surveys the efforts of progressive prosecutors who are pursuing welfarist goals and engaging welfarist work — institutionalizing “welfarist prosecution” as a new means of reforming the local prosecutor’s office.

A. *Welfarist Mission Statements and Goals*

Generally speaking, progressive prosecutors embrace a holistic vision of justice and aim to improve the system’s overall fairness to the criminal justice-involved, laying the groundwork for welfarist prosecution. Rather than “focusing on convictions or being ‘tough on crime,’”⁶¹ progressive prosecutors generally focus on “whether or not the prosecutor sought a just or equitable outcome for all parties affected by the prosecution process.”⁶² They have in effect “chang[ed] the tone” of prosecution by promoting “a more open, less punitive, more holistic approach to criminal justice,”⁶³ as is reflected not only in their policies but also in how they “project[] an image of care and concern not only for victims, but also for criminal defendants who themselves might in some sense be victims of social circumstances or systemic racial injustice.”⁶⁴

Some *welfarist* progressive prosecutors have taken this vision further — seeking not just criminal justice, but more just *social welfare outcomes* for the criminal justice-involved. As a poignant example, Boston’s former DA Rollins described her understanding of her role as a prosecutor as follows:

I was elected DA on the promise that I would use the power of this office to lift up communities. Prosecutors are not merely attorneys; we are ministers of justice. That role extends far beyond the courtroom. Racial justice. Economic justice. Educational equity. Equal access to medical and mental

⁶¹ Leak, *supra* note 58, at 305.

⁶² Nguyen, *supra* note 54, at 342.

⁶³ Flanders & Galoob, *supra* note 48, at 693 & n.41 (citing Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1709 (2018) (noting how some progressive prosecutors’ “policy shifts . . . embrace a more holistic, responsible conception of how law enforcement resources ought to be used, and . . . consider the detrimental impact of prosecution on traditionally disadvantaged groups”).

⁶⁴ *Id.* at 694; see also Bellin, *supra* note 49, at 707 (conceptualizing “the American prosecutor as a caretaker for the criminal justice system, who should default to lenience when that system becomes so congested and punitive that it cannot deliver on its constitutional ideals”); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1253 (2020) (arguing for “reorienting prosecutors as non-adversarial, servants of the law”).

health care. Commitment to our youths' success and improvement. These are all societal issues that impact public safety but that can't be handled exclusively through a law enforcement approach We can't arrest our way out of substance use disorders or prosecute away poverty and lack of opportunity.⁶⁵

Then-DA Rollins understood that as a “minister of justice,” she was obliged to “lift up communities” on issues of racial justice, economic justice, educational opportunity, and poverty — matters traditionally understood to be outside the purview of the American prosecutor and left to the welfare state. This expansive vision of a DA's role in the criminal justice system aligns with an expressly *welfarist* orientation committed to facilitating higher-order social welfare goals rather than prosecuting to convict: as then-DA Rollins noted, “I represent not just the victim, but the defendant and the community.”⁶⁶

Others have described their prosecutorial philosophies and missions similarly. Per SA Foxx: “Criminal justice, law, crime, and violence [are] complicated. These are not simple issues”; they require “a holistic approach” because “if people are healed, they don't hurt.”⁶⁷ DA George Gascón (Los Angeles) promised to “employ a holistic paradigm of public safety.”⁶⁸ As another example, Prosecuting Attorney (PA) Dan Satterberg (Seattle) promised to “meet[] people [with substance use disorder] where they are with care navigators, counselors and more rapid access to effective treatment medications” and to “build a judgment-free approach to holistic health needs for people struggling with substance

⁶⁵ Press Release, Suffolk Cnty. Dist. Att'y, DA Rollins Delivers \$200K in Grants to Community Organizations (June 23, 2021), <https://www.suffolkdistrictattorney.com/press-releases/items/community-reinvestment-grants> [<https://perma.cc/K9T2-Z59Z>].

⁶⁶ Andrea Estes & Shelley Murphy, *Stopping Injustice or Putting the Public at Risk? Suffolk DA Rachael Rollins's Tactics Spur Pushback*, BOS. GLOBE (July 6, 2019, 5:57 PM), <https://www.bostonglobe.com/metro/2019/07/06/stopping-injustice-putting-public-risk-suffolk-rachael-rollins-tactics-spur-pushback/IFC6Rp4tVHiVhOf2t97bFI/story.html> [<https://perma.cc/R8Y4-JWFR>] (adding that then-DA Rollins had focused “not only on what the victim wants, but on who the defendant is and whether he or she may need help more than prosecution”); *see also* Press Release, Suffolk Cnty. Dist. Att'y, Statement of District Attorney Rachael Rollins on Her Confirmation as US Attorney for the District of MA (Dec. 8, 2021), <https://www.suffolkdistrictattorney.com/press-releases/items/confirmation> [<https://perma.cc/YK5U-MZG4>] (“Upon taking office, [DA] Rollins [had] introduced a policy of presumptively diverting or declining to prosecute certain categories of non-violent, low-level misdemeanor offenses that are more indicative of mental illness, substance use disorder, food or housing insecurity, poverty or homelessness than of criminal intent.”).

⁶⁷ Danielle Sanders, *One on One with Cook County State's Attorney, Kim Foxx*, CHI. DEF. (June 29, 2021), <https://chicagodefender.com/one-on-one-with-cook-county-states-attorney-kim-foxx> [<https://perma.cc/GR4S-FP2K>].

⁶⁸ Press Release, L.A. Dist. Att'y, George Gascón's Plan to Expand Diversion, Reduce Incarceration, and Prevent Recidivism in Los Angeles County (Oct. 28, 2020), <https://www.georgegascon.org/campaign-news/george-gascons-plan-to-expand-diversion-reduce-incarceration-and-prevent-recidivism-in-los-angeles-county> [<https://perma.cc/5286-J6J7>].

use disorder.”⁶⁹ These prosecutors aren’t alone.⁷⁰ The prosecutors who espouse these expansively holistic visions and acknowledge the social service needs of criminal defendants evince a welfarist understanding of their role in the criminal justice system.

B. Welfarist Programs and Policies

Beyond endorsing holistic justice visions — which the archetypal progressive prosecutor does — some prosecutors *enact* those visions via tangible programs and policies in a distinctly welfarist fashion. In addition to their stated ideologies and express acknowledgments of the need to consider the social circumstances of the criminal justice-involved, these prosecutors’ offices have enacted policies and programs that serve to counter the criminalization of poverty and (deliberately or incidentally) bridge the gap left by lackluster social services. These include, for example, connecting defendants with job training programs; advocating against monetary sanctions and bail bonds; promoting diversion, mental health, and substance abuse programming; and promoting specialty court programs for marginalized populations. In some cases, welfarist prosecutors affirmatively link the criminal justice-involved to existing programs (either in the community or sponsored by the state); in others, prosecutors’ offices provide welfarist services themselves. While by no means a full replacement in scope or form, these direct and indirect programs and policies embody a welfarist orientation and fulfill, in practice, analogous social roles to those once served by a more robust welfare state.⁷¹

For example, welfarist prosecutors connect defendants with employment opportunities. Some do so through community partnerships, like St. Louis County PA Wesley Bell, who has pledged “to build partnerships in the community and bring in resources such as job training and placement, as well as drug addiction and mental health treatment.”⁷² Similarly facilitating connections to job training programs, PA Satterberg’s Law Enforcement Assisted Diversion program

⁶⁹ Dan Satterberg, *My Sister’s Drug Addiction — And What It Taught Me*, CROSSCUT (May 17, 2018), <https://crosscut.com/2018/05/my-sisters-drug-addiction-and-what-it-taught-me> [https://perma.cc/WD44-N2RY].

⁷⁰ See *supra* pp. 2158–61.

⁷¹ To be sure, the American welfare state has never been a panacea. See, e.g., COOPER, *supra* note 5, at 33–37. Nevertheless, its historic contraction opened the door for other arms of the state — and nonstate actors — to fill some of the gaps left behind.

⁷² *End Mass Incarceration and Restore Communities: Increase the Use of Mental Health Dockets*, VOTE WESLEY BELL, <https://www.votewesleybell.com/issues-1> [https://perma.cc/53Q4-9645]. This includes partnering with community organizations like the Urban League. Rachel Lippmann, *Bell Pushes for Significant Expansion of St. Louis County Treatment Courts*, ST. LOUIS PUB. RADIO (Jan. 8, 2019, 4:22 PM), <https://news.stlpublicradio.org/government-politics-issues/2019-01-08/bell-pushes-for-significant-expansion-of-st-louis-county-treatment-courts> [https://perma.cc/D42J-Z8Y9].

affirmatively “steers people arrested for drug offenses and prostitution away from prosecution and into services aimed at decreasing recidivism such as drug treatment and job training.”⁷³ In this way, PA Satterberg’s office directly aims to supplant a criminal justice approach with a welfarist response, and he is not alone in using job training programs as a means of diversion.⁷⁴ DA Ogg, similarly, has hosted public workshops with community partners to help provide attendees with job training, information about employment options, and educational opportunities.⁷⁵ This creative, direct promotion of employment opportunities would seem to have no place in the traditional approach to prosecution, which is concerned primarily with securing conviction rates. Still other welfarist progressive prosecutors have, less directly, advocated for enhanced funding for job training services,⁷⁶ again stepping out of their traditional law enforcement role and into more a welfarist orientation.

In addition, many welfarist prosecutors have called for an end to money bail and monetary sanctions, with clear social welfare implications.⁷⁷ DA Gascón, for example, directly eliminated cash bail on his first day in office.⁷⁸ DA Krasner announced that his office would no longer seek bail from individuals arrested for twenty-five low-level offenses, to avoid locking people up “simply because they were too poor to make bail.”⁷⁹ San Francisco’s DA Chesa Boudin, who likewise

⁷³ Robert J. Smith & Whitney Tymas, *Election Night Saw Victories in Local Criminal-Justice Reform — This Should Be the Beginning*, THE NATION (Nov. 12, 2016), <https://www.thenation.com/article/archive/election-night-saw-victories-in-local-criminal-justice-reform-this-should-be-the-beginning> [https://perma.cc/5XRY-UYM4].

⁷⁴ See, e.g., RACHAEL ROLLINS, THE RACHAEL ROLLINS POLICY MEMO, at D-1 (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [https://perma.cc/3EZS-F5T8] (noting then-DA Rollins’s policy to use diversion, like job training, rather than prosecution to respond to certain crimes); Casey O’Brien, *San Francisco’s New DA Is Trying to Stop Families from Being Separated by Incarceration*, PRISM (Apr. 20, 2020), <https://prismreports.org/2020/04/20/san-franciscos-new-da-is-trying-to-stop-families-from-being-separated-by-incarceration> [https://perma.cc/0JCZ-8NV9] (describing DA Boudin’s similar efforts).

⁷⁵ Alvaro “Al” Ortiz, *DA’s Office Will Offer Free Removal of Outstanding Warrants During Weekend Event*, HOUS. PUB. MEDIA (July 13, 2018, 10:55 AM), <https://www.houstonpublicmedia.org/articles/news/2018/07/13/295629/das-office-will-offer-free-removal-of-outstanding-warrants-during-weekend-event> [https://perma.cc/N8E6-VMH9].

⁷⁶ DA Krasner is one example, see Nyle Fort, *Meet Larry Krasner, Philly’s New Progressive DA Who Has Sued the City’s Police Dept. 75 Times*, IN THESE TIMES (Nov. 8, 2017), <https://inthesetimes.com/article/in-person-larry-krasner-police-philadelphia-pennsylvania-democratic-jail> [https://perma.cc/B677-ZC6W], and DA Boudin is another, see Heather Knight, *SF DA Candidate Knows Pain of Prison: His Radical Dad Is Locked Up*, S.F. CHRON. (Sept. 17, 2019, 9:35 AM), <https://www.sfchronicle.com/bayarea/heatherknight/article/SF-D-A-candidate-knows-pain-of-prison-His-14444513.php> [https://perma.cc/6VP8-KBZ9].

⁷⁷ See, e.g., Medina, *supra* note 49 (describing PA Bell’s and DA Krasner’s bail policies).

⁷⁸ David Alan Sklansky, *Foreword: The Future of the Progressive Prosecutor Movement*, 16 STAN. J. C.R. & C.L. i, iii (2021).

⁷⁹ Pat Loeb, *Philly DA Says Bail Reform Is Working, Offers Data to Back Up Claim*, KWY NEWSRADIO (Feb. 19, 2019, 6:14 PM), <https://www.audacy.com/kywnewsradio/articles/news/philadelphia-da-says-bail-reform-working-offers-data-back-claim> [https://perma.cc/4GPZ-8GPM].

stopped the practice of asking for cash bail upon assuming office, describes money bail as “a system that privileges the wealthy and the powerful over the poor and the innocent.”⁸⁰ Moreover, others have pledged to end fines and fees, with the express recognition that in so doing, prosecutors’ offices can move closer toward “a truly fair and consistent system of justice in which low-income defendants do not face additional punishment by way of unaffordable fines and fees that drive them deeper into debt and poverty,” in DA Krasner’s words.⁸¹ This recognition is uniquely welfarist and expressly acknowledges the class biases built into the money bail system; elimination of this system actively confronts the criminalization of poverty.

On mental health, welfarist prosecutors tend to understand the need for addressing issues of mental illness and addiction as not only a crime-reduction tactic, but also a welfare-enhancing measure.⁸² After all, “[i]n a mental health crisis, people are more likely to encounter police than get medical help,” resulting in “2 million people with mental illness [being] booked into jails each year.”⁸³ The link is well established between the historic deinstitutionalization of state-run mental healthcare facilities and the rise in individuals with mental illness finding themselves enmeshed in the criminal justice system.⁸⁴ Some prosecutors have, in part, responded to the decline in state-provided welfare services by recognizing this connection in their prosecutorial work⁸⁵ and by framing mental health–related criminal activity as a public health problem, not

⁸⁰ *Policy: No Cash Bail*, S.F. DIST. ATT’Y, <https://www.sfdistrictattorney.org/policy/no-cash-bail> [<https://perma.cc/2BR6-LEUX>] (adding that “[t]his system means that people with money can ‘buy’ their way out of jail, . . . while [others who cannot do so] are stuck in jail”).

⁸¹ Michael Tanenbaum, *Philly D.A. Wipes Out Fines and Fees for Impoverished Defendants*, PHILLYVOICE (July 3, 2019), <https://www.phillyvoice.com/larry-krasner-philadelphia-no-fines-fees-indigent-defendants-poverty-courts> [<https://perma.cc/A6HC-QTVX>]; see also Thomasi McDonald, *Six Months In, Satana Deberry Talks About How She’s Changing Durham’s Criminal Justice System*, INDY WEEK (July 26, 2019, 4:23 PM), <https://indyweek.com/news/durham/satana-deberry-six-month-report> [<https://perma.cc/H49A-VU8Z>] (describing Durham County DA Satana Deberry’s decision to waive unpaid traffic fines and fees upon assuming office).

⁸² See, e.g., Press Release, *supra* note 65 (noting that then-DA Rollins had declined to prosecute certain crimes more likely to be associated with, inter alia, mental illness or substance use disorder than with supposed criminal propensity).

⁸³ *Jailing People with Mental Illness*, NAMI BUCKS CNTY. PA, <https://namibuckspa.org/about-nami-bucks-county/public-policy/jailing-people-with-mental-illness> [<https://perma.cc/82TN-XTYG>].

⁸⁴ See, e.g., Nguyen, *supra* note 54, at 335 (“[I]ssues with mental illness and addiction became prominent in the early 1950s when the deinstitutionalization of state mental health care facilities forced those living with mental illness to become homeless and left them untreated. [Once out of facilities,] those living with mental illness . . . reappeared before law enforcement, then in jails, and ultimately courtrooms.”); Steven Raphael & Michael A. Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rates*, 42 J. LEGAL STUD. 187, 189–90 (2013) (demonstrating that “4–7 percent of incarceration growth between 1980 and 2000 is attributable to deinstitutionalization”).

⁸⁵ See Nguyen, *supra* note 54, at 335.

a crime problem.⁸⁶ In practice, this has entailed welfarist prosecutors directly promoting drug treatment and diversion over criminal charges for drug-involved crimes,⁸⁷ delivering direct grant aid to mental health–related community organizations⁸⁸ and (less directly) lobbying for legislation that would bolster drug treatment centers so as to better support the overall wellbeing of the criminal justice–involved.⁸⁹

Last, some prosecutors have engaged a welfarist model in their liberal use of diversion through specialty courts, including drug courts and treatment courts, as well as mental health courts, homeless courts, and veterans’ courts.⁹⁰ This typically entails diversionary referrals thereto.⁹¹ Specialty courts, in turn, may directly provide individuals with a variety of social services, including job skills trainings, educational scholarships, employment assistance, and transitional housing.⁹² Some prosecutor office–sponsored diversion programs have themselves hired social work professionals to assist defendants with securing employment, GEDs, vocational training, and substance use disorder rehabilitation services;

⁸⁶ See, e.g., Press Release, Phila. Dist. Att’y’s Off., District Attorney Krasner Calls for Greater Urgency & Action on Overdose Prevention (Mar. 18, 2021), <https://medium.com/philadelphia-justice/district-attorney-krasner-calls-for-greater-urgency-action-on-overdose-prevention-da653f298c9e> [<https://perma.cc/K69T-FHNH>] (“It is [DA Krasner’s] goal to promote a public health approach to overdose prevention with regard to substance use and substance use disorder.”); Press Release, Suffolk Cnty. Dist. Att’y, DA Rollins Announces Funding for Community-Based Drug Diversion Partnership (May 13, 2020), <https://www.suffolkdistrictattorney.com/press-releases/items/2020/5/13/da-rollins-announces-funding-for-community-based-drug-diversion-partnership> [<https://perma.cc/8ANB-8VD5>] (“We cannot prosecute our way out of the opioid epidemic [in] our communities. This is a public health problem, [necessitating] a public health approach . . .”).

⁸⁷ Joel Currier, *New St. Louis County Prosecutor Wants to Fight Crime by Addressing Addiction and Mental Health*, ST. LOUIS TODAY (Jan. 9, 2019), https://www.stltoday.com/news/local/crime-and-courts/new-st-louis-county-prosecutor-wants-to-fight-crime-by-addressing-addiction-and-mental-health/article_f4232dfe-of21-57b8-a2a3-4851ad0e5015.html [<https://perma.cc/FK7E-QDJM>].

⁸⁸ See, e.g., Press Release, *supra* note 65.

⁸⁹ Steve Hunter, *King County Prosecutor Satterberg Seeks More Help for Drug Addicts*, KENT REP. (Feb. 10, 2020, 12:51 PM), <https://www.kentreporter.com/news/king-county-prosecutor-satterberg-seeks-more-help-for-drug-addicts> [<https://perma.cc/2P79-2T5T>].

⁹⁰ See, e.g., *Bureaus of the Suffolk DA’s Office*, SUFFOLK CNTY. DIST. ATT’Y’S OFF., <https://www.suffolkdistrictattorney.com/about-the-office/bureaus-of-the-suffolk-das-office> [<https://perma.cc/B5JK-3WDF>] (describing partnerships of then-DA Rollins’s office with specialty courts, with the welfarist goal of “help[ing] vulnerable populations comply with treatment plans, maintain sobriety, and resolve their low-level cases with intervention rather than incarceration”); *Cook County State’s Attorney Candidate Questionnaire: Kim Foxx*, ACLU ILL., <https://www.aclu-il.org/en/cook-county-states-attorney-candidate-questionnaire-kim-foxx> [<https://perma.cc/L35P-9E9V>] (describing SA Foxx’s diversionary treatment programs for mental health and substance use disorders and quoting SA Foxx as saying “[a]s with all cases[,] we seek the most effective method of justice[,] versus simply pursuing a conviction”).

⁹¹ See, e.g., Lippmann, *supra* note 72 (on PA Bell’s practice); Smith & Tymas, *supra* note 73 (on PA Satterberg’s practice).

⁹² See, e.g., Michael Hagerty, *How Harris County’s Drug Court Program Turned One Addict’s Life Around*, HOUS. PUB. MEDIA (Sept. 10, 2019, 2:58 PM), <https://www.houstonpublicmedia.org/articles/shows/houston-matters/2019/09/10/345548/how-harris-countys-drug-court-program-turned-one-addicts-life-around> [<https://perma.cc/8RAR-F3PU>] (describing DA Ogg’s STAR Drug Court).

some even provide transportation to/from services.⁹³ This is an impressively direct intervention of a prosecutor into the role of a social service provider. In addition to the social welfare-enhancing effects of attending treatment court generally (at least in comparison to traditional courts), drug courts regularly require defendants to have or procure stable employment.⁹⁴ While this requirement may lead to similar exclusionary effects as do the employment eligibility requirements of welfare-to-work programs,⁹⁵ it nonetheless represents a dual (if imperfect) attempt (a) to provide social services through addressing addiction and mental healthcare needs and (b) to assist the criminal justice-involved in accessing needed financial resources, along with other social services.⁹⁶ In these ways, some progressive prosecutors have attempted to live up to their promise to pursue holistic justice through distinctly welfarist programs and policies that have, intentionally or incidentally, begun to fill some of the gaps in the United States's weakened welfare system — particularly as applied to the criminal justice-involved.

III. CONSEQUENCES OF THE WELFARIST SHIFT

This Part explores the normative and theoretical consequences of the shift in prosecutorial orientation away from a traditional, adversarial model of law and order and toward a holistic, demonstrably welfarist approach. One interpretation of the shift is that it represents a continuation of the public defense social work model, applied now to prosecutors' offices. Even so, though, is the shift defensible in light of the adversarial model through which the criminal justice system is set up? This Part surveys the tensions and argues, first, that prosecutors need

⁹³ See Nick Tabor, *What if Prosecutors Wanted to Keep People Out of Prison?*, N.Y. MAG. (Mar. 27, 2018), <https://nymag.com/intelligencer/2018/03/what-if-prosecutors-wanted-to-keep-people-out-of-prison.html> [<https://perma.cc/KFL8-REYA>] (describing alternative sentencing program of progressive prosecutor Scott Colom, the DA of Mississippi's Sixteenth Circuit Court).

⁹⁴ See, e.g., *Benefits of Drug Court*, SUP. CT. OF CAL. CNTY. OF SAN MATEO, https://www.sanmateocourt.org/court_divisions/criminal/drug_court/benefits.php [<https://perma.cc/23FR-U3VE>] (“[D]rug court programs [often require]: obtaining a high school or GED certificate; obtaining and/or maintaining employment; and developing mentor relationships within the community to sustain [participants] after they leave the drug court program.”).

⁹⁵ See *supra* section I.A, pp. 2152–55.

⁹⁶ Assessing the merits of drug court and its overall ability to assist individuals in securing employment is beyond the scope of this Note. But drug court participation is associated with improved employment outcomes, see, e.g., *Benefits of Drug Court*, *supra* note 94, and some drug courts provide services that include “mental health, health and dental services, housing assistance, self-help groups, workforce development, education, job readiness and training programs, employment search, family therapy, parenting education, therapy for children, phone counseling, recovery support network[s], community groups, and recovery coaches,” EXEC. OFF. OF THE TRIAL CT., ADULT DRUG COURT MANUAL: A GUIDE TO STARTING AND OPERATING ADULT DRUG COURTS IN MASSACHUSETTS 29–30 (2015), <https://www.mass.gov/doc/adult-drug-court-manual/download> [<https://perma.cc/S6QS-KJTB>]. Referrals to drug courts can thus be welfare enhancing through their direct connection to employment assistance and other social services.

not be conceived as strictly adversarial. Second, even if this development is inherently conflicted, welfarist prosecution is still better than the alternative — a system in which a weak social safety net’s effects are compounded by an expansive penal state.

A. *The Social Work Model and the Ministerial Prosecutor*

Social workers have long interacted with the criminal legal bar, albeit on the defense side.⁹⁷ They began working in public defense offices fifty years ago, where they “have played a critical role in ensuring that public defense clients receive needed services *outside* of the criminal justice system.”⁹⁸ At its core, the defense-side social work model attests to the holistic needs of the criminal justice-involved. In collaboration with attorneys, these social workers evaluate clients’ needs, prepare reports, appear in court on clients’ behalf, and refer clients to services in the social safety net.⁹⁹ They act as an essential “part of the defense team,” and the most robust practices “consider broader issues affecting the client (for example, substance use, mental health, poverty, and family and social support), potential responses or resolutions to these issues, and reentry and the collateral consequences of involvement in the criminal justice system.”¹⁰⁰ Welfarist prosecution extends the social work model into the prosecutor’s office. Defense-side social workers, like welfarist prosecutors, view their mission holistically.¹⁰¹ They both help protect against collateral consequences by ensuring defendants have access to a social safety net postdisposition.

This ostensibly conflicts with the prosecutor’s adversarial role. A prosecutor’s formal job, in the adversarial system, arguably is to litigate *against* those they prosecute, not serve as their caseworker. Prosecutors

⁹⁷ See generally MATEI ET AL., *supra* note 36.

⁹⁸ *Id.* at 2 (emphasis added).

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625 (2006); Robin Steinberg, *Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013)). Indeed, defense teams’ social workers help fulfill the spirit of the defense bar’s constitutional mandate from *Padilla v. Kentucky*, 559 U.S. 356 (2010), on the *Strickland* requirement to advise clients of at least one consequence of plea agreements — deportation. See 559 U.S. at 373–74; *Strickland v. Washington*, 466 U.S. 668 (1984). Some progressive prosecutors have also taken up this mantle. See, e.g., Christina Carrega, *Brooklyn DA Eric Gonzalez Hires Staff to Protect Immigrants from Deportation*, N.Y. DAILY NEWS (Apr. 24, 2017, 11:57 AM), <https://www.nydailynews.com/new-york/brooklyn/eric-gonzalez-hires-staff-protect-immigrants-deportation-article-1.3094689> [<https://perma.cc/XXQ8-NSSA>] (“Acting DA Eric Gonzalez has hired two immigration attorneys to train all staff on immigrant issues and to advise on plea bargains . . . and sentencing recommendations to avoid deportation and other consequences.”).

¹⁰¹ See MATEI ET AL., *supra* note 36, at 2 (noting that defense-side social workers “consider the client as a whole person and provide the court with insights on the extenuating circumstances behind the client’s actions as well as resources to support their success in the community”).

are ill positioned for social services provision if they are conceived as a fundamentally coercive arm of the state. Indeed, some progressive prosecutors have been criticized for misunderstanding structural inequalities in social circumstances.¹⁰²

But prosecutors have another institutional role — to be “ministers of justice.”¹⁰³ This ministerial conception is arguably a better way to understand the modern U.S. prosecutor, as it recognizes that it’s in the interest of their client (the state) to “seek justice” and that prosecutors’ work involves exercising moral (as opposed to amoral) discretion.¹⁰⁴ In this view, the prosecutor seeks justice of a higher order, rather than merely securing conviction rates. Though a departure from the strictly adversarial approach, welfarist prosecution sits comfortably within this ministerial conception of the prosecutor’s role in the criminal justice system.

Additionally, strains on public defense resources might necessitate welfarist prosecution. Public defenders’ caseloads continue to grow, and without defense spending keeping pace, many criminal justice-involved individuals go without attorney-facilitated social services altogether.¹⁰⁵ The consequence is an increasingly one-sided criminal legal system, characterized by “the disappearing adversary.”¹⁰⁶ This heightens the need for reformist prosecutors to pursue ministerial, welfarist justice. To do so, the social work model (welfarist *defense*), aligned with the ministerial view of the role of the prosecutor, is a helpful guide.¹⁰⁷

¹⁰² See, e.g., Jessica Pishko, *What Kim Ogg Gets Wrong About Work, Poverty, and Crime*, THE APPEAL (Feb. 19, 2020), <https://theappeal.org/kim-ogg-put-down-gun-pick-up-employment-application> [<https://perma.cc/624X-2558>].

¹⁰³ See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2020) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); see also Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1426–29 (2018) (exploring these dual roles and the tensions between them).

¹⁰⁴ Fish, *supra* note 103, at 1443–51 (arguing against prosecutorial adversarialism); see also *id.* at 1463–68 (expounding the “minister of justice” view).

¹⁰⁵ See GOTTSCHALK, *supra* note 22, at 9–10; see also Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/PC9A-LBCT>] (chronicling the story of one public defender with nearly 200 felony cases at a time); *id.* (noting that public defenders spend an average of two hours investigating felony cases).

¹⁰⁶ See Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1223 (2020). See generally *id.* (arguing for countering mass incarceration through regulating “mass prosecution,” given the high amount of prosecutorial discretion and power in controlling criminal justice outcomes and “the disappearing adversary” on the other side).

¹⁰⁷ Indeed, some prosecutors’ offices already employ social workers — though more commonly to assist in victim services programs and not for the prosecuted. See, e.g., *Programs & Diversion*, OFF. OF DIST. ATT’Y KIM OGG, <https://app.dao.hctx.net/about-hcdao/programs-diversion> [<https://perma.cc/8BJG-XNDZ>] (noting that approximately one-third of DA Ogg’s office’s Victim Services staff are social workers).

B. A Mitigatory Step in the Right Direction

Notwithstanding welfarist prosecution's limitations, it is a welcome development given the otherwise weak social safety net for the criminal justice-involved. In Bazelon's words, "[w]hile it would be nice if law-makers and the courts threw themselves into fixing the criminal justice system" — and if policymakers reinforced the social safety net — "in the meantime, elections for prosecutors represent a shortcut to addressing a lot of dysfunction."¹⁰⁸ And especially so for the criminal justice-involved, who have been uniquely disadvantaged by the weakened welfare state and its eligibility and welfare-to-work requirements; they are in a unique position to be assisted by welfarist prosecutors.

Welfarist prosecutors — like many prosecutors described in this Note — understand the challenges of poverty, homelessness, lack of adequate mental health care, and addiction that some of the accused face. They have the power and, arguably, ministerial responsibility to administer their prosecutorial discretion toward welfarist ends. The progressive prosecution movement responds to calls to reimagine the prosecutorial role as one of a caretaker,¹⁰⁹ a servant of the law,¹¹⁰ or a "color-conscious" professional attuned to the racial and socioeconomic realities of the criminal justice system.¹¹¹ The movement embraces a truly rehabilitative model of criminal justice that contends with inequitable social starting points. But it can go further by *also* responding to the criminalization of poverty and, as we have seen from at least some progressive prosecutors so far, promoting an expansive welfarist agenda that takes into account the holistic needs of the criminal justice-involved.

Of course, welfarist prosecution is not a silver bullet. Practically speaking, prosecutors' abilities to provide welfare-enhancing services are contingent on their own budgets, which vary by locality.¹¹² And meaningfully sweeping reductions in the criminalization of poverty will materialize only when society "reform[s] the system as a whole."¹¹³ Relatedly, prosecutors doing this work must take care to protect against reproducing the inequalities and coercive, paternalistic dynamics that undergird the U.S. criminal justice system; for example, reformist

¹⁰⁸ BAZELON, *supra* note 56, at xxxi.

¹⁰⁹ See Bellin, *supra* note 49, at 711–17.

¹¹⁰ See Bellin, *supra* note 64, at 1253.

¹¹¹ See generally Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1541 (2012) (arguing for "a color-conscious vision of [prosecutors'] professional duties"). See also *id.* at 1546 ("Color-conscious prosecutors must make a special effort to assess the justice needs of the entire community they serve, particularly those whose voices are not adequately reflected in . . . majoritarian politics.").

¹¹² See generally Romero, *supra* note 57 (arguing that progressive prosecutors may be less effective in underresourced, smaller, rural communities).

¹¹³ See Nguyen, *supra* note 54, at 343.

prosecutors must proactively guard against punitive sanctions for non-compliance with welfarist programs.¹¹⁴ So while some progressive prosecutors' offices indeed offer hope into the welfarist prosecutorial model, the success of this shift remains to be seen.

Still, welfarist prosecutors have redefined and expanded the role of the prosecutor — counteracting the rise in excessive policing *and* the United States's weak and punitive social safety net through their holistic orientations, programs, and policies. Indeed, “it takes a village” to incarcerate an individual.¹¹⁵ Why not include prosecutors in the village that has ad hoc arisen to bolster the weakened welfare state, especially for the criminal justice-involved, who may suffer its effects the most severely?

CONCLUSION

The progressive prosecution movement arose at a unique time in America's history. The criminal justice system has become overburdened, overly punitive, and insufficiently adaptive to the holistic needs of those whose lives it touches. At the same time, the United States has witnessed a marked decline in the accessibility and availability of social services provisioned through the welfare state, noticeably in the transition from AFDC to the more restrictive TANF. And the “mark of a criminal record” that Professor Devah Pager found nearly two decades ago manifestly abounds,¹¹⁶ severely curtailing the access that criminal justice-involved individuals have to social services. Welfarist prosecutors offer a glimmer of hope in this society, albeit providing an imperfect solution given the tensions in asking a penal arm of the state to do the welfare state's work. Unless the United States sees a substantial widening of the social safety net to bring it up to par with its peer nations,¹¹⁷ and until the United States likewise meaningfully confronts its related mass incarceration problem, welfarist prosecution represents a valuable interim step forward in mitigating the criminalization of poverty.

¹¹⁴ See *supra* pp. 2153–55 (on the criminalization of welfare).

¹¹⁵ See Pickerell, *supra* note 57, at 81 (citing Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 181 (2019)).

¹¹⁶ See generally Pager, *supra* note 23.

¹¹⁷ See, e.g., Elise Gould & Hilary Wething, *U.S. Poverty Rates Higher, Safety Net Weaker than in Peer Countries*, ECON. POL'Y INST. (July 24, 2012), <https://www.epi.org/publication/ib339-us-poverty-higher-safety-net-weaker> [<https://perma.cc/8RR4-8CVF>] (“[The U.S. has, among its peers,] the highest poverty rate and one of the lowest levels of social expenditure — 16.2 percent of GDP, well below the vast majority of peer countries, which average 21.3 percent . . .”).