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Gideon's Servants and the Criminalization of Poverty

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I. INTRODUCTION

Every day, in public defender offices around the country, thousands of criminal lawyers step outside of their constitutional mandate. They find drug treatment programs and jobs for their clients. They intervene with landlords and child welfare services. They worry about whether their clients have transportation, or appropriate clothing for an interview. In sum, they provide a wide array of social services and legal aid that make them look less like the traditional defense attorneys contemplated by *Gideon v. Wainwright* and more like social workers.¹

At the same time, in schools, welfare offices, and public hospitals, civil servants are also operating outside their traditional job descriptions. Teachers are calling the police and sending students to probation offices. Welfare case managers monitor their clients for fraud and refer them to prosecutors. Emergency rooms are providing opportunities to catch and arrest people with open warrants. In other words, these institutions of the welfare state are engaged in a wide array of

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¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

criminal functions that make them look less like service providers and more like law enforcement officers.

These two phenomena are the flip sides of the same coin. Public defenders and other criminal justice actors are morphing into service providers in response to the tight connection between criminalization and their clients' poverty, the same connection that drives teachers and welfare caseworkers to treat their poor clients as presumptive criminals.² This phenomenon is sometimes referred to as the "criminalization of poverty:" namely, that many aspects of being poor have been rendered criminal.³ The homeless are punished for sleeping on the street.⁴ Working women are punished for their lack of access to childcare.⁵ The poor are punished for their dependence on government benefits or informal sources of income.⁶

But the phenomenon also includes the converse: brushes with the criminal system tend to make people poor. They do so directly by imposing fines and fees, and indirectly by making it harder to get jobs, credit, and other resources.⁷ Moreover, because the social safety net itself is retracting, the criminal justice system has become a "peculiar social service" for the incarcerated and their families.⁸ In all these ways, the criminal system and the welfare state knit poverty and criminality together, functionally as well as ideologically, norm by norm, and encounter by encounter. Public defenders are responding to this tight nexus by providing poverty-sensitive legal representation, even as welfare workers are reacting to it by treating the poor as "latent criminals."⁹

² See *infra* Part II.

³ See generally LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (Duke Univ. Press 2009).

⁴ NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, *NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES*, 7 (2014), *available at* http://www.nlchp.org/documents/No_Safe_Place (documenting the numerous laws that criminalize homeless activities).

⁵ KAARYN GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 91 (2012) (describing mothers who lost welfare benefits because they could not find childcare for their children and therefore could not work); see also SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* 26–29 (2009) (describing network of illegal childcare operations in low-income neighborhoods).

⁶ See generally GUSTAFSON, *supra* note 5; VENKATESH, *supra* note 5.

⁷ See generally Alexis Harris, Heather Evans, & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIOL. 1753 (2010); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007).

⁸ MEGAN COMFORT, *DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF PRISON* 18, 182 (2008) ("[T]he oddly beneficial functions of the penitentiary arise predominantly in the absence of social-welfare institutions traditionally charged with such roles: job-placement and drug-treatment programs, mental health services, domestic violence shelters, and individual and family counseling.").

⁹ GUSTAFSON, *supra* note 5, at 1.

This criminal-civil convergence is peculiar to what I call the bottom of the “penal pyramid,”¹⁰ the world of minor offenses and urban poverty in which crime, unemployment, racial segregation, and lack of social services swirl around in one large, nearly inextricable mass. The legal threat of a minor criminal conviction, fine, and/or brief stint in jail typically arises alongside an array of other common threats to a defendant’s wellbeing such as eviction, unemployment, addiction, and other health problems. It means that public defenders must contend with their clients’ poverty as both cause and effect of their involvement with the criminal system.

At the same time, lawyers who work at the bottom must also grapple with the distinct legal culture of minor case processing which is infamous for its quick-and-dirty “assembly line” quality. Hundreds of cases are pled out in standard fashion, and courts are typically uninterested in hearing about individual cases, the evidence, or the possibility of litigation.¹¹ For many defenders, the institutional demands of docket clearing and the pressure to enter standardized pleas strip them of the ability to act as traditional legal advocates in the *Gideon* sense.¹² In this way, the legal process ironically discourages attention to legal outcomes, especially in the face of clients’ other pressing needs.¹³

By contrast, the legal culture—and thus the role of counsel—looks very different at the top of the penal pyramid where offenses are more serious or where defendants and counsel have better resources.¹⁴ Federal and other serious offenses tend to eclipse the daily burdens of a defendant’s poverty and bring stark clarity to the roles of the legal actors involved. Thirty-year drug sentences, like securities fraud and other well-litigated cases, demand sustained attention not only from the lawyers, but from trial and appellate courts and even the public, creating an environment in which lawyers can authentically assume the traditional legal adversarial role contemplated by *Gideon*. While defendants at the top are still overwhelmingly indigent,¹⁵ their poverty is overshadowed by the magnitude of their cases. The demands of the serious criminal case and the meaningful

¹⁰ Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 1313, 1317 (2012) [hereinafter *Misdemeanors*]; see also Alexandra Natapoff, *The Penal Pyramid*, in A THEORY OF AMERICAN CRIMINAL JUSTICE: LAW AND SOCIOLOGY IN CONVERSATION (Sharon Dolovich & Alexandra Natapoff eds., forthcoming 2015).

¹¹ *Misdemeanors*, *supra* note 10.

¹² See generally Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) (exploring this phenomenon in detail).

¹³ See, e.g., Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008) (arguing that it is often more efficient for innocent misdemeanor defendants to plead guilty).

¹⁴ Natapoff, *Misdemeanors*, *supra* note 10, at 1317 (describing the careful legal culture at the top of the pyramid).

¹⁵ MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2009 8 (2011), available at <http://www.bjs.gov/content/pub/pdf/fjs09.pdf> (seventy-six percent of federal defendants qualify for appointed counsel.).

opportunity to litigate thus define the lawyer's role in ways that minor cases often do not.

This Essay contemplates the phenomenon of civil-criminal role-blending at the bottom of the penal pyramid where offenses are pettiest and defendants are poorest. In this realm, public defenders are not the only ones redefining their jobs outside the classic adversarial process. Specialty courts (such as drug, mental health, and veterans' courts) provide treatment, counseling, and moral support to defendants in lieu of traditional punishments.¹⁶ Police in some cities are engaging in street-level diversion, channeling addicts into treatment and the homeless into shelters instead of jails.¹⁷ Prosecutors have started "community prosecution" programs aimed at preventing crime and engaging neighborhood issues.¹⁸ In all these ways, the criminalization of poverty imposes welfarist responsibilities on criminal justice actors, even as it pushes civil workers into more punitive law enforcement roles. The results can be ideologically confusing.¹⁹ In the land of misdemeanors, order maintenance policing, drug courts, public schools and public housing, it is ironically common for lawyers and law enforcement to use punishment to get poor people welfare benefits, and for welfare providers to leverage benefits to get poor people punished.

Public defenders sit squarely on top of this institutional and ideological fault line. Not only do they have a unique constitutional mandate as legal advocates for poor criminals, they have also long accepted a broader service role than that contemplated by *Gideon*.²⁰ Nevertheless, their role-shifting should be understood as part of a larger cross-institutional phenomenon. In essence, we cannot understand what public defenders do without understanding what the criminal system looks like, and we cannot understand what the criminal system looks like without surveying all the players and institutions—civil as well as criminal—who makes up its daily operations and normative commitments.²¹ When we do, we see that the criminalization of poverty has created a world of low-level criminal justice in which the various institutions that manage poverty—from public defender offices to emergency rooms—are struggling to define their obligations in ways that often cause them to converge as well as clash.

This symposium is entitled "The Failures of *Gideon* and New Paths Forward." A central part of the *Gideon* crisis is the failure to recognize that we have

¹⁶ See *infra* Part III.A.

¹⁷ See *infra* Part III.C.

¹⁸ See *infra* Part III.B.

¹⁹ See David Thacher, *Conflicting Values in Community Policing*, 35 LAW & SOC'Y REV. 765, 767–68 (2001) (describing the importance of "institutional segregation" in which different institutions are entrusted with protecting different values).

²⁰ See *infra* Part IV.

²¹ See generally Mona Lynch, *The Situated Actor and the Production of Punishment: Towards an Empirical Social Psychology of Criminal Procedure*, in A THEORY OF AMERICAN CRIMINAL JUSTICE: LAW AND SOCIOLOGY IN CONVERSATION, *supra* note 10.

conscripted public defenders to do far more than represent individual clients in legal cases. We have made them advocates for the socially dispossessed at the bottom of the criminal justice pyramid where a client's problems can range from personal poverty and drug addiction to structural exclusion from housing and labor markets. We've put similar pressure on police, emergency room health workers, and welfare case managers, all of whom must contend with the inextricably tight relationships between poverty, social disadvantage, and the operation of the criminal system. As a result, the formalist *Gideon* framework of law and adversariality—a relatively accurate depiction of lawyering in serious cases—falls apart as a descriptive mechanism at the bottom.

A note on generalizations: this Essay often discusses what public defenders “do” or think they should do in an ideal setting. In practice, most public defenders do not and cannot perform all the functions that their job demands. The public defense bar is infamously overwhelmed and many defenders cannot even manage their official caseloads—particularly their misdemeanor caseloads—much less provide additional social services to their clients.²² But some of the best public defender offices in the country are well-resourced, peopled by select lawyers, and provide the highest levels of legal representation comparable to any elite private sector firm. These offices have pioneered a variety of broad service-oriented models, sometimes referred to as “client-centered” or “holistic” representation.²³ In other words, when public defenders actually have the time and resources to fully occupy their roles, they often conclude that being a public defender includes a service-oriented, welfarist approach that recognizes the links between their clients' criminality and poverty. While most defenders may not be able to provide such services, we can nevertheless draw powerful lessons from the fact that leading defender institutions have taken this route.

This Essay proceeds as follows. First, it briefly surveys the criminalization of the welfare state through such institutions as schools, welfare offices, hospitals, and immigration. It then charts the opposing forces—the welfarization of the criminal process—and how courts, prosecutors, and police have increasingly taken on the roles of service providers to the poor. It then considers the special bridging function of the public defender, and concludes with some thoughts about what these convergences tell us about the social function of the petty offense process more generally.

²² See, e.g., ROBERT C. BORUCHOWITZ ET AL., NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 9–17 (2009).

²³ See *infra* Part IV.

II. THE CRIMINALIZATION OF THE WELFARE STATE

Over the past thirty years, the U.S. criminal system has famously grown more punitive and less committed to rehabilitation and individual offender reform.²⁴ Conversely, the welfare state has become increasingly committed to punishment. Or, to put it more theoretically, the demise of “penal welfarism” has brought with it a kind of “welfare punitiveness” in which once-benign state welfare functions have morphed into quasi-criminal modes of control and punishment.²⁵

Perhaps the most infamous criminalization of a core social service has occurred in the so-called “school-to-prison pipeline,” in which public education has been transformed into an encounter with the criminal system for thousands of children.²⁶ Police, prosecutors, and probation officers have taken up residence in public schools. Infractions that once led to a trip to the principal’s office and a call to a child’s parents have now become the basis for criminal charges and referral to the juvenile system. The impact of this criminalization has been heaviest on children of color: seventy percent of arrested students are African American or Latino and minority boys are more likely to be arrested, referred to law enforcement, suspended or expelled than their white counterparts for comparable behavior.²⁷

This infiltration by criminal justice norms is repeating itself across the institutional spectrum. For example, in *Cheating Welfare*, Kaaryn Gustafson describes how the modern welfare system relies heavily on criminal charges and punishment as a way of managing welfare caseloads and benefits.²⁸ Recipients are routinely charged with crimes and punished for minor violations of the welfare rules; case managers have been known to refer clients to prosecutors without telling them that they were being investigated for criminal offenses.²⁹ As Gustafson puts it more broadly:

Policing the poor and protecting taxpayer dollars from fraud and abuse have taken priority over providing security to economically vulnerable parents and children. Today’s welfare system treats those who use

²⁴ See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2002); FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981).

²⁵ WACQUANT, *supra* note 3, at 197, 299.

²⁶ See generally CATHERINE KIM ET AL., THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM (2010); Samantha Buckingham, *A Tale of Two Systems: How Schools and Juvenile Courts are Failing Students*, 13 U. MD. L.J. RACE RELIG. GENDER & CLASS 179 (2013).

²⁷ Buckingham, *supra* note 26, at 189–90. See also KIMBERLE WILLIAMS CRENSHAW, PRISCILLA OCEN & JYOTI NANDA, BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015) (documenting similar discriminatory practices towards black girls).

²⁸ See generally GUSTAFSON, *supra* note 5.

²⁹ *Id.* at 51–68 (describing broad overlaps between welfare and criminal justice apparatus).

public benefits, or who even apply for benefits, as latent criminals. Nationwide, welfare recipients are treated as presumptive liars, cheaters, and thieves. Their lives are heavily surveilled and regulated, not only by the welfare system, but also by the criminal justice system.³⁰

Health care providers and institutions have also taken on a punitive cast. For decades, public hospitals have drug-tested poor pregnant women of color, referring them for prosecution when they test positive.³¹ In that same punitive spirit, Alice Goffman describes how Philadelphia police monitor hospitals and emergency rooms for people with outstanding warrants, checking the names of patients and those who accompany them.³² As a result, family members and friends will often avoid coming to the hospital or visiting the injured, while men may even miss the birth of their children for fear of arrest. A study of the emergency room admitting policies of a large public hospital in Los Angeles found similar results. Emergency room nurses used criminally-inflected criteria and stereotypes—for example whether they believed patients were associated with criminal activity—to allocate and withhold emergency medical treatment.³³ These confluences have led one researcher to conclude that “the urban poor’s access to healthcare is mediated . . . by incarceration, policing, and crime control language.”³⁴

The immigration administration has also become a heavily criminalized regime not only of exclusion, but punishment. Indeed, as the popular term “crimmigration” suggests, the immigration system is now so tightly intertwined with the criminal process that it is often hard to distinguish the two.³⁵ A vast array of minor criminal behaviors have become grounds for deportation, even where there is no conviction, and 90 percent of all deportations are triggered by criminalized behavior.³⁶ Immigration has also become a site of overcriminalization in its own right: half of all federal prosecutions are for immigration crimes.³⁷ Even the apparatuses have become intertwined, as police forces

³⁰ *Id.* at 1.

³¹ Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1676–77 (2008); see also Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

³² ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* 34–35 (2014).

³³ Armando Lara-Millan, *Public Emergency Room Overcrowding in the Era of Mass Imprisonment*, 79 AM. SOC. REV. 866, 873 (2014).

³⁴ *Id.* at 880.

³⁵ Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379–92 (2006).

³⁶ Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128 (2013).

³⁷ Jennifer M. Chacon, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 651 (2012).

increasingly make immigration enforcement part of their local function.³⁸ In these ways, what was once a civil administrative matter has become a criminalized, punitive arena.

Schools, welfare offices, public hospitals, and immigration are governmental functions. But criminalization travels unofficial routes as well, and its story would be incomplete without recognizing its impact on the private employment sector.³⁹ Today's labor market is so heavily influenced by workers' criminal records—particularly for African American men—that a person's employability and economic viability is inextricably intertwined with his criminal justice exposure. As Devah Pager has explained:

The 'credential' of a criminal record, like educational or professional credentials, constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic, and political domains.

. . . [In particular, employers] view this credential as an indicator of general employability or trustworthiness.⁴⁰

Because Americans continue to stereotype black men as criminals, this negative credentialing has crushing economic consequences for African Americans, even those without criminal records. Indeed, the assumption that black men have been criminalized is so stigmatizing and pervasive that an African American man *without* a record may be just as unlikely to get a job as a white man with an actual criminal conviction.⁴¹ The private market for work has thus imported the normative judgments and racial skew of the criminal system to such an extent that unemployment has become a collateral consequence of a criminal conviction.⁴²

³⁸ Eagly, *supra* note 36, at 1130 (“[I]mmigration enforcement is now deeply intertwined with the local enforcement of criminal law.”).

³⁹ See generally Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Incarceration*, 160 U. PA. L. REV. 1789, 1790 (2012) (“[A] new civil death is meted out to persons convicted of crimes in the form of a substantial and permanent change in legal status, operationalized by a network of collateral consequences.”).

⁴⁰ PAGER, *supra* note 7, at 4–5.

⁴¹ In Pager's experiment, black testers with no criminal record were as unlikely to get jobs as white testers with convictions on their records. *Id.* at 91 (“[B]eing black in America today is just about the same as having a felony conviction in terms of one's chances of finding a job.”).

⁴² Various states have tried to push back by delinking the criminal system from employment. These efforts include “ban the box” rules that prohibit employers from asking about criminal records, and rules against reporting criminal records to employers. See, e.g., Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y. 963, 979–87 (2013). The Delaware Labor Department has created an expungement program, stating that it has “identified criminal records as a significant barrier to entering the workforce for the TANF [Temporary Assistance for Needy Families] population.” *About Us*, THE STATE OF DELAWARE,

In all these ways, the public civil apparatus—from schools to welfare to the workplace—has incorporated the tools and values of the criminal system in ways that have rendered it less generous, more punitive, and more exclusionary. Whether we label it “the criminalization of poverty”⁴³ or more broadly “governing through crime,”⁴⁴ the underlying lesson is the same: civil actors and institutions increasingly view their roles and clients through lenses and categorizations provided by the criminal process.

III. PUTTING WELFARE BACK INTO CRIMINAL LAW ENFORCEMENT

The description above is part of a widely-told story about the neo-liberal demise of the welfare state and penal welfarism in particular.⁴⁵ But it is not the whole story. Various criminal law officials and institutions are slowly reintroducing a welfare-like approach to offenders, from community policing to drug courts. Particularly in connection with low-level offenses such as drugs and quality-of-life, police, prosecutors, judges, and sheriffs are tempering their roles as purveyors of retributive punishment and embracing concerns and policies more typically associated with the social safety net.⁴⁶

To be clear, this new welfarist impulse is not necessarily generous or even benign. Some programs are driven not by a resurgence of empathy for offenders, but by the need to reduce dockets and jail populations.⁴⁷ Other reforms, like drug courts, may actually increase the reach and intrusiveness of the criminal system, or exacerbate existing inequalities.⁴⁸ But even with such ambivalences, these new forms of offender management provide significant treatment, diversion, and other

<http://apex.delawareworks.com/about.php> (last visited May 18, 2015). My thanks to Ben Fleury-Steiner for this insight.

⁴³ GUSTAFSON, *supra* note 5.

⁴⁴ See SIMON, *supra* note 24.

⁴⁵ E.g., GARLAND, *supra* note 24, at 75.

⁴⁶ See, e.g., Jonathan Simon, *The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to Brown v. Plata*, 48 HARV. C.R.-C. L. L. REV. 217, 245 (2013) (forecasting a possible resurgence of the “medical” or rehabilitative model of corrections).

⁴⁷ See e.g., Joan Petersilia, *California Prison Downsizing and its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL’Y REV. 327, 329 (2014) (describing “mixed reviews” of California’s response to the Supreme Court’s order to reduce the prison population); Armando Lara-Millan & Nicole Van Cleve, *Punishment as Privilege: Denying Rights and Resources in the Overburdened Gateways of Mass Imprisonment*, (unpublished manuscript) (draft presented at the 2014 meeting of the Law & Society Association) (documenting how California sheriff departments are offering jail inmates “early release” onto probation for lack of bed spaces).

⁴⁸ Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1561 (2004) (on net-widening); see also Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 792 (2008) (on how drug court participants often receive longer sentences than they would have under a traditional sentencing regime).

welfare enhancing services to an offender population once written off as incorrigible.⁴⁹

A. *Specialty Courts*

Perhaps the most overtly welfarist turn of the criminal system is occurring in so-called “problem-solving” courts. The explosion of these specialty courts—they exist in every jurisdiction and there are thousands of them—reflects a renewed commitment to the idea that criminal punishment should serve as a vehicle for rehabilitation and the reintegration of offenders into the law-abiding community.⁵⁰ From drug treatment to mental health services to job training, specialized courts address addiction, mental health problems, veterans’ issues, prostitution, and other social challenges once seen as the bailiwick of the welfare state.

The typical drug court, for example, siphons offenders out of the traditional criminal process and substitutes supervision, treatment, and an extensive program of intervention for jail. In the effort to provide effective treatment rather than traditional punishment, the legal actors’ roles are upended. The drug court “treatment team” consists of the defendant, judge, defense attorney, and prosecutor, players who are traditionally locked in non-cooperative, adversarial relationships. Instead, the “prosecutor and defender become partners collaborating in an effort to rehabilitate the addicted client” and the judge’s “primary role shifts from the determination of guilt to the provision of therapeutic aid.”⁵¹ “The judge ‘will frequently engage in a dialogue with the offender,’ adopting the roles of ‘confessor, taskmaster, cheerleader, and mentor; in turn exhorting, threatening, encouraging and congratulating the participant for his or her progress, or lack thereof.’”⁵² Unlike the neutral arbiter of tradition, drug court judges are intimately involved in providing medical and personal support to criminal defendants, much like treatment providers themselves.

To be sure, problem-solving courts are still criminal justice institutions, and the punitive, controlling quality of the surveillance and control they impose on offenders distinguishes them from true welfare providers such as hospitals, mental health services, or voluntary drug treatment programs.⁵³ As Jane Spinak has noted, “[t]here are serious questions to ask about why we like trying to fix the problem at

⁴⁹ Cf. GARLAND, *supra* note 24, at 58 (describing the rejection of the rehabilitative ideal and the dominant criminological belief that “nothing works”).

⁵⁰ Miller, *supra* note 48, at 1561; see also Bowers, *supra* note 48, at 792.

⁵¹ Miller, *supra* note 48, at 1492–93.

⁵² *Id.* at 1493.

⁵³ See *id.* at 1487 (arguing that drug courts are still punitive). See also Bowers, *supra* note 48, at 783 (pointing out that drug courts often lead to longer sentences); COMFORT, *supra* note 8, at 18, 196 (“The fact that a close investigation finds counterintuitive ‘benefits’ to incarceration does not override the much more obvious and amply documented destructive efforts of forced separation and confinement on family ties, children’s welfare, and community life.” (internal citations omitted)).

the back end, by the time we get to court, rather than trying to address the issues before people ever have to go into the criminal justice system in the first place.”⁵⁴ Nevertheless, this rehabilitative alternative to traditional punishment has become firmly entrenched in the U.S. criminal process, showcasing judges’ potential welfarist roles and making it part and parcel of the experience of offenders and their attorneys.

B. *Community Prosecution*

The idea that the criminal system should prevent and treat, as well as punish, has made its way into other core law enforcement functions. Around the country, prosecutors are opening offices in high-crime neighborhoods, reaching out to residents, and reframing their jobs as community servants rather than just case prosecutors.⁵⁵ From San Francisco to Indianapolis to Washington D.C., the prosecutorial function is increasingly seen not only in terms of law enforcement, but also crime prevention and community service. Under this view, “‘doing justice’ brings new goals: reducing and preventing crime, . . . and strengthening bonds with citizens, governmental and law enforcement agencies, and civic groups to establish and secure a community capacity for enhancing security and promoting justice.”⁵⁶

Community prosecution takes different forms. Some offices have relocated into housing projects and storefronts. Others send prosecutors into high-crime communities to attend community meetings and hear residents’ concerns.⁵⁷ Former U.S. Attorney General Eric Holder described how he revised the U.S. Attorney’s Office when he arrived as follows:

As a local prosecutor, I realized that I could be far more effective in addressing the crime problem if I deployed some of my attorneys into the community where they could develop special relationships with members of the police department, businesses, non-profit organizations,

⁵⁴ Leon Neyfakh, *The Custom Justice of “Problem-Solving Courts,”* BOSTON GLOBE (March 23, 2014), <http://www.bostonglobe.com/ideas/2014/03/22/the-custom-justice-problem-solving-courts/PQJLC758Sgw7qQhiefT6MM/story.html>.

⁵⁵ Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 345 (2002) (surveying growth in community prosecution nationwide); see also Anthony Alfieri, *Community Prosecutors*, 90 CALIF. L. REV. 1465 (2002).

⁵⁶ Catherine M. Coles, *Evolving Strategies in 20th-Century American Prosecution*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 193 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008). See also Center for Court Innovation, *Community Prosecution*, <http://www.courtinnovation.org/topic/community-prosecution> (last visited Oct. 31, 2014) (“Community prosecution is founded on the idea that prosecutors have a responsibility not only to prosecute cases but to solve public safety problems, prevent crime and improve public confidence in the justice system.”).

⁵⁷ Thompson, *supra* note 55, at 345–46; Alfieri, *supra* note 55, at 1473–74.

educational institutions, the faith community and, of course, the citizens themselves. In doing so, I found that we were better able to respond to the community's needs.⁵⁸

Community prosecution moves prosecutors away from their traditional litigious, case-oriented role and towards a more community-oriented service model in which prosecuting crime is seen as a form of direct service to communities and their residents. Prosecutors thus take their place alongside other official service providers, providing the benefits of safer streets, government responsiveness, and improved quality of life.

While it would be a stretch to say that community prosecution transforms prosecutors into poverty workers, the concept implicitly acknowledges the tight connections between crime and social disadvantage. In some instances, it explicitly recognizes the criminalization of poverty. In Vermont, for example, one State's Attorney began a diversion program for low-level misdemeanors in direct response to the crime-poverty nexus:

[W]hen I became a prosecutor first in Philadelphia, and then in Burlington, Vermont, it was not lost on me that we were prosecuting people, both African-Americans and white people, who came from poverty, who came from places with a lack of resources. They came from marginalized places in the world and I began to realize that we were continuing to marginalize them through the criminal justice system, whether it be for drug prosecution or mental health illnesses that caused criminal behavior.⁵⁹

In lieu of prosecution, the Burlington Vermont diversion program refers offenders to social service programs such as job training and drug treatment. In effect, this version of community-based prosecution is a reincarnation of old-school penal welfarism: the impulse to proactively address the needs of the poor through the operation of the criminal system.

C. Police

Nowhere is the welfarist impulse in law enforcement more complex and conflicted than in the police function. Doctrinally speaking, police are treated mainly as law enforcement actors; their authority flows from the existence of

⁵⁸ Thompson, *supra* note 55, at 345 (quoting U.S. Attorney General Eric Holder).

⁵⁹ Center for Court Innovation, *Podcast: The Evolution of a Prosecutor: Early Intervention Improves Safety and Saves Money*, <http://www.courtinnovation.org/research/podcast-evolution-prosecutor-early-intervention-improves-safety-and-saves-money?url=research%2F5%2Finterview&mode=5&type=interview&page=1> (last visited Oct. 31, 2014).

reasonable suspicion or probable cause that “crimes” have been committed.⁶⁰ But as the Supreme Court has acknowledged, police interactions with citizens “are incredibly rich in diversity,”⁶¹ and Fourth Amendment doctrine barely captures the wide variety of police functions and practices that go far beyond the “competitive work of ferreting out crime.”⁶²

As part of this diversity, police have a well-established “community caretaking” function.⁶³ This includes giving directions to the lost traveler, rescuing the injured,⁶⁴ and, in the iconic case, helping ducklings across busy intersections.⁶⁵ Indeed, historically speaking, the “police function” was not limited to crime at all: it included regulatory matters, public safety, and the maintenance of public order above and beyond the enforcement of specific criminal laws.⁶⁶

Today’s police engage in wide array of functions that look suspiciously like social work. For example, police in Los Angeles’s infamous Skid Row use their authority to channel the homeless into shelters and rehabilitation programs. One senior police officer lauded “the rehabilitative aspects of skid row” and the accompanying police function as follows:

The majority of the community desires to make skid row a true community for individuals struggling with the disease of addiction, homelessness, and mental illness. . . . [A]n environment conducive to change in the lives of people struggling with a variety of issues . . . where people can have a better chance of taking their lives back.⁶⁷

Forrest Stuart calls these police “resource managers,” contrasting their welfarist function within the marginal space of Skid Row with the more conventional punitive and exclusionary role they play in wealthier “primary” spaces. While in wealthy neighborhoods and gentrified downtowns, police are often seen as dehumanizing the homeless and attempting to hide them from view,

⁶⁰ *Illinois v. Gates*, 462 U.S. 213 (1983); *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

⁶¹ *Terry*, 392 U.S. at 13.

⁶² *Johnson v. United States*, 333 U.S. 10, 14 (1948).

⁶³ Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 261 (1998).

⁶⁴ *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

⁶⁵ ROBERT MCCLOSKEY, MAKE WAY FOR DUCKLINGS (1941) (in which Officer Michael helps Mrs. Mallard and her family of ducklings to cross the street to get to Boston Gardens).

⁶⁶ MARKUS DIRK DUBBER, POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 49, 53–59 (2005) (describing the far reaching peace-keeping powers of British and colonial police); see also George C. Thomas, III, *Stumbling Towards History: The Framers’ Search and Seizure World*, 43 TEX. TECH. L. REV. 199, 201, 226–29 (2010) (“What [founding-era] constables did not do was investigate crime.”).

⁶⁷ Forrest Stuart, *From ‘Rabble Management’ to ‘Recovery Management’: Policing Homelessness in Marginal Urban Space*, 51 URB. STUD. 1909, 1914 (2014).

Skid Row policing “rehumanizes” the homeless by attempting to get them into shelters and programs.⁶⁸

The failures of the wars on crime, gangs, and drugs have spawned other “resource management” approaches to policing. In Boston, police instituted a famously successful cooperative endeavor with a group of clergy called the Ten Point Coalition, clinical social workers, and other service providers, to extract young, violent gang members from their dysfunctional criminal milieu. Police and sheriffs also began the Boston Reentry Initiative, which offers serious offenders job training, vocational opportunities, drug, mental health, and other services to help them reintegrate into society upon release.⁶⁹

In Seattle, police have instituted a street-level diversion program in which police “take drug and prostitution offenders—among the main staples of the criminal justice mill—to rehabilitative and social support services rather than criminal processing on select days.”⁷⁰ The effort mirrors comparable pre-booking diversion programs that channel the mentally ill into treatment rather than jail.⁷¹ As Mary Fan describes these efforts, “[r]ather than acting as the muscular arm of the incarcerating state, police serve as the first screen of an offender’s suitability for rehabilitation and community reintegration.”⁷²

These approaches go above and beyond the general commitment to “community policing.” Broadly speaking, community policing “exhorts city police departments to forswear their autonomy and collaborate with practically everyone: community groups and institutions, property owners, agencies of city government, other police and security forces, elected officials, businesses.”⁷³ Like the community prosecution movement, which it spawned, community policing embraces the notion that police provide services to residents above and beyond the tracking down of criminals. But the police programs described above take the notion a step further, connecting residents more firmly to the welfare state—

⁶⁸ *Id.* at 1923–24 (“By manipulating behavioural incentives, these policing practices aim to ‘reprogramme’ homeless individuals to make the ‘right’ choice and, through collaboration with the mega shelters, transform them into sober, self-governing and responsible citizens.”).

⁶⁹ Anthony Braga et al., *Controlling Violent Offenders Released to the Community: An Evaluation of the Boston Reentry Initiative*, 46 J. RES. CRIME & DELINQ. 411, 413, 417 (2009); Anthony A. Braga, et al., *Losing Faith? Police, Black Churches, and the Resurgence of Youth Violence in Boston*, 6 OHIO ST. J. CRIM. L. 141 (2008); see also Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 438–39 (2000).

⁷⁰ Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 166 (2013).

⁷¹ *Id.* at 168.

⁷² *Id.* at 167.

⁷³ Thacher, *supra* note 19, at 765 (analyzing eleven different community policing programs); see also James Forman Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 7–8 (2004) (defining community policing as a strategy of police-citizen consultations in which they “jointly define neighborhood crime problems and set police priorities,” and through which citizens take responsibility for helping to address those problems).

whether it takes the form of a homeless shelter, a drug treatment program, or a hospital—and the benefits it provides.

To be clear, the expansion of the police's welfarist role does not necessarily lessen or eliminate their law enforcement commitments. Indeed, police penetration into the welfare state often increases their punitive reach. Los Angeles police bring arrestees to the emergency room not only to provide them treatment, but to create opportunities for interrogation.⁷⁴ Seattle police have broad discretion over who gets into diversion treatment programs, raising the risk of further racial selectivity.⁷⁵ Many worry that community policing more generally erodes civil liberties and privacy in neighborhoods where police have greater access to private spaces and personal information.⁷⁶ Each of these new functions complements and strengthens the traditional law enforcement role. But the examples above complicate the adversarial and punitive images of police, and illustrate how even this quintessential law enforcement function may be taking on a more civil welfarist character.

IV. THE BRIDGING ROLE OF PUBLIC DEFENDERS

Public defenders have long grappled with the non-criminal needs of their clients. They find them drug treatment programs, bus tokens, and clothing for job interviews. They develop relationships with them, their families, and their children. Robin Steinberg, co-founder of the Bronx Defenders, once brought her heroin-addicted client home with her for a couple of days so as to ensure her appearance for trial, an act Steinberg describes as something “only a young public defender would do.”⁷⁷

For the most part, right-to-counsel doctrine has not recognized counsel's expansive caretaking function, although that may be changing. In *Padilla v. Kentucky*, the Court concluded that at least one non-criminal consequence of conviction—deportation—is so significant that attorneys must advise their clients about it.⁷⁸ Since then, numerous scholars have argued that *Padilla* opens the door to a broader conception of the defense attorney role. Jack Chin, for example, maintains that part of what “defense lawyers are for” is to help clients handle a wide array of collateral consequences—from employment to housing to immigration—and that *Padilla* is the first step in formalizing those functions as part of the *Gideon/Strickland* inquiry into whether counsel has provided effective

⁷⁴ Lara-Millan, *supra* note 33, at 879.

⁷⁵ Fan, *supra* note 70, at 192–93.

⁷⁶ E.g., Carol Steiker, *More Wrong Than Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 49 (Tracey L. Meares et al., eds., 1999).

⁷⁷ 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, 625 (2006).

⁷⁸ *Padilla v. Kentucky*, 599 U.S. 356, 373–74 (2010).

assistance.⁷⁹ More broadly, many argue that the vast array of collateral consequences that the criminal system now imposes on offenders should be understood more centrally as punishment in their own right and therefore an appropriate arena for defense counsel intervention.⁸⁰

The collateral consequences debate reflects a more general reality: that standard questions of guilt and innocence are not always central—and may even be peripheral—to the significance of a low-level case for a client and the concomitant role of their lawyer. This is in part because the personal and civil consequences of conviction, especially for poor African Americans, have expanded so dramatically and have become so burdensome that responsible lawyers cannot reasonably ignore them. But it also reflects how the system itself, particularly the misdemeanor process, has structurally sidelined questions of guilt. Assembly-line courts do not provide much opportunity for litigation and the system is heavily weighted towards pleas.⁸¹ In that world, a lawyer's job is not so much about avoiding conviction—everyone assumes the defendant will plead—but haggling over its consequences, personal, civil, and pragmatic, as well as the more formally criminal.

These realities have led some of the best public defender offices in the country to embrace a variety of new work models. Various referred to as “holistic representation,” “community-oriented representation,” or “client-centered representation,” these offices conceptualize themselves as full service advocates for the poor communities from which their clients come.⁸² For example, the Bronx Defenders work in teams of defense attorneys, civil welfare attorneys, social workers, and parent advocates. Its lawyers are trained in interdisciplinary fields including social work, immigration, and mental health.⁸³ The Georgia Justice Project provides not only criminal defense, but also GED classes, employment placements, and other social services.⁸⁴ In Portland, the public defender office hires legal assistants and outreach coordinators from the community, including

⁷⁹ Gabriel J. Chin, *What Are Defense Lawyers For? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH. L. REV. 151, 151 (2012).

⁸⁰ E.g., Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 457 (2010); see also Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 277 (2011).

⁸¹ See *Misdemeanors*, *supra* note 10; see also Bowers, *supra* note 13.

⁸² See, e.g., MELANCA CLARK & EMILY SAVNER, BRENNAN CTR. FOR JUSTICE, COMMUNITY ORIENTED DEFENSE: STRONGER PUBLIC DEFENDERS 7 (2010), available at http://brennan.3cdn.net/930f13b765ab919c80_ylm6beoe2.pdf.

⁸³ 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, 988, 992, 995 (2013).

⁸⁴ *Criminal Defense*, GEORGIA JUSTICE PROJECT, <http://www.gjp.org/programs/criminal-defense/> (last visited Oct. 25, 2014).

“reporters, nuns, bartenders, college professors, high school dropouts, and home-makers,” to find alternative services and programs for their clients.⁸⁵

Even for public defenders whose offices have not specifically embraced these holistic models, a large part of the public defender role includes finding social services for their needy clients. A classic example is the lawyer representing a drug-addicted client, looking for ways to translate her client's criminal case into drug treatment. Public defenders may use competency hearings to get their clients mental health treatment.⁸⁶ Travis County, Texas even created a mental health public defender office specifically designed to represent and seek treatment for mentally-ill, indigent defendants.⁸⁷ In these ways, public defenders recognize, implicitly or explicitly, that part of their responsibility to their clients includes working up their welfare needs, even though *Gideon* and *Strickland* do not contemplate such duties.

Perhaps the largest deviation from the individualistic *Gideon* model can be seen in some defender offices' decision to leverage their institutional roles to affect criminal justice policy. The Bronx Defenders have staff members dedicated to policy and community development.⁸⁸ The Pace Criminal Justice Clinic helped form a city-wide advocacy coalition to end the zero-tolerance policing practices that ensnared many of the clinic's clients.⁸⁹

This kind of institutional advocacy is not free from controversy and it poses special challenges to the conception of the public defender. First and foremost, it is potentially in conflict with the standard *Gideon*-based individualized client model.⁹⁰ Policies that might help a group of defendants or a community may not be good for an individual client.⁹¹ The model may even encourage the very same sort of cherry-picking for which drug courts have been criticized, skimming off

⁸⁵ Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 431 (2001).

⁸⁶ Kelly Davis, *Lost in the criminal justice system: If you're mentally ill, good luck finding your way*, SAN DIEGO CITY BEAT (Aug. 27, 2014), <http://www.sdcitybeat.com/sandiego/article-13354-lost-in-the-criminal.html?> (quoting Deputy Public Defender as saying “Over the last several years, we’ve been paying a lot more attention to how we help these people stay out of the system. It’s all about trying to identify why the person’s in the system in the first place, treat that issue or address it so they won’t have to come back.”).

⁸⁷ Jeanette Kinard & Caroline Carow, *A Different Kind of Justice: Lessons Learned from a Mental Health Public Defender*, 17 MICH. ST. U. J. MED. & L. 293, 293 (2013).

⁸⁸ Steinberg, *supra* note 83, at 998.

⁸⁹ M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance” Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 366–67 (2013).

⁹⁰ Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 162–67 (2004) (describing the dominance of the individualistic defender model and its conflicts with community-oriented public defense).

⁹¹ Fabricant, *supra* note 89, at 379–80 (discussing potential ethical conflicts generated by “cause-lawyering” inside the criminal system).

sympathetic clients and easier cases while leaving the harder cases to the traditional system.⁹²

Notwithstanding these challenges, the move towards community-based and holistic defense models brings the criminal process ever closer to the concerns of the civil welfare state. These criminal justice actors are interpreting their legal obligations to include social and even political work, precisely because defending the indigent is so tightly intertwined with larger social welfare questions of poverty and employment, neighborhood disorganization and racial segregation, drug addiction and health care. As defender offices link their clients' burdens to systemic social policies, they not only challenge the individualistic, legalistic model contemplated by *Gideon*, but also transform the criminalization of poverty into a live issue for the criminal system as a whole.⁹³

V. CRIME, POVERTY, LEGAL ROLES AND RULES

"[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."⁹⁴

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."⁹⁵

For over fifty years, *Gideon v. Wainwright*, and to a lesser extent *Griffin v. Illinois*, have offered a narrow doctrinal response to the criminalization of poverty. These cases and their progeny recognize the fundamental proposition that poor people often experience the criminal system differently than do the wealthy.⁹⁶ Their response has been to give such defendants lawyers.⁹⁷ The assumption behind

⁹² *Criminal Defense*, *supra* note 84 (For example, the Georgia Justice Project does not accept sex offenders or domestic violence cases.); *see also* Bowers, *supra* note 13, at 786 (accusing drug courts of catering to the most socially sympathetic and least needy defendants).

⁹³ *E.g.*, Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternative Visions of the Public Defender*, 84 GEO. L.J. 2419, 2422 (1996).

⁹⁴ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁹⁵ *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (requiring the state to furnish indigent defendants free transcripts for appeal).

⁹⁶ *E.g.*, *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (noting that indigent defendants often "have little education, learning disabilities, and mental impairments").

⁹⁷ *Griffin* gave defendants free transcripts, not lawyers, but it established the principle that the indigent are entitled to basic due-process that eventually was explicitly recognized in *Douglas v. California*, 372 U.S. 353 (1963) (establishing an equal-protection and due-process based right-to-counsel on the first appeal as of right); *see also* Tracey Meares, *What's Wrong with Gideon?*, 70 U. CHI. L. REV. 215 (2003) (arguing that the *Gideon* turn to rights instead of a more general standard of due process limited the Supreme Court's responses to inequality).

both lines of cases is that counsel can cure the disparities of treatment that the criminal system visits on the poor.⁹⁸

This might be a decent assumption for serious cases, where good defense counsel can often even out the legal playing field between rich and poor in a variety of ways. But it does not begin to address the realities of the misdemeanor process where legal issues are less salient and case outcomes are intimately tied to a wide range of disadvantaged life experiences. Here, the most serious effects of a case on a poor person's life may not be susceptible to litigation at all: for example, the impact on their employability, credit, or family arrangements.

In other words, at the bottom of the penal pyramid where offenses are minor and defendants are poor, the legal aspects of a criminal case are just one piece of a larger punitive picture. The criminalization of poverty and the vast expanse of collateral consequences—formal and informal—that attend a conviction mean that defense lawyers do not merely engage legal rules, but must evaluate the impact of the criminal case on their client's life situation. For poor defendants facing minor offenses, the complex of socio-legal challenges cannot be resolved through due process alone. To put it another way, at the bottom of the pyramid, due process is a weak proxy for good representation. Public defenders have known this for a long time; the Supreme Court has yet to recognize it.

At the same time, the criminal system is not hermetically sealed. Other players—from social workers to employers to emergency room nurses—drive individuals into the system and define the consequences once they get there. *Gideon's* right to a fair trial and *Griffin's* commitment to procedural equality do not begin to comprehend what fairness might mean in this complex universe.⁹⁹

The decreasing relevance of standard right-to-counsel doctrine is a corollary of the limited relevance of the adversarial model, especially at the bottom of the pyramid.¹⁰⁰ On the one hand, the assembly-line misdemeanor process is only nominally adversarial: most case outcomes are a foregone conclusion. For low-level routine cases in high-volume courts, law and evidence rarely control outcomes; discovery is minimal if it takes place at all, defenders rarely litigate, and

⁹⁸ But see *Ross v. Moffitt*, 417 U.S. 600, 612 (1974) (finding no right to counsel on discretionary appeal and noting that “[t]he Fourteenth Amendment does not require absolute equality or precisely equal advantages . . . nor does it require the State to equalize economic conditions” (internal citations and quotation marks omitted)).

⁹⁹ Even the newly-minted right to attorney competence during plea bargaining in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), while more expansive than *Gideon's* focus on fair trials, does not reach this far. See, e.g., Darryl Brown, Lafler, Frye, and *Our Still-Unregulated Plea Bargaining System*, 25 FED. SENT’G. REP. 131, 132–33 (2012) (noting that “the ineffective assistance doctrine . . . is always a limited form of process guarantee”).

¹⁰⁰ See Darryl Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585 (2005) (arguing that defense counsel are becoming less relevant and effective as guarantors of accuracy due to the infrequency of trial).

courts do not like when they do.¹⁰¹ As Eve Brensike Primus, a former public defender, describes it, “I routinely had misdemeanor court judges refuse to address legal issues and tell me to save my legal arguments for appeal.”¹⁰² In dozens of other courts, judges refuse to hear motions or punish attorneys who attempt to litigate in the traditional way.¹⁰³ This is not a system in which the adversarial model—and therefore *Gideon*’s promise of adversarial due process—is doing much work.

Just as profoundly, many criminal justice actors—from defense counsel to police, prosecutors and judges—have modified their legalistic, adversarial stance. Instead, they are engaged in community prosecution, problem-solving courts, and holistic representation, namely, quasi- or non-adversarial models in which issues other than guilt or innocence take precedence. These actors may even incorporate the aims and norms of the traditional welfare state, casting themselves broadly as service providers to a needy population, rather than narrowly as legal adversaries in a criminal case. In this ideologically flexible world, staunch public defenders have described themselves as engaged in “crime prevention,” even as police worry whether poor people are receiving social services and rehabilitation.¹⁰⁴

All this is to say that the criminal system is a deeply conflicted socio-legal institution, particularly at the bottom of the penal pyramid where defendants are poorest and offenses are pettiest. While the bottom has been poorly served by the standard doctrinal discourse generated by *Gideon*, it is powerfully shaped and illuminated by public defenders, the primary enforcers of *Gideon*’s promise.¹⁰⁵ The blurring and shifting of the public defender’s role thus mirrors a larger reality: not only is the criminalization of poverty eroding the adversarial process, but it is also recasting the very purposes of the criminal system.

¹⁰¹ See Eve Brensike Primus, *Our Broken Misdemeanor System: Its Problems and Some Potential Solutions*, 85 S. CALIF. L. REV. POSTSCRIPT 80, 81–82 (2012).

¹⁰² *Id.* at 81.

¹⁰³ BORUCHOWITZ ET AL., *supra* note 22, at 44–45 (documenting judicial pressure on misdemeanor lawyers to plead cases and clear dockets); see also AMERICAN BAR ASSOCIATION, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 21 (2004).

¹⁰⁴ Compare Steinberg, *Beyond Lawyering*, *supra* note 77, at 633 (describing holistic defense as a “crime prevention tool”), with Stuart, *supra* note 67, at 1923 (in which Skid Row police see their role as getting the homeless into shelters and treatment).

¹⁰⁵ See generally Jonathan Rapping, *Grooming Tomorrow’s Change Agents: The Role of Law Schools in Helping to Create a Just Society*, 12 OHIO ST. J. CRIM. L. 465 (2015).