



Un-Meetable Promises: Rhetoric and Reality in New York City's Human Trafficking Intervention Courts

A report by the Global Health Justice Partnership of the Yale Law School
and Yale School of Public Health

in collaboration with

The Sex Workers Project of the Urban Justice Center

September 2018

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Acknowledgments

This report is one of the products of a four-year collaboration between the Sex Workers Project (SWP) of the Urban Justice Center and the Global Health Justice Project (GHJP) of Yale University. This collaboration was supported by a generous grant from the Levi Strauss Foundation. Moreover, this work is an initiative of the Gruber Project for Global Justice and Women's Rights.

SWP is a New York City-based advocacy organization dedicated to using human rights and harm reduction approaches to protect and promote the rights of individuals who by choice, circumstance, or coercion engage in sex work. In addition to providing direct legal services to individual clients in criminal legal, immigration, and police misconduct matters, SWP conducts trainings for community organizations, outreach programs, and service providers working with trafficked persons and sex workers. SWP also engages in policy advocacy at the local, state, federal, and international levels aimed at securing systemic change grounded in the experiences and concerns of sex workers and their communities.

The Global Health Justice Partnership was established in 2012 as a joint program of Yale Law School and the Yale School of Public Health. GHJP focuses on intersections of health, rights, and justice by engaging students, scholars, and practitioners in developing interdisciplinary responses to global health disparities. GHJP began working with SWP in 2014 on questions at the intersection of health and rights for people in the sex sector, initially with a specific focus on HIV and criminalization (and the web of laws explicitly using HIV status as a defining element of the crime of prostitution); and subsequently providing background memoranda on these laws nationally and in specific locales. In the course of these investigations, we encountered proliferating narratives of “diversion,” as well as specific local policing and court practices that used these narratives. This report, in addition to a national scoping report on “prostitution” crime-specific intervention and “diversion” practices, are the result of two years of work on these questions. This national report and other GHJP work related to health justice questions can be found at: <https://law.yale.edu/ghjp>

Thanks to Shaylen Foley (YSPH 2017) and Jessica Peñaranda (SWP) for collecting the data and creating initial drafts of the report. Thanks to Melissa Hope Ditmore (SWP) who synthesized all this material for the first review, and to Alice M. Miller (GHJP), Crystal Deboise (SWP), D’Laney Gielow (YLS 2018), Ann Sarnak (YC 2017), Poonam Daryani (GHJP), Sarah Aquilla (GHJP), Laika Abdulali (YLS 2018), and Sarah DiMagno (YC 2018) for additional research, writing and editing assistance.

Thanks also to our external reviewers for feedback on various drafts, including Leigh Latimer from the Legal Aid Society; Corey Shdaimah from the University of Maryland, School of Social Work; and Sienna Baskin of NEO Philanthropy.

Interview information in this report was gathered pursuant to IRB approval from Yale University, which covered student, faculty and SWP staff dealing with human subjects data. Data collection took place in waves between May-December 2016, with updates continuing into 2017 and 2018. Subsequent reviewers and writers worked with anonymized data, and other information was updated from public records and reports.

Glossary of acronyms, key words and explanation of terminology

For further detail on terms below, see section on key legal frameworks affecting the HTICs.

| | |
|------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| ACD | Adjournment in contemplation of dismissal |
| AP8 | Prostitution-specific docket, used as an alternate name for HTIC in some settings |
| CCI | Center for Court Innovation [See website at: https://www.courtinnovation.org/] |
| CJS | Criminal justice system |
| Defendant | Person arrested, booked, and facing criminal charges in a court of law |
| Dismissal | Dismissal of charges, often used colloquially to signal a “best outcome” for a criminal defendant in a low-level prostitution offense |
| HTIC | Human Trafficking Intervention Court |
| Mandate | In the case of HTICs, the “mandate” refers to the pre-plea agreement that defendants enter into with courts that prescribes them a set of conditions to complete. |
| NYPD | New York Police Department |
| PDP | Prostitution diversion program/processes, a wide-ranging set of practices embedded in the criminal justice system which claim to move persons facing arrest, conviction, or detention from low-level prostitution offenses out of the purview of the CJS and into some form of support/services. They may arise pre-arrest, pre-booking, pre- or post-adjudication or sentencing. |
| Prostitution | Engaging in sexual conduct with another person in return for a fee; it is a criminal offense (misdemeanor) in New York State. |
| Sex worker | A person whose labor or livelihood is the selling or trading of sexual conduct for money or other goods of value; this term is used in contemporary discussion to connote that a person selling sex is engaged in a form of labor and was adopted by persons within the sex trades as a self-designation. In this report, we try to use the term in its relevant historical context (after the mid-1980s) for persons targeted as the sellers/offering actors under prostitution laws. |
| Trafficking | Under U.S. law (federal): the act of recruiting, harboring, transporting, providing, or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion. Under NYS law: compelling another to work in any sector against their will and for one’s own profit. Colloquially, however, the term is often incorrectly used to refer to any movement into prostitution. |
| Sex trafficking | Under U.S. law, the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act. ¹ To meet the elements of the federal crime of “trafficking”, the person so moved must be under 18 or, if over 18, be moved by force, fraud or coercion into selling sex. |

¹ 22 U.S. Code § 7102 (9)(A).

Warrant

An order, issued by a court or judge, to authorize the arrest of an individual for an offense. Warrants can be issued on the underlying crime (known as an arrest warrant) or on failures to meet court-mandated obligations, such as not appearing in court (known as a bench warrant).

Some notes on terminology and the focus of this report:

TERMINOLOGY: We recognize that the term “defendant” for persons moving through the HTICs and receiving services in some cases may be jarring. Nonetheless, we use “defendant” throughout this report when referencing individual interview subjects because it reflects the reality of their status in the criminal justice system. Although some actors may use words like “participant” or “human trafficking victim”, we decided against their use here. “Participant” implies voluntariness, when in fact everyone moving through New York’s HTIC system has been criminally charged and is in services pursuant to a court mandate. Similarly, the term “victim” is descriptively untrue – not everyone moving through the HTIC system meets the definition of a human trafficking victim—and does not reflect the manner in which HTICs’ treat persons under their purview: people in HTICs are treated as criminal defendants; they are mandated to complete certain services and are made to feel that they are under a constant threat of criminal sanction. Our use of the term “defendant” in no way represents an endorsement of the arrest of persons selling sex as a crime, nor of the way that people arrested on sex work-related charges are treated in the criminal justice system.

FOCUS: The HTIC model, with its reliance on traditional policing, reaches a very limited sub-set of people in the sex sector, primarily those arrested on the street and in massage parlors, with some arrests based on online and/or hotel conduct [for more information, see Section III of the report on *NYC HTIC structures and processes*]. This report therefore deals with only a sub-set of the people active in the sex sector. It is not reflective of the immense variation of the sites of sex work (which also include apartment, hotel, escort, web-based, among others). Moreover, the focus of the report on persons going through the HTICs does not reflect the diversity of persons in the sex sector: gender and racial stereotypes in policing result in the profiling of persons for arrest under prostitution laws. Although cis, trans, and nonbinary people of all genders, races, and national status can be found in different sex sectors, the HTICs see distinct sub-sets, primarily cisgender women, in most but not all courts.^{2,3} The number and proportion of non-U.S. nationals in the HTICs are unknown, but The Legal Aid Society reported that of all their clients arrested in NYC for unlicensed massage, 91% were non-citizens and 37% were undocumented.⁴ Recognizing the diversity of people in the sex sector and the variety of the forms of selling sex is important to effective interventions and organizing among affected persons in the sex sector. To the extent possible, this report seeks to not confuse work with and policy about street-based sex work with the work by and for other sex sector workers and the policy needed to protect their rights and health.

2 Ray, Audacia and Emma Caterine. *Criminal, Victim, or Worker? The Effects of New York’s Human Trafficking Courts on Adults Charged with Prostitution-Related Offenses*. New York City: Red Umbrella Project, 2014. redumbrellaproject.org/.

3 Monto, Martin A. “Objectivity, Activism, and the Challenge of Research on a Highly Polarized and Somewhat Stigmatized Topic.” *Challenging Perspectives on Street-Based Sex Work*. Ed. Corey Shdaimah, Ed. Katie Hail-Jares, Ed. Chrysanthi Leon. Philadelphia: Temple University Press, 2017.

4 Dank, Meredith, Jennifer Yahner, and Lilly Yu. *Consequences of Policing Prostitution: An Analysis of Individuals Arrested and Prosecuted for Commercial Sex in New York City*. Washington, DC: Urban Institute, 2017. <https://www.urban.org/sites/default/files/publication/89451/consequences-of-policing-prostitution.pdf>.

Executive summary

This report draws attention to and provides analyses of the actual operation and on-going missed opportunities and failures of the specialized courts launched statewide by the NYS Unified Court System's Human Trafficking Intervention Initiative with much fanfare in 2013: the sensationally named "Human Trafficking Intervention Courts" (HTICs). According to their founders and supporters, HTICs' seek to provide relevant criminal justice relief and sufficient services system-wide to interrupt the revolving door of criminalization and victimization posited as the essence of the wrong done to and experienced by the ostensibly "trafficked" persons.

Examination of practice calls out something different. The HTICs are in fact judge-driven municipal courts with a focus on persons arrested for low-level prostitution crimes—persons who can be diverted from penalties facing them on findings of guilt by completing a mandated set of counseling or social service sessions. However, what is revealed in the report is disquieting. The courts cannot fulfill what they are set up to do because of two core sets of contradictions: those arising from the conflation of trafficking with prostitution, and those arising from confusing criminal justice coercions and interests with the structures and practices needed for effective uptake of counseling and social services by marginalized and at-risk populations.

Working together with the Sex Workers Project of the Urban Justice Center, this report, titled "Un-Meetable Promises: Rhetoric and Reality in New York City's Human Trafficking Intervention Courts" by the Global Health Justice Project (GHJP) of the Yale Law School and School of Public Health, makes clear why this misdiagnosis and mistreatment arose and how the practices of the HTICs are experienced and are sustained by both defendants and court actors alike.

The report finds that although the courts and affiliated services are at times appreciated by the defendants who pass through them, the promises of the system are ultimately un-meetable: as long as over-policing of the poor along lines of race and gender, coupled with criminalization of buying and selling sex, are the context in which these courts operate, they cannot stop the revolving door of criminalization.

The overwhelming need of most defendants is stable housing and work opportunities, long-term mental health support structures, and the decriminalization of their livelihoods, identities, and conducts. However, too often, the services received through the HTICs are too few and too narrow in scope and capacity to effect the desired change. Moreover, embedding social services within a coercive penal context that frames defendants as "victims" but treats them like "criminals" raises concerns about both the efficacy of the services and the ethics of delivering them in mandated settings. And while some defendants report positive experiences and receive services of real value, we argue that this does not detract from the fundamental problem of making access to services contingent on a presumed "victim" status and involvement in the criminal justice system, with which any level of contact can be destabilizing and disempowering. On the rare occasion that the courts and service providers deliver on the promise to treat defendants with respect and attention to their needs, such decent practices ought to be a standard of practice for all court-involved persons, including those presumed to be involved in the sex sector. This practice of gatekeeping services by the CJS has been called "penal welfare," a term scholars Cohen,

Gruber, and Mogalescu employ to highlight the growing tendency of criminal law institutions to provision social benefits.⁵ Penal welfare does not resolve concerns regarding the potential for harm in any contact with the criminal justice system and may block or impede the development of alternative (i.e., not punitive) forms of remediation and assistance.⁶

In light of the disconnected workings of the HTIC and its irreconcilable gulf between reality and rhetoric, we argue that a more rehabilitative and compassionate role of the courts—in line with their own claims and goals – is one based on *clarity of mission, brevity of engagement, and decency of practice*. Instead of acting as a gatekeeper or manager of social services, courts should primarily occupy themselves with minimizing often intensive “diversion” program requirements as well as defendant time under CJS surveillance.

In practice, this means that the courts reduce their scope of activity and divest from the logics of penal welfare: to do so, they must implement uniform standards for practice and treatment of defendants that are non-judgmental, respectful, and compassionate and that minimize intensive program requirements as well as defendant time and contact with the criminal justice system. Accordingly, service mandates should involve minimal requirements and, upon their completion, charges should be immediately and expeditiously dismissed and sealed without an adjournment in contemplation of dismissal period (a typical ACD requires defendants to go six months with an open record and without any re-arrests before charges are dismissed and sealed). To the extent that the courts continue to facilitate access to social services, they should act as a springboard—not case manager—in setting up contact with community-based and -respected providers with whom defendants can choose to engage on their own terms. Service providers, in turn, should be responsible for assessing defendant needs, administering the mandate in a timely and appropriate manner, and monitoring, evaluating and accordingly revising which and how services are delivered according to ethics and standards supported by sex worker and other affected populations. Any further attempt to address the needs of persons engaged in sex work should be guided by their leadership.

The bulk of our recommendations are directed at the NYS Unified Court System, as the HTICs are their initiative. However, we also call for greater accountability from public-private agencies such as the Center for Court Innovation, which is intertwined in the operations of the HTICs and offers guidance to other jurisdictions planning so-called diversion initiatives. The CCI, despite its central role, has not yet provided evidence to support claims of effectiveness that move beyond goals of CJS efficiency and cost savings; given this, CCI should move to seriously evaluate health and rights improvements. Generating such evidence would require not only ethical, transparent, and independent data collection, but also engagement with the extensive literatures on social work, case management, and sex work, which are often critical of court-based service provision. Including the perspectives of court-involved persons, especially persons in the sex sector, would be central to any such evaluation.

⁵ Gruber, Aya, Amy Cohen, and Kate Mogulescu. “Penal Welfare and the new Human Trafficking Intervention Courts.” *Florida Law Review*, Vol. 68, 2016, pp. 1-73.

⁶ *Ibid.*

Taken together, findings of the report also make visible a need for deeper understandings of mass misdemeanor arrests, which includes research on policing as well as municipal courts and jails. In particular, greater attention must be paid to the gender- and race-specific challenges faced by women, both cis and transgender, caught in cycles of surveillance and criminalization for low-level offenses. While research in this domain of the criminal justice system can be difficult to carry out, it is often where injustice and precarity arise for marginalized communities.

In sum, the courts operate as a (well-intentioned, perhaps) band-aid on a wound neither correctly diagnosed nor adequately structured to fulfill their mandate. This report by the GHJP is undergirded by a health and justice framework and analyzes the courts in light of their historical antecedents (especially the storied New York Women's Court) as well as contemporary criminal justice trends toward "problem-solving" courts and "diversion" processes. Moreover, we place these ideas and practices in context, highlighting the experiences of court-involved persons and key actors, such as social service providers. Through these lenses, and in light of the current social anxiety and fascination over so-called sex trafficking, the underlying ideological and structural constraints emerge.

Roadmap of this report

The report is structured around questions around rhetoric, capacity, practices and underlying assumptions motivating these courts. It contains four main analytical sections as well as Conclusions and Recommendations and Appendices with our methodology and other information on our research.

I. A genealogy of "prostitution diversion" in New York: *Déjà vu all over again?*

The report begins with a historical and analytic section on the origins, practices, and narratives of over 100 years of criminological experimentation with responses to "women selling sex" in order to locate the latest iteration (HTICs) within their broader historical context in NYC in particular and the nation (in regard to experiments with "problem-solving" courts). Understanding shifting responses to prostitution over time, as well as the rise of contemporary "problem-solving" and "diversion" courts, helps to illuminate the paradoxes and flaws of the HTICs, which are in some technical and structural ways distinct from their predecessors (i.e., the Women's Court of the earlier 20th century and the Midtown Community Court of the 1990s), but also reveal remarkable continuities in their mix of ideas about gender, sex, crime, victimhood, and (coercive) rehabilitation.

II. Taking the measure of "problem-solving" courts and HTICs: Current frames, research, knowledge, and gaps:

After sketching a critical history of "problem-solving" courts in NYC, the report synthesizes the existing scholarship on the perceived challenges, rhetorical benefits, and ethical quandaries posed by these courts, with particular attention to the HTICs. Reoccurring themes in the scholarship on "problem-solving" courts include the contradictions and dangers of "penal welfare", which describes the growing practice of provisioning social services through courts. The tensions in this practice arise at several junctures: not only do such courts often fail to facilitate access to concrete material resources that address long-term systemic needs, but they may actually increase the intervention of criminal justice systems into defendants' lives.

The section highlights what is known of the practices and impacts of HTICs through a review of the few published reports on the HTICs, as well as through a mapping of the complex legal frameworks that shape its structure, and therefore also shape the experiences of affected defendants. With regards to the legal frameworks affecting the HTICs, it is important to note that while defendants can raise the defense of trafficking to a prostitution charge at the outset of prosecution, they forgo this defense if they chose to enter the HTICs and must accept an adjudication of their *prostitution offense* as if still a criminal defendant.

III. What happens in the NYC HTICs: Mapping the structures and processes through key stakeholders' eyes:

The section traces and analyzes the stated versus experienced goals, structures, and program elements of the HTICs, including entry points (policing and arrests), decisions on eligibility, practice of service provision, exit processes, as well as court operations and courtroom culture. The perspectives of persons engaged in the HTICs (service providers, court personnel, defense attorneys and defendants) collectively point to the opaqueness and inconsistencies surrounding the courts' practices: these qualities of the courts are a source of distress and disempowerment for many defendants who feel a near constant threat of criminal sanction and whose on-going disempowerment runs counter to the purportedly "rehabilitative" approach of the system.

IV. Deep dive on service provision in HTICs:

The section details and assesses the experiential perspectives of stakeholders on the efficacy, ethics and meaning of the mandated social service provision in the NYC HTICs. Often, the needs flagged by persons in the sex sector include housing assistance, economic opportunities, immigration assistance, childcare support, and a range of healthcare services. While the services offered via the HTICs (primarily counseling, case management, and referrals – regardless of need or readiness to engage) are desired by some defendants, the question remains whether making them contingent on involvement in the criminal justice system is appropriate in a health justice framework as well as effective in responding to the structural needs of defendants. There are also concerns that the HTIC-created demand outstrips the ability of providers to provide timely, comprehensive, and high-quality services to defendant and non-defendant populations, which raises questions about the distribution of funding and resources within and beyond the HTIC system.

Moreover, the coercive nature of prosecution and criminal justice procedures is at odds with the professional ethics of many social service professions, which emphasize the centrality of respecting client autonomy, securing informed consent, fostering self-determination, and avoiding coercion in therapeutic relationships. The section underscores the need for disentanglement and regulatory independence between social service and criminal justice systems, which the Conclusions and Recommendations section further expounds.

V. Conclusions and Recommendations:

The concluding section delivers recommendations directed at actors operating at all levels of influence within the HTIC system (NYS Unified Court District, Center for Court Innovation, law enforcement, service providers, etc.), with an eye towards guidance that promotes health, rights, and justice for sex worker and other communities affected by these criminal justice processes. The recommendations are

grounded in principles of human rights, harm reduction, and accountability while operating within a commitment to greater change: the complete decriminalization of sex work and associated practices, with criminal law interventions (including policing) reserved to a limited and minimal use in response to violence, coercion, theft (including theft of services) and other exploitative practices committed against persons in the sex sector. Without the decriminalization of sex work, we argue that the promises of the HTICs *cannot* be met and the claims of the system will continue to crumble under the weight its paradoxes. Recognizing these contradictions, the recommendations provide ideas for how the court system can scale back its role and scope of involvement in order to reduce immediate harms to sex workers as individuals and as communities caught in oppressive structures and cycles of surveillance, policing, arrest, prosecution, diversion, and incarceration.

Introduction: Why this report? NYC HTICs in national context and with an empirical and critical lens

This paper offers a history and review of the ideology, structure, and practices of Human Trafficking Intervention Courts (HTICs) in New York City, with particular attention to the provision of services in coercive environments. It seeks to build on concerns raised by sex worker advocates and service providers through a detailed examination of the genealogy, structure, processes, and service mandates of HTICs. While HTICs have been established in eleven countries through New York State,⁷ this report focuses on those in New York City, which plays an outsize role in modeling new criminal justice policies.⁸

At its statewide launch in 2013, New York State's system of HTICs generated considerable buzz in the criminal justice reform arena.⁹ HTICs claim to apply a “problem-solving” approach to criminal adjudication of low-level prostitution offenses by “diverting” defendants out of traditional criminal justice processes, such as detention, and into rehabilitative programming.¹⁰

The report comprises both desk research as well as observational study and interviews: desk research was conducted on the courts and into academic literatures on, among key topics, the emergence of “diversion” courts and processes in the United States, the provision of social services in criminal justice system settings, and critical analysis of law and practices affecting persons who sell sex, while observational study and interviews were carried out with key stakeholders, including service providers and persons who have gone through the HTICs as defendants [see Appendix I for the full interview list and a description of the study methods]. Although much of the original data for the study are from 2015/2016, our more recent observations of these programs in the summer of 2017 and in updates in 2018 is that, although the programs have changed somewhat in their details, their rhetoric, paradoxes and shortcomings remain constant.

While our analysis is provisional, the goal of this report is to stimulate more close reviews of and accountability for these processes: a rhetorical claim to “do good” cannot substitute for actual demonstrations of impact on the lives, health and rights of people already vulnerable to systematic neglect and abuse.

Our goal in researching the overall shape of HTICs and adding a more in-depth analysis of service delivery in HTICs in New York City is to supplement the existing empirical literature on “prostitution courts”. These courts are distinctive for their special emphasis on “rehabilitation” or changing lives, which, according to the language of the programs, is to be accomplished through the meeting of needs by social service delivery. Yet, to date, there has been no systematic attempt to describe and evaluate the social service components of these programs.

7 “Human Trafficking Intervention Courts: Court Locations.” *NY State Unified Court System*, NYCourts.gov, January 2017, www.nycourts.gov/courts/problem_solving/htc/courts.shtml.

8 See, for example, Issa Kohler-Hausmann's justification for why she focused on misdemeanors in NYC. She said: “The jurisdiction I have chosen—New York City—pioneered the intentional expansion of misdemeanor arrests as part of a new policing strategy. Although New York is not a representative American city in many respects, its law enforcement experiment is widely looked to as a national model for crime control, and the system of misdemeanor justice that has emerged there represents a model of criminal administration distinct from anything discussed in ordinary courses on criminal law.” [Kohler-Hausmann, Issa. “Managerial Justice and Mass Misdemeanors.” *Stanford Law Review*, Vol. 66, 2014, pp. 611-694.]

9 Lippman, Jonathan. “Announcement of New York's Human Trafficking Intervention Initiative.” *Center for Court Innovation*, 4 Oct. 2013, www.courtinnovation.org/articles/announcement-new-yorks-human-trafficking-intervention-initiative.

10 Gruber, Cohen & Mogalescu, “Penal Welfare,” 6.

The unique contribution of this report lies in its synthesis of perspectives—offered by social service providers, defendants, court staff, and others who participate in the operations of these courts—on the social services mandated by HTICs. A growing body of social service literature, which focuses on the ethics and efficacy of providing services in a carceral setting, only episodically seems to enter legal and policy scholarship, so we also aim to bring these bodies of work into conversation.^{11,12,13}

When it comes to the conceptualization of prostitution as a “quality of life” offense and the use of a “problem-solving” approach to its adjudication as a criminal offense, there are additional complexities arising in HTICs as “problem-solving” courts and gateways to services.

One major issue stems from applying a neoliberal treatment paradigm (arising from a public health/individual behavior change intervention model) to a conduct that is a livelihood strategy. While some people may sell sex because of needs arising from drug use or owing to poverty-exacerbated mental health issues, the actual conduct which is meant to be reduced by diversion programs is not a behavioral problem, but rather an economic exchange: for many, sex work is a part of the low-wage economy and represents a rational solution to employment needs in a limited labor market.^{14,15} A “problem-solving” approach to prostitution eschews the economic and other structural factors at play; instead, this approach tends to track neoliberal ideologies and practices by blurring therapeutic and coercive mechanisms and focusing on individual problems and solutions instead of state responsibility and systemic change.¹⁶ Although the services provided through these “diversion” initiatives may in fact deliver desired support for some individuals at times, what is offered (mental health and trauma counseling) as well as what is not often offered (job training, housing assistance) exemplifies a scattershot and often inadequate response to prostitution (which is often conflated with “trafficking” in court rhetoric).¹⁷

The histories of national efforts toward “diversion” within the continuing punitive practices around misdemeanors, as well as the specific history and critical state- and city-level efforts in New York, help uncover an essential incoherence that characterizes HTICs: the HTICs rebrand some individuals as agency-less “victims”, but offer social services contingent on defendants’ participation in the criminal process, thus implicitly casting them as “criminals”.¹⁸

11 Shdaimah, Corey. “Taking a Stand in a Not-So-Perfect World: What’s a Critical Supporter of Problem-Solving Courts to Do?” *University of Maryland Law Journal of Race, Religion, Gender and Class*, Vol. 10, Issue 1, 2010, pp. 89-111.

12 Strangio, Chase. “Project Rose: A Case Study on Diversion, Sex Work, and Constitutionality.” *Challenging Perspectives on Street-Based Sex Work*. Ed. Corey Shdaimah, Ed. Katie Hail-Jares, Ed. Chrysanthi Leon. Philadelphia: Temple University Press, 2017.

13 Wahab, Stephanie and Megan Panichelli. “Ethical and Human Rights Issues in Coercive Interventions with Sex Workers.” *Affilia: Journal of Women and Social Work*, Vol. 28, Issue 4, 2013, pp. 344-349.

14 Rosen, Eva and Sudhir Alladi Venkatesh. “A ‘Perversion’ of Choice: Sex Work Offers Just Enough in Chicago’s Urban Ghetto.” *Journal of Contemporary Ethnography*, Vol. 37, No. 4, 2008, pp. 417-441.

15 Leon, Chrysanthi and Corey Shdaimah. “JUSTifying Scrutiny: State Power in Prostitution Diversion Programs.” *Journal of Poverty*, Vol. 16, 2012, pp. 250-273.

16 Ibid.

17 Shdaimah, Corey and Marie Bailey-Kloch. ““Can You Help With That Instead of Putting Me in Jail?”: Participant Insights on Baltimore City’s Specialized Prostitution Diversion Program.” *Justice System Journal*, Vol. 00, Issue 00, 2014, pp. 1-14.

18 Baylson, Mira. “Victim or Criminal? Street-level Prostitutes and the Criminal Justice System” *Challenging Perspectives on Street-Based Sex Work*. Ed. Corey Shdaimah, Ed. Katie Hail-Jares, Ed. Chrysanthi Leon. Philadelphia: Temple University Press, 2017.

The paradox of the trafficking defense

As described more thoroughly in Section II of the report, New York amended its penal code to create new trafficking-related crimes in 2007,¹⁹ and by 2010 it became the first state to pass legislation allowing trafficking victims to vacate prior prostitution charges based on evidence of being trafficked.^{20,21} Moreover, in 2015, the legislature made trafficking an affirmative defense to a charge of prostitution, prostitution in a school zone, and loitering for the purposes of prostitution.²² It is important to note, however, that while this option to plead an affirmative defense for trafficking victims uses the same language and narratives of “trafficking” as the HTICs, it is a totally separate and exclusive process not available to those who opt into the HTIC system.

There is a fundamental tension in the idea that the defendants are “trafficking victims”, and in turn that they should be “rehabilitated” in the penal framework of the criminal court, where they can be (and some are) convicted of criminal charges. Estimates of the percentage of HTIC cases that result in convictions vary and seem to have changed over time. In their testimony at the City Council Oversight Hearing on the effectiveness of HTICs, Brooklyn Defenders Services stated that 40% of their HTIC caseload results in convictions.²³ However, of 1,400 defendants charged with prostitution offenses in NYC between 2015 and 2016 and represented by The Legal Aid Society, 84% of cases were fully dismissed, 10% were resolved with a conviction for a lesser offense (ex. disorderly conduct), and 6% resulted in convictions for prostitution-related or more serious charges.²⁴ Even if the majority of cases do not result in convictions, as the latter report would suggest, our interviews for this report indicate that defendants perceive themselves to be under serious threat of sanctions throughout their involvement in the HTICs, including during the ACD period. This perception of threat, coupled with fear of ongoing policing, generates anxiety and results in a sense of powerlessness and stasis.

The inherent contradictions (and objective and subjective impairments) that arise as defendants move through HTICs as “criminal/victims” pose particularly complex practical and ethical questions for service providers and court officials working within these systems – questions that have been raised, but only rarely joined to other legal and advocacy literatures. This report seeks to amplify attention to the intersections and the key health and rights needs of persons arrested for street-level sex work offenses in NYC. What do defendants experience in these programs? Are they rehabilitative, or do they create new harms? How do service providers conceive of their role in these systems? This report sketches initial answers to these questions and highlights additional points of inquiry that we hope spur further research and data collection.

19 N.Y. Penal Law §§ 135.35, 230.34 (2007).

20 N.Y. Crim. Proc. Law § 440.10 (2010).

21 Broudo, Melissa, and Sienna Baskin. *Vacating Criminal Convictions for Trafficked Persons: A Legal Memorandum for Advocates and Legislators*. New York: Sex Workers Project, 2012.

22 N.Y. Pen. Law § 230.01.

23 Modzeleski, Jillian. “BDS testifies at NYC Council Oversight Hearing on the Effectiveness of Human Trafficking Intervention Courts.” *Brooklyn Defender Services*, 18 Sept. 2015, bds.org/bds-testifies-at-nyc-council-oversight-hearing-on-the-effectiveness-of-human-trafficking-intervention-courts/.

24 Dank, Yahner, & Yu, *Consequences of Policing Prostitution*, 8.

I. A genealogy of “prostitution diversion” in New York: Déjà vu all over again?

NYS HTICs sit at the intersection of two streams of criminal justice work: prostitution-specific (mostly women-focused efforts) and more gender blind criminal justice reform efforts framed as problem-solving courts. These efforts overlap in time, and share some, but not all, of their rhetoric, thus reminding us how much traditional CJS and policing efforts have siloed responses to crimes associated with women, sexuality and morality.

In particular, reviewing the last century of experimentation with prostitution-focused courts and processes in NYC provides useful background to contemporary mapping and analysis of HTIC ideologies, structures, processes, and experiences. From the early 20th century New York City Women’s Court to “problem-solving” courts decades later, special adjudication processes for (predominantly cisgender) women arrested for prostitution have been common practice in the city; criminal courts have often been conceptualized by reformers with a variety of underlying motivations as avenues for social problem-solving and psycho-social treatment.²⁵

Understanding the origins, ideologies, and practices of past prostitution diversion courts, in light of the contemporaneous movement of “problem-solving” courts, helps to illuminate the paradoxes and flaws of current practices of the HTICs, which are in some technical and structural ways distinct from their predecessors, but also reveal remarkable continuities in their mix of ideas about gender, sex, crime and (coercive) rehabilitation.²⁶

A. The New York Women’s Court: Early 20th century responses to the new “victim/prostitute”

Although the HTICs are frequently heralded as a new and innovative approach to prostitution and trafficking,²⁷ prostitution-specific courts have a long and storied history in New York. From the 17th through the 19th centuries, prostitution was considered a “moral” or “vice” offense, along with vagrancy, drunkenness, and disorderly conduct.²⁸ By the late 19th century, sex became “an activity increasingly directed by economic and market forces”²⁹ as brothels and “bawdy houses” dramatically increased in number in NYC, concentrated in a few neighborhoods of the city.³⁰

By the turn of the 20th century, views on prostitution (and women selling sex) were increasingly influenced by Progressive-era social mores and critiques of the “evils” of industrial capitalism. Court reformers of this period began to re-categorize female sellers of sex not as evil or “loose” women, but as “victims of social and economic forces beyond their control”, deserving treatment rather than punishment.³¹

25 Cohen, Amy J. “Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City.” *Texas Law Review, Ohio State Public Law Working Paper No. 379*, 2017.

26 Ibid., 951-954.

27 Schweig, Sarah, Danielle Malangone, and Miriam Goodman. *Prostitution Diversion Programs*. New York: Center for Court Innovation, 2012, pp. 3.

28 Gruber, Cohen & Mogalescu, “Penal Welfare,” 8.

29 Gilfoyle, Timothy J. *City of Eros: New York City, Prostitution, and the Commercialization of Sex, 1790-1920*. New York: W.W.Norton & Company, 1994, pp. 20.

30 Ibid., 30-36.

31 Cohen, “Trauma and the Welfare State,” 924.

Anti-prostitution crusaders attributed female exploitation to the excesses of commercialism and consumerism, particularly in New York City.³² The Committee of Fourteen, a private association of wealthy and influential citizens formed in 1905, aimed to suppress commercialized vice in the city. The Committee urged the municipal government to prevent prostitution and end the spread of venereal disease.^{33,34} In 1907, the Committee pushed the city to set up specialized “night courts”, which processed criminal cases in the wake of police raids of hotels, tenement buildings, and suspected brothels, often occurring after regular court hours.³⁵

Social reformers’ concern, specifically for “exploited women”, resulted in local legislation which separated night courts into separate courts for male and female offenders.³⁶ Judges in the Women’s Court were afforded increased controls over women in the court; not only was finger printing mandated, but magistrates could order convicted defendants to submit to physical exams and even detention if they were found to be ill.³⁷ The Women’s Court was praised by reformers for allowing for the specialized treatment of cases and for its “tender regard” for women, especially first-time offenders.³⁸ Spectators were encouraged to attend court proceedings to witness the moralizing approaches of the judges and to see this process as serving as an “uplifting approach”. Ironically, while this allegedly uplifting approach was presented as an “emancipation” of women, the word of law enforcement was often prioritized over the testimonies given by women themselves.³⁹

Similar to the rhetoric today around HTICs, the Women’s Court movement saw itself as a progressive reaction against the “police” courts of an earlier period, with their draconian approaches and preference for incarceration.⁴⁰ The Women’s Court was touted as a “new kind of informal social welfare institution” in which jurists aimed to treat “social ills” more holistically by avoiding reliance on incarceration.⁴¹ Notably, Cohen and others point out that this informality was associated not just with moralism, but with more intimate forms of control of women’s lives.

The NYC Women’s Court became mired in conflict and controversy.⁴² Although it appears that public solicitation declined during the 1920s in NYC, arrests continued at the same rate. Moreover, critics in the 1930s and 40s decried the Court’s abridgement of civil liberties and procedural due process, contesting the wide judicial discretion and informality of the Women’s Court.^{43,44} By 1967, the Women’s Court had fallen sufficiently out of favor that it was abolished in the context of a broader reorganization of the New York court system that got rid of magistrate courts more generally.⁴⁵ Notably, in 1969, prostitution was

32 Ibid., 924-928.

33 Committee of Fourteen records, 1905-1932. MssCol 609. Manuscripts and Archives Division, The New York Public Library, New York City.

34 Quinn, Mae C. “Revisiting Anna Moscowitz Kross’s Critique of New York City Women’s Court: The Continued Problem of Solving the “Problem” of Prostitution with Specialized Criminal Courts.” *Fordham Urban Law Journal*, Vol. 33, No. 2, 2005, pp. 106-109.

35 Ibid., 108.

36 Laws of 1907, Ch. 598, adding section 1397-a to the Greater New York Charter (“The Agnew Bill”).

37 Cohen, “Trauma and the Welfare State,” 934-937.

38 Quinn, “Revisiting Anna Moscowitz Kross’s Critique,” 11.

39 Ibid., 112, 116.

40 Cohen, “Trauma and the Welfare State,” 922-923.

41 Ibid., 947.

42 Ibid., 941-942.

43 Ibid., 945.

44 Quinn, “Revisiting Anna Moscowitz Kross’s Critique,” 118.

45 Ibid., 130-131.

re-classified as a class B misdemeanor, with a 90-day maximum sentence.⁴⁶ Cases were dealt with alongside other misdemeanors—raising all the concerns vis-à-vis racist policing, unaccountable practices, and insufficient attention to actual justice raised by many scholars of criminal law, as well as the issues specific to so-called vice crimes, in this case around sexuality, gender and morality.^{47,48}

“White Slavery,” the Mann Act, and the racialized rhetoric of trafficking

The early 20th century also saw a parallel political conversation emerging at the national level. Concerns about “white slavery” and human trafficking had pervaded public political spheres by the late 1800s, linked to stories stoking a popular racialized anxiety about the influx of immigrants into the U.S during this period.⁴⁹ These narratives, popularized through media, portrayed white European girls who had been tricked into prostitution,^{50,51} as well as rural American women trafficked into urban areas.^{52,53} Sociopolitical perceptions of the exchange of sex for money were complicated; such political and journalistic narratives implied a distinction between “innocent” and “fallen” women, in which only “innocent” women were worthy of protection. Involuntary participation in the sex trade was simultaneously presumed and doubted for these women.⁵⁴

As American politicians grew increasingly concerned about the movement of white women across borders for “immoral purposes” (i.e., commercial sex), the Congressional Immigration Commission, chaired by Senator William Dillingham of Vermont, issued a report in 1909 that described the entry of women into the U.S. as part of the international sex trade.⁵⁵ The Commission was particularly concerned about the “infection of innocent wives and children” through the “evils of prostitution”. In 1910, the White-Slave Traffic Act (more commonly known as the Mann Act) was passed in the U.S. Congress. This federal law criminalized activities thought to facilitate the trafficking of women across state or national borders, as well as the persuasion or coercion of any female in interstate or foreign commerce “for the purpose of prostitution or debauchery.”⁵⁶

46 Cohen, “Trauma and the Welfare State,” 945, and see section on *Key legal frameworks affecting the HTICs*.

47 Kohler-Hausmann, Issa. *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing*. Princeton: Princeton University Press, 2018.

48 Gruber, Cohen & Mogalescu, “Penal Welfare.”

49 Bromfield, Nicole F. “Sex Slavery and Sex Trafficking of Women in the United States: Historical and Contemporary Parallels, Policies, and Perspectives in Social Work.” *Journal of Women and Social Work*, Vol. 31, No. 1, 2016, pp. 129-139.

50 Doezema, Jo. “Loose women or lost women? The re-emergence of the myth of white slavery in contemporary discourses of trafficking in women.” *Gender Issues*, Vol. 18, Issue 1, 1999, pp. 23-50.

51 Wahab, Stéphanie. ““For Their Own Good?”: Sex work, social control and social workers, a historical perspective.” *The Journal of Sociology and Social Welfare*, Vol. 29, Issue 4, Article 4, 2002, pp. 39-57.

52 Donovan, Brian. *White Slave Crusades: Race, Gender, and Anti-Vice Activism, 1887-1917*. Urbana: University of Illinois Press, 2006.

53 Addams, Jane. *A new conscience and an ancient evil*. New York: McMillan, 1912.

54 Doezema, “Loose women or lost women?”

55 United States Immigration Commission 1907-1910. *Importing women for immoral purposes: a partial report from the Immigration Commission on the importation and harboring of women for immoral purposes*. 61st Congress, Document No. 196, 1909.

56 18 U.S.C. §§ 2421–2424 (1910).

B. The rise of contemporary “problem-solving” and “diversion” courts: National and New York City-specific stories and practices

Since the abolition of the Women’s Court in the 1960s, New York has experienced at least two waves of reforms to the criminal justice system, with the creation of “problem-solving” courts in the 1990s (part 1 of this section) and now the emergence nationally of pre-arrest/pre-booking diversion programs (part 2).⁵⁷ Many factors precipitated these shifts, including larger nation-wide trends in criminal procedural reform and increased concerns over the financial and bureaucratic burdens of mass incarceration.⁵⁸

While New York State may be something of a pioneer where *prostitution-specific* diversion initiatives are concerned, its programs are part of a much broader, longstanding national trend in states and cities toward “problem-solving,” “diversionary,” or “alternative” processes and courts. Starting in the late 1980s, courts around the country began reevaluating approaches to “quality of life” offenses committed by populations thought to be vulnerable and in need of rehabilitation.⁵⁹ The resultant shift towards a rhetoric of rehabilitative criminal justice is attributable to a variety of factors, including:

*overburdened courts, crowded jails and prisons, strained government budgets, advances in the science of drug use [and mental health] intervention and recovery, shifting public sentiment about drug [and mental health] policy, awareness of the negative and residual impacts of justice involvement on families and communities, and a preponderance of research on the effectiveness and cost efficiency of alternatives to incarceration.*⁶⁰

These considerations prompted the creation throughout the 1990s and 2000s of hyper-local, specialized dockets around the country for specific populations and offenses—drug and alcohol courts, mental health courts, veterans’ courts, courts for juveniles, people who are homeless, first-time offenders, etc.^{61,62}

1. New York: “Broken windows” policing and the emergence of “problem-solving” courts

In NYS, the emergence of “broken windows” policing in the 1990s—an approach to law enforcement that linked visual social disorder to violent crime—was central to this story in NYC.⁶³ According to William Bratton, Mayor Rudy Giuliani’s first police commissioner (1994-1996),⁶⁴ targeting “crimes committed against the community” (e.g., prostitution, panhandling, or graffiti) was an efficient way to reduce overall crime. This new regime of policing resulted in a sharp increase in “mass misdemeanor” arrests.⁶⁵ According to legal scholar Issa Kohler-Hausmann, these mass misdemeanor arrests gave rise to a new model of criminal justice administration, in which the goal is not to adjudicate specific cases, but to enact social control by sorting, regulating, and monitoring the populations targeted by “broken windows”

57 Cohen, “Trauma and the Welfare State,” 945-948.

58 Ibid., 946-948.

59 McLeod, Allegra M. “Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law.” *Georgetown Law Journal*, Vol. 100, 2012, pp. 1587-1674.

60 *No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives*. Chicago: Center for Health and Justice at TASC, 2013.

61 McLeod, “Decarceration Courts.”

62 Hail-Jares, Katie, Corey S. Shdaimah, and Chrysanthi S. Leon, editors. *Challenging Perspectives on Street-Based Sex Work*. Philadelphia: Temple University Press, 2017.

63 Gruber, Cohen & Mogalescu, “Penal Welfare,” 9.

64 Bratton returned as Police Commissioner under Mayor de Blasio, 2014-16.

65 Gruber, Cohen & Mogalescu, “Penal Welfare,” 10.

policing practices through their involvement with the criminal justice system over time.⁶⁶ This shift in policing priorities towards low-level offenses also had a gendered impact: while the risk of arrest increased for both men and women, the risk was amplified for women, who are more likely to be involved in the types of minor offenses targeted by broken windows policing than in higher level offenses.⁶⁷ Reflecting this gendered impact, between 1980 and 2009, the arrest rate for simple drug possession or use tripled for women, but only doubled for men.⁶⁸ Moreover, the number of women arrested as a proportion of total arrests more than doubled from 11% in 1960, to 26% in 2014.⁶⁹

At the same time that there was a rapid increase in public arrests resulting from new policing tactics, including Bratton's own initiatives, the New York court system began to operate "problem-solving" courts, known in some instances as "community courts". These courts adopted the individualist perspective that characterized public policy more broadly during the 1990s; problem-solving courts of this era reflect the "larger ethos of personal responsibility" which had integrated itself into the welfare system proper after the 1996 TANF reforms in which welfare morphed into a contractual, conditional relationship between citizen and state.⁷⁰

The most prominent of these "problem-solving" courts was the Midtown Community Court (MCC), established in 1993. The MCC combined punishment (most often through community service) with the rhetoric of "self-help" (through social and educational services).⁷¹ While policing practices aimed solely to reduce the visibility of "vice" crime, emerging community courts and "problem-solving" courts claimed to incorporate a deeper, more "rehabilitative" approach to misdemeanor crime.⁷²

The Center for Court Innovation spearheaded the creation of the MCC and other such problem-solving courts.⁷³ As with the involvement of the Committee of Fourteen in the creation of the Women's Court in 1907, a cadre of influential, wealthy citizens were involved in the MCC's establishment. In this case, it was a collection of high-powered professionals involved in developing the Times Square Business Improvement District who helped to fund and administer the project, with help from and vocal advocacy by a new cohort of crusaders mobilizing specifically against sex work.⁷⁴

In Midtown, "no thorough democratic process was used to decide what constituted a neighborhood 'problem' in need of resolution"; sex workers and others categorized as "vice criminals" had little input in the evolution of the Court, and business interests had an undue and unfair influence on policing, arraignment, and sentencing processes that affected sex workers and others in the area.⁷⁵ Court proceedings were insulated from review, as were "pernicious" police practices and invasive judicial monitoring.⁷⁶ Sex workers and others who were arrested in Midtown under policies of expanded police discretion faced

66 Kohler-Hausmann, "Managerial Justice and Mass Misdemeanors."

67 Swavola, Elizabeth, Kristine Riley, and Ram Subramanian. *Overlooked: Women and Jails in an Era of Reform*. New York: Vera Institute of Justice, 2016.

68 Ibid.

69 Ibid.

70 Cohen, "Trauma and the Welfare State," 953.

71 Gruber, Cohen & Mogalescu, "Penal Welfare," 11.

72 Ibid., 1344.

73 Cohen, "Trauma and the Welfare State," 946-947.

74 Quinn, "Revisiting Anna Moscovitz Kross's Critique," 133-134.

75 Ibid., 147-148.

76 Ibid., 150-152.

community service and/or mandated participation in social services programs, and if they failed to fulfill these requirements, they faced the possibility of incarceration.⁷⁷

While the (limited) welfare administered through problem-solving courts like the MCC was vaguely reminiscent of practices in the Women’s Court, scholars have flagged both similarities and differences between the two:

*...whereas treatment-oriented Progressive-era courts offered programs of moral and behavioral reform to adjust deviant social behaviors that undercut an idea of good social-moral order, problem-solving courts aspire to teach individual responsibility to cure the individual pathologies that undercut an idea of a good ordered self.*⁷⁸

The 20th century MCC was both modernizing and pathologizing—in their focus on individuals and the use of health rhetoric, as well as their invocation of community standards, the MCC laid some of the groundwork for the HTICs to come.^{79,80,81}

Today, review of current “problem-solving” courts at the national level reveals, on the one hand, widely divergent in practices, but common language: most “problem-solving” courts use the same language to describe their end goals – they all claim to interrupt cycles of criminalization by “diverting” offenders into services and rehabilitative programming designed to help them achieve stable, law-abiding lives. Some programs reward those who successfully complete their prescribed mandate—such as substance abuse treatment, counseling, or life skills classes—with reduction, dismissal, or vacation of criminal charges. Notably, these processes are massively under-examined for their actual effects.⁸²

A lack of attention to gender specificity, in regard to women in general (including trans women) is often definitional in U.S. criminal justice and policing policies. While it is true that men dominate the criminal defendant and prison and jail populations, women of all kinds are among the fastest growing populations.⁸³ And the lack of gender specificity in CJS policy and research is nearly overwhelmed by the race discriminatory aspects of the system; the last five years of work against mass incarceration focuses rightly on race and racism, as well as a withdrawing welfare state and authorities governing through “fear of crime” and risk, but^{84,85} lacks attention to the intersecting aspects of gender and race (for both cis- and transgender persons).

77 Ibid., 138-139.

78 Cohen, “Trauma and the Welfare State,” 948.

79 Ibid., 949-950.

80 Leon and Shdaimah, “JUSTifying Scrutiny: State Power in Prostitution Diversion Programs”

81 Shdaimah, Corey. “Response - Prostitution/Human Trafficking Courts: Policy Frontline as Fault line.” *Texas Law Review Online*, Vol. 96, 2017.

82 Csete, Joanne, and Denise Tomasini-Joshi. *Drug Courts: Equivocal Evidence on Popular Intervention*. New York: Open Society Foundations, 2015; See also Yale Global Health Justice Partnership, *Diversion from Justice: A rights-based analysis of local “prostitution diversion programs” and their impacts on people in the sex sector in the United States*. New Haven, CT: Global Health Justice Partnership of Yale Law School and School of Public Health, 2018.

83 Swavola, Riley, and Subramanian, *Overlooked: Women and Jails in an Era of Reform*, 6.

84 Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New Press, 2010.

85 Simon, Jonathan. *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. New York: Oxford University Press, 2007.

Finally, and more recently in terms of “trends” in criminal justice in the U.S., an entirely different stream of “diversion” practices are also evolving in NYS and nationally, in which the focus is pre-arrest or pre-booking intervention to connect affected populations to social services without an arrest (as opposed to HTICs, which are post-booking “diversion” interventions).

2. National trends in pre-arrest and pre-booking “diversion” programs: Potential and concerns

Beginning around 2011, a new wave of pre-arrest and pre-booking “diversion” programs have been emerging as strategies to reduce the harms associated with contact with the criminal justice system.⁸⁶ Police officers are generally given discretionary authority at point of contact to divert individuals who commit low-level offenses to case management and trauma-informed social services, in lieu of traditional prosecution and criminal justice proceedings. Models for pre-booking and pre-arrest programs include the Law Enforcement Assisted Diversion (LEAD)⁸⁷ programs implemented in several cities including Albany, NY, as well as the Pre-Arrest Diversion (PAD)⁸⁸ initiative being piloted in Atlanta/Fulton County, GA.

These pre-arrest/pre-booking models differ from the HTICs—which offer interventions only after an arrest has been made/charges filed—by attempting to interrupt cycles of criminalization earlier. The offenses eligible for diversion are generally street-level petty offenses, or “violations driven by unmet behavioral needs”, such as those associated with drug use, mental health and poverty.⁸⁹

Pre-arrest/pre-booking programs claim to be community-based approaches informed by harm reduction philosophies. If developed and implemented with these harm reduction principles, including the participation of the most affected in their design, implementation and evaluation, these programs have some promising elements. However, most pre-arrest and pre-booking models still operate within the framework of the criminal justice system by making police officers gatekeepers to social services and bestowing them with wide discretion and authority in determining who to divert. In addition, individuals’ failure to adhere to the terms of the diversion program may trigger clawback provisions, such as a misdemeanor summons, that may result in criminal proceedings, and/or informal reports of social workers turning to policing to coerce drop-outs to return. Considering the sizeable public and private grants going to pre-arrest/pre-booking programs,⁹⁰ it can also be considered whether funding social service programs directly could achieve the same outcomes without increasing police contact.

Moreover, these programs could actually have a net widening effect (in this sense, meaning both increased police-community contact and/or arrest rates)⁹¹, particularly in environments where police were not actively arresting the divertible offenses in normal operating procedure and begin diverting individuals

86 “About LEAD.” *LEAD (Law Enforcement Assisted Diversion), Seattle*, www.leadkingcounty.org/about/.

87 “What Is LEAD?” *LEAD National Support Bureau*, www.leadbureau.org/.

88 “Atlanta/Fulton County Pre-Arrest Diversion Initiative.” *Atlanta Fulton County Pre-Arrest Diversion Initiative*, prearrestdiversion.org/.

89 “What Is LEAD?” *LEAD National Support Bureau*, www.leadbureau.org/.

90 For more information on the public and private funding streams involved in the Albany LEAD program, see page 6. [Report to Albany on the LEAD Program: One Year Anniversary April 1, 2016-March 31-2017. Albany: LEAD Albany, 2017. https://d3n8a8pro7vhm.cloudfront.net/katal/pages/117/attachments/original/1519030430/2017_Alban_Year_Report.pdf?1519030430].

91 Natapoff, Alexandra. “Misdemeanor Criminalization.” *Vanderbilt Law Review*, 2015.

they would have otherwise left alone on the grounds of connecting them with social services. In these environments, arrest numbers may not decrease and interaction with police (and all of its attendant risks) may actually increase. This relates to questions of accountability (both in regard to financial flows and in terms of responsiveness to key populations) as well as meaningful evidence-based outcome evaluations of these processes, which are still in question in most settings.⁹² While some programs have monitoring and evaluation processes in place, reports released to date are not conclusive on whether there are net widening or other unintended external impacts, particularly with regard to effects on police-community encounters.

C. Trafficking, violence, and trauma today: The age of HTICs

Building off the purported “success” of courts like the MMC, and clearly riding the wave of the contemporaneous interest in the harms of “trafficking” [see text box below on *Contemporary understanding of trafficking*], New York State Chief Judge Jonathan Lippman in 2013 rolled out the New York State Unified Court System’s Human Trafficking Intervention Initiative—the newest iteration of specialized courts addressing prostitution-related criminal offenses. Introducing the initiative at the Citizens Crime Commission, Lippman declared that “within the new framework that we are creating, New York will be a trail blazer, the first state in the nation to create a statewide system of courts, designed to intervene in the lives of trafficked human beings and to help them to break the cycle of exploitation and arrest.”⁹³

In his announcement of the court-led expansion of the HTIC model to the rest of the state, Chief Judge Lippman drew heavily from the rhetoric of the anti-trafficking movement, noting that:

*For most of our history, trafficking victims had an entirely negative place in our culture. They were thought of not as victims, but as criminals, addicts, delinquents, incorrigible and profit-driven. Many still feel that way, but we have come a long way in our understanding of this complex problem. We have come to recognize that the vast majority of children and adults charged with prostitution offenses are commercially exploited or at risk of exploitation. All too often, they are victims of intimate partner violence, unable to extricate themselves and needing protection from their abusers. They may be runaways, easy prey to traffickers, or be in the grip of an addiction that has led to their exploitation.*⁹⁴

⁹² LEAD Albany is in the process of conducting process and outcome evaluations [Report to Albany on the LEAD Program: One Year Anniversary April 1, 2016-March 31-2017. Albany: LEAD Albany, 2017. https://d3n8a8pro7vhmx.cloudfront.net/katal/pages/117/attachments/original/1519030430/2017_Albanys_LEAD_First_Year_Report.pdf?1519030430] and LEAD Seattle has conducted and released three to date on: 1) Participants’ experiences with LEAD case management, 2) Participant Housing, Employment, and Income Outcomes, and 3) Criminal Justice and Legal System Utilization and Associated Costs. The aforementioned evaluations, however, do not address concerns such as net widening with regards to police contact and other unintended external effects. [“LEAD - LEAD Evaluation.” *Law Enforcement Assisted Diversion (LEAD)*, leadingcounty.org/lead-evaluation/.]

⁹³ Lippman, “Announcement of New York’s Human Trafficking Intervention Initiative.”

⁹⁴ *Ibid.*

Instrumentalizing “trauma” in trafficking narratives

The broader violence-against-women movements, especially the domestic intimate partner violence (IPV) movement and its language of violence and trauma, also shaped the contemporary anti-trafficking frame, as evidenced by Judge Lippman’s comments.

Scholars Cohen, Gruber, and Mogalescu have extensively analyzed the way that ideas about IPV shaped judicial understanding of the behavior of the women before them in court – and also shaped what they understood to be the right court responses, including a focus on counseling and trauma services.⁹⁵ Cohen, for example, argues that the language of trauma is particularly useful in the context of court-mandated responses to sex work, as it allows defendants to be treated as both victims (traumatized into their criminal actions) and agents (active in carrying out a criminal behavior). She argues this squares the circle of contradictions between the courts accepting that sex workers are guilty actors who can be swept from the streets and simultaneously mandating a softer approach of providing counseling and trauma services to sex workers as “trafficking victims”.⁹⁶ “Trauma” itself is rarely actually investigated, left “underspecified” in the workings of the HTIC, according to Cohen.⁹⁷

The “ideal victim” theory attempts to explain how the treatment and outcomes of defendants in criminal justice proceedings is often influenced by who is recognized as a legitimate “victim”, with the process of victim identification being deeply bound up with ideological beliefs about defendants’ characteristics and behaviors, including their sexuality, gender, and race.⁹⁸ Building on this theory, Corrigan and Shdaimah argues that women involved in “sexual crimes”, including prostitution, must make themselves intelligible to legal actors through courtroom “performances consistent with expectations about victimization and trauma.”⁹⁹ The expectation that defendants display trauma and vulnerability in order to legitimize their claims is undoubtedly rife with paternalism and liable to inequitable outcomes, but it is also a site where Shdaimah claims some defendants have exercised strategic agency in the face of limited options: defendants are often cognizant of the normative understandings held by criminal justice decision makers and may choose to fulfill their expectations of “traumatized victim” in order to secure recognition, resources, and legal protections for themselves.^{100,101}

95 Gruber, Cohen & Mogalescu, “Penal Welfare.”

96 Cohen, “Trauma and the Welfare State,” 983.

97 Ibid., 983.

98 Corrigan, Rose and Corey Shdaimah. “People with Secrets: Contesting, Constructing, and Resisting Women’s Claims about Sexualized Victimization.” *Catholic University Law Review*, Vol. 65, Issue 3, 2016, pp. 436-429.

99 Ibid., 434.

100 Ibid.

101 Shdaimah, Corey and Chrysanthi Leon. ““First and Foremost They’re Survivors”: Selective Manipulation, Resilience, and Assertion Among Prostitute Women.” *Feminist Criminology*, Vol. 10, Issue 4, 2015, pp. 326-347.

HTICs claim to apply a “problem-solving” approach to criminal adjudication of low-level prostitution offenses by “diverting” defendants out of traditional criminal justice processes, such as detention, and into rehabilitative programming.¹⁰² The New York State Unified Court System’s Human Trafficking Intervention Initiative established HTICs in eleven counties throughout the state.¹⁰³ To date, New York is one of only a few states to have systematized its prostitution responses in this way.¹⁰⁴

Although human trafficking arises in many labor sectors (domestic work, agricultural, fisheries and construction, etc.), the dominant focus in contemporary discussion and policymaking around human trafficking has been movement into forced prostitution or the sex sector more generally, sometimes short-handed as “sex trafficking”.¹⁰⁵ The specter of “sex trafficking” quickly infused and reoriented the debate over prostitution law in the U.S. in the early 2000s, as some advocates and policymakers began to reframe prostitution as “trafficking” and sex workers as “trafficking victims”.

The language with which the HTICs were introduced in 2013 reflected the integration of anti-trafficking and trauma discourses into “problem-solving” adjudication paradigms. This “victim”-focused approach continues to inflect the policies and practices of the eleven New York HTICs currently operating in counties throughout the state.

Contemporary understanding of trafficking

Within mainstream transnational global women’s rights, at the end of the 20th century, attention to “sex trafficking” drove a new conversation on “trafficking” as both slavery and violence against women, raising it as an international problem from the mid-1990s to today. The side-by-side adoption in 2000 of the U.S. Trafficking Victim Protection Act (TVPA/TVPRA) and the UN Trafficking Protocol [see section on *Key legal frameworks affecting the HTICs*] reflects the high level of attention.^{106,107} Public awareness campaigns against international human trafficking helped to put trafficking back on the political docket in New York, particularly as the state was depicted as a port of entry into the U.S. for trafficked women.¹⁰⁸ The New York State legislature in 2007 passed an anti-trafficking law¹⁰⁹, in 2008 the Safe Harbor for

102 See Human Trafficking Intervention Courts: Overview at: www.nycourts.gov/courts/problem_solving/htc/index.shtml

103 Lippman, “Announcement of New York’s Human Trafficking Intervention Initiative.”

104 Only Texas’s network of prostitution prevention programs rivals New York in its statewide scale. In 2011, Texas adopted legislation mandating establishment of “prostitution prevention” programs in counties with populations greater than 200,000. Tex. Health & Safety Code Ann. §§ 169.001-006 (2011). There are currently eight prostitution-specific court programs operating in counties throughout Texas [Yale Global Health Justice Partnership, *Diversion from Justice*].

105 Peters, Alicia. *Responding to Human Trafficking: Sex, Gender, and Culture in the Law*. Philadelphia: University of Pennsylvania Press, 2015.

106 Ibid.

107 Miller, Alice, and Tara Zivkovic. “Orwellian Rights and the UN Trafficking Protocol.” *Routledge Handbook of Human Trafficking*. Ed. Ryszard Piotrowicz et al., Routledge, 2017.

108 O’Donnell, Denise and Hansell David. “New York State Interagency Task Force on Human Trafficking” *Interagency Task Force, Implementation of the 2007 law*, 2008. http://www.criminaljustice.ny.gov/pio/humantrafficking/human_trafficking_rpt_aug08.pdf

109 N.Y. Pen. Law §§ 135.35 makes labor trafficking a class D felony; 230.34 makes sex trafficking a class B felony.

Exploited Children Act¹¹⁰, and in 2015 the Trafficking Victims Protection and Justice Act¹¹¹, all of which further tied prostitution-related criminal proceedings to human trafficking both domestically and transnationally.

The national and state laws relied on a narrative of an innocent “victim” in order to distinguish trafficked persons (worthy of help) from criminals (unworthy), and to justify not only the provision of services, but the possibility of a visa and path to citizenship in the case of the U.S. TVPRA.^{112,113} The stories and responses notably also only presented cisgender women as the prototypical victim in prostitution, so that the presence of trans women or men selling sex were made invisible.¹¹⁴

The HTIC system signaled a marked shift in the language and frameworks used to interpret and adjudicate prostitution/sex work as a criminal offense [see section on *Key legal frameworks affecting the HTICs*]. As Cohen et al. point out, the goal of the HTICs was larger than that of community courts like the MCC, which principally aimed to reduce the visibility of commercial sex in Midtown. Instead, advocates saw the HTICs as “tools to directly reduce violence, if not combat a global slave trade in sex itself.”¹¹⁵ While the HTICs in this way are distinct from their predecessors (the Women’s Court of the earlier 20th century and the MCC of the 1990s), Shdaimah notes that all three responses “share fundamental similarities both regarding *who* is targeted and the limited, conservative nature of the reform.”¹¹⁶

In the early 2000s, the rhetoric of trafficking as violence (with the model of “violence as control” drawn from IPV work, above) became inextricably bound up in legal conversations about prostitution diversion in New York for sellers of sex. For instance, Judge Fernando Camacho of the Queens Criminal Court—which in the early 2000s became the first court to institute a specialized docket for prostitution-related offenses—received training by DV advocates to recognize coercive control in domestic violence courts, and he extended that idea of coercive control (over sex workers by “pimps”) in his framework for the Queens

110 Services for Exploited Children, 2008 Sess. Law New of N.Y. Ch. 569 (A. 5258-C).

111 N.Y. Pen. Law § 230.01.

112 Peters, *Responding to Human Trafficking: Sex, Gender, and Culture in the Law*.

113 Chuang, Janie A. “Rescuing trafficking from ideological capture: Prostitution reform and anti-trafficking law and policy.” *University of Pennsylvania Law Review*, Vol. 158. No. 6, 2010, pp. 1655-1728.

114 The Urban Institute found that 5% of individuals arrested for sex work across the boroughs of NYC identify as transgender [Dank, Yahner, & Yu, *Consequences of Policing Prostitution*, 6].

115 Gruber, Cohen & Mogalescu, “Penal Welfare,” 12.

116 Shdaimah, “Response—Prostitution/Human Trafficking Courts,” 17. In reference to the similarities between the Women’s Court, MCC, and HTICs, Shdaimah (pp. 20-21) also observes that “in three moments, women who are arrested for prostitution are provided an alternative pathway that neither challenges the legal status of selling sex nor releases them from criminal justice supervision. In all cases, a (differing) blend of material resources is provided with the stipulation that defendants participate in activities that are designed to shape them into normatively productive citizens, whether through job training, education, or therapy. These transformations are encouraged through a combination of the stick (i.e. public disapproval, sanctions, and criminal punishment) and carrot (i.e. material resources, praise, and removal of criminal consequences such as null processing or expungement).”

County prostitution diversion program.^{117,118} In describing the challenges he encountered setting up a prostitution diversion program in the Queens County Supreme Court, he stated:

*[...] these aren't bad girls who like to do this. Many of them are poor, unfortunate, lost souls who have no choice but to do this. And then after that, you know, operationally the obstacles were just—I can't even name them. I mean just in terms of getting all these kids going to the same part, the pimps hanging around the corner waiting for the cases to be called, using my quorum as a place to recruit, getting these kids—the security issues—getting these kids out safely without the, without you know, the pimp waiting outside to throw them in a car and take them back to the track.*¹¹⁹

Judge Lippman's 2013 statement, too, reflected a seamless conflation of trafficking with all sex work, and all sex work as exploitative and/or violent.¹²⁰

117 Gruber, Cohen & Mogalescu, "Penal Welfare," 18.

118 Schweig, Sarah. "Changing Perceptions: A Conversation on Prostitution Diversion with Judge Fernando Camacho." *Center for Court Innovation*, Jan. 2012, www.courtinnovation.org/publications/changing-perceptions-conversation-prostitution-diversion-judge-fernando-camacho.

119 Ibid.

120 Lippman, "Announcement of New York's Human Trafficking Intervention Initiative."

II. Taking the measure of “problem-solving” courts and HTICs: Current frames, research, knowledge, and gaps

Over the past few decades, legal scholars, judges, and advocates have reflected on the perceived challenges, benefits, and ethical quandaries posed by “problem-solving” generally, and courts aimed at low-level prostitution offenses more particularly.¹²¹

Specifically, many scholars have identified the significant gap that has emerged between the goals that these courts attempt to achieve (i.e., decarceration and less adversarial, more informal adjudication processes, facilitating exit from sex work) and their outcomes in practice (i.e., increased criminal surveillance, fewer criminal protections, and more incarceration in some instances).¹²² Corey Shdaimah identifies the contradiction embedded between punitive and rehabilitative approaches to “problem-solving”, especially when it comes to the adjudication of prostitution offenses,¹²³ and questions the narrowly constructed focus of services on individual factors instead of systematic issues.^{124,125} Her research on prostitution “diversion” programs across the U.S. suggests that while they are often less harmful than traditional criminal justice processes, their ability to facilitate access to concrete material resources (housing assistance, educational and vocational training, etc.) is often limited for a range of theoretical and practical reasons, highlighting the importance of investing in “opportunity structures outside of the courts and beyond the individual.”¹²⁶ Aya Gruber, Amy Cohen, and Kate Mogulescu further clarify the tension of court-based programs through the use of the term *penal welfare*, which reflects “states’ growing practice of provisioning social benefits through criminal court.”¹²⁷

Critics have pointed out the lack of input by persons most affected and the due process problems that arise as confusion about pleas, sentences and advice about “deals” dominates the processes. Additionally, there is a strong concern nationwide that prostitution “diversion” processes widen the net in subjecting individuals to increased sex work-related policing, arrest and processing.¹²⁸ There are other indirect perversities, such as when community programs can’t meet other local needs because of contracts through HTICs [for more on these issues, see Section IV on *Deep dive into service provision in the HTICs.*]

121 Cohen, “Trauma and the Welfare State,” 918.

122 McLeod, “Decarceration Courts,” 1587.

123 Shdaimah, “Taking a Stand,” 90.

124 Leon and Shdaimah, “JUSTifying Scrutiny: State Power in Prostitution Diversion Programs.”

125 Shdaimah and Bailey-Kloch, “Can You Help With That Instead of Putting Me in Jail?”

126 Ibid.

127 Gruber, Cohen & Mogulescu, “Penal Welfare,” 5.

128 Net widening refers to be both increases in police-community interactions and/or arrests rates [Natapoff, “Misdemeanor Criminalization”]. While net widening might be challenging to identify in cities such as NYC where broken windows policing practices already created conditions of mass misdemeanor arrests, there is still potential for increased police-community contact. Moreover, documentation of other prostitution “diversion” programs suggests that net widening can occur and is a cause for concern. For instance, the now-defunct Project ROSE, which operated in Phoenix, AZ, was strongly criticized by scholars and sex worker rights advocates for inciting a surge in police sting operations (and thereby arrests and criminalization) of sex workers on the street and online [Wahab and Panichelli, “Ethical and Human Rights Issues in Coercive Interventions With Sex Workers,” 346; Yale Global Health Justice Partnership, *Diversion from Justice*; Maryasova, Ksenia. “Project ROSE Aims to Change Lives, Traumatizes Sex Workers Instead, Critics Say.” *The State Press*, 14 Oct. 2014, <http://www.statepress.com/article/2014/10/project-rose-aims-to-change-lives-traumatizes-sex-workers-instead-critics-say/>].

A. Who is affected by HTICs and what are the affects?

There is far too little empirical data available to evaluate the success of HTICs in terms of their goals of “reducing re-engagement with the criminal law” or in regard to supporting useful services to meet the needs of the people who pass through them. To begin, the number of individuals who encounter HTICs is nearly impossible to ascertain: the closest estimate might be drawn from a report by the Urban Institute, which noted that of the 1,413 individuals charged with prostitution-related offenses in four boroughs in NYC and represented by Legal Aid Society attorneys between February 2015-March 2016, “many” were prosecuted in the HTIC system, but the exact number is left to guesswork.¹²⁹ Publicly available information, such as through the Division of Criminal Justice Services, includes summaries of arrests for major offense groups as well as dispositions of adult arrests, but no information is included on the court in which the case was handled.¹³⁰

Additionally, the often anecdotal data available, including the data sourced from impacted populations, show a vast gap between the HTICs’ claimed goals and the reality of HTICs’ impact on individuals arrested for sex work. Although the HTICs purport to move sex workers away from incarceration, connect vulnerable people with services, and cut down on inefficiency by stopping the cycling of sex work-connected defendants through the criminal justice system, the constant surveillance by police and courts can also serve to hold individuals within the criminal justice system and hinder their exit from the sex work sector. Police, in arresting individuals to bring to the HTICs, inflict emotional and physical harms and target people once branded as sex workers. Individuals point to the difficulty of engaging with therapeutic services under mandate, without agency, and the scarcity of housing and financial services under the criminal model of the HTICs. Moreover, as detailed in the section that follows, the current practices of HTICs raise serious concerns about unintended consequences of the system on noncitizen sex workers.

1. Specific concerns for noncitizen populations

While actual data on citizenship status is hard to come by, based on experience, advocates are concerned that a significant proportion of court-engaged sex workers are perhaps noncitizens. For instance, at Legal Aid Society, 91% of their clients charged with “unlicensed massage” were noncitizens, and 37% were undocumented.¹³¹ Collateral immigration consequences of the HTIC system severely impact the lives of noncitizen sex workers. In November 2017, a noncitizen sex worker, Yang Song, jumped out of a window and died rather than be arrested.¹³² In *Padilla v. Kentucky*, the Supreme Court recognized that it may be more important to some noncitizens to avoid harsh immigration consequences, such as deportation or ineligibility for immigration benefits, than to avoid some criminal penalties.¹³³ The current HTIC framework, which arrests, charges and/or convicts noncitizen sex workers before attempting to move them away from criminal penalties, puts them at serious risk for life-altering immigration consequences. For example, the law makes inadmissible “[a]ny alien who...has engaged in prostitution within 10 years of

129 Of the 1,413 defendants charged with prostitution-related offenses, the breakdown by borough is as follows: in the Bronx (234), Brooklyn (446), Manhattan (282), and Queens (451) [Dank, Yahner, & Yu, *Consequences of Policing Prostitution*, 5].

130 “Criminal Justice Reports & Statistics.” *NYS Division of Criminal Justice Services*, www.criminaljustice.ny.gov/crimnet/ojsa

131 *Ibid.*, 9.

132 Whitford, Emma and Grant, Melissa. “After Deadly Vice Sting, Advocates Say End to Prostitution Arrests is Long Overdue.” *In Justice Today*, 30 Nov. 2017, injusticetoday.com/after-deadly-massage-parlor-raid-advocates-say-end-to-prostitution-arrests-is-long-overdue-e61f4aae1bca.

133 See *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

the date of application for a visa, admission, or adjustment of status.”¹³⁴ Prostitution charges or convictions may also trigger the federal immigration category of Crimes Involving Moral Turpitude, which can make sex workers deportable or inadmissible.¹³⁵

The HTIC system mandates that defendants complete programs run by the state or nonprofits, and then stay clear of further charges for six months after the court grants an adjournment in contemplation of dismissal (ACD). Following this process, their charges may be dismissed and sealed. This period of open charges is a concern for many noncitizen sex workers; in some cases, lawyers may be able to petition the courts to dismiss and seal noncitizen sex workers’ charges earlier than six months after the ACD is granted to reduce their risk of immigration harm.¹³⁶

There is a concern that immigration enforcement may focus more on noncitizen sex workers who have *gone through* the HTIC system. Noncitizens with criminal charges or convictions have consistently been targeted for immigration arrest, detention and deportation, including under the Obama administration. Under the current administration, they are even more at risk. On February 20, 2017 the Department of Homeland Security (“DHS”) issued a memorandum directing U.S. Immigration and Customs Enforcement (“ICE”) personnel to prioritize removing otherwise removable noncitizens who “(1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense.”¹³⁷ This memorandum dramatically expands those who are seen as priorities for immigration enforcement, putting noncitizen sex workers who go through the HTIC system in the crosshairs of immigration enforcement personnel.

The Immigrant Defense Project reported a 1200% increase between 2016 and 2017 in ICE arrests and attempted arrests at NYS courthouses, including HTICs.¹³⁸ In June 2017, a Queens Criminal Court judge alerted public defenders that ICE agents were in the Human Trafficking Intervention Courtroom, waiting to detain their noncitizen client when her case was called.^{139,140} The client was in court to have her charges dismissed after completing her service mandate. The public defenders were forced to ask the court to take their client back into custody until the ICE agents had left, to protect her from immigration arrest. Before leaving, however, ICE agents arrested three people outside the Queens courthouse, including one who had appeared as part of the HTIC.¹⁴¹

134 8 USC § 1182(a)(2)(D), INA § 212(a)(2)(D).

135 8 USC § 1227(a)(2)(A), INA § 237(a)(2)(A). 136 Ray & Caterine, *Criminal, Victim, or Worker?*, 22.

137 Kelly, John. (Secretary, U.S. Dept. of Homeland Security). “Enforcement of the Immigration Laws to Serve the National Interest (“The Enforcement Memo”).” *U.S. Department of Homeland Security*, 20 Feb. 2017, www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

138 Immigrant Defense Project. “IDP Unveils New Statistics & Trends Detailing Statewide ICE Courthouse Arrests in 2017.” 2017, <https://www.immigrantdefenseproject.org/wp-content/uploads/ICE-Courthouse-Arrests-Stats-Trends-2017-Press-Release-FINAL.pdf>.

139 Fertig, Beth. “Outcry After Immigration Agents Seen at Queens Human Trafficking Court.” *WNYC News*, 16 June 2017, <https://www.wnyc.org/story/outcry-after-immigration-agents-come-trafficking-victim-queens-courthouse/>.

140 Grant, Melissa Gira. “ICE Is Using Prostitution Diversion Courts to Stalk Immigrants.” *The Village Voice*, 18 July 2017, www.villagevoice.com/2017/07/18/ice-is-using-prostitution-diversion-courts-to-stalk-immigrants/.

141 The Fund for Modern Courts. “Protecting the Administration of Justice in New York State: Impact of ICE Arrests on New Yorkers’ Access to State Courthouses.” 2017, pp. 10-11, <http://moderncourts.org/wp-content/uploads/2017/12/Modern-Courts-Report-December-2017-ICE-and-NY-COURTHOUSES2-1.pdf>.

In January 2018, ICE issued controversial guidance on “Civil Immigration Enforcement Actions Inside Courthouses”.¹⁴² According to the guidance, ICE has the authority to conduct immigration enforcement actions against specific, targeted individual inside courthouses, but should attempt to avoid arrests in non-criminal courts and should generally not go after non-targeted individuals (e.g., family members and witnesses). Many immigration rights advocates have claimed that the guidance authorizes ICE to continue its practices of violating the constitutional rights of immigrants and of conducting immigration enforcement at courthouses with wide discretion.¹⁴³

While public defenders, district attorneys, and advocates have called on the NY Office of Court Administration to adopt rules to stop civil arrests in NY courthouses, so far, no such orders have been issued.¹⁴⁴ Governor Cuomo signed an executive order to prohibit ICE arrests at some state buildings without a warrant, but this does not apply to state-run courts as they fall outside of his authority.¹⁴⁵ The 2018 New York State budget did, however, include a \$10 million grant to expand the New York Immigrant Family Unity Project and provide legal counsel for all immigrants who are in removal proceedings.¹⁴⁶ This is the first statewide public defender program for detained immigrants in the United States.¹⁴⁷

Noncitizens and the international anti-trafficking framework

The international anti-trafficking framework focuses on finding and identifying trafficked persons, in order to provide them with services [see section on *Key legal frameworks affecting the HTICs*].¹⁴⁸ For noncitizens, this regime may be especially coercive and mandate unwanted surveillance and intrusions into a trafficked person’s life.¹⁴⁹ Miller and Zivkovic describe the current “right to be found” as an Orwellian right, which can oppress trafficked persons even as the law claims to free them from their traffickers and abuse.¹⁵⁰ There are multiple sets of rationales by which noncitizens may not want to be identified by the state. For instance, they may not want to be identified formally as trafficked persons within the context of irregular migration that

142 *Civil Immigration Enforcement Actions Inside Courthouses: Directive Number 11072.1*. U.S. Immigration and Customs Enforcement. 10 Jan. 2018, <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf>.

143 Johnson, Tory. “ICE Issues Guidance on Enforcement at Courthouses.” *Immigration Impact*, 7 Feb 2018, <http://immigrationimpact.com/2018/02/07/ice-guidance-enforcement-courthouses/>.

144 Morawetz, Nancy and Lindsay Nash. “Get ICE out of N.Y.’s courtrooms.” *NY Daily News*, 25 Jan 2018, <http://www.nydailynews.com/opinion/ice-n-y-s-courtrooms-article-1.3777389>.

145 Governor Cuomo. “No. 170.1 Amendment to Executive Order 170 – State Policy Concerning Immigrant Access to State Services and Buildings.” *State of New York Executive Chamber*, 25 April 2018, https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_170.1.pdf.

146 Mayor’s Office of Management and Budget. “Budget Summary: The City of New York Executive Budget Fiscal Year 2018.” *NYC.gov*, 2018, pp. 36, <http://www1.nyc.gov/assets/omb/downloads/pdf/sum4-17.pdf>.

147 Blanco, Octavio. “New York to provide lawyers for immigrants facing deportation.” *CNN*, 13 April 2017, <http://money.cnn.com/2017/04/13/news/economy/new-york-immigrant-legal-defense-fund/index.html>.

148 Miller & Zivkovic, “Orwellian Rights and the UN Trafficking Protocol,” 328.

149 *Ibid.*

150 *Ibid.*

may have been facilitated by community members and during which the trafficking may have occurred. They may also fear contact with immigration systems, might not want the specific services mandated, or might not want to engage these services under threat of penalty. While noncitizens may desire state intervention or support in improving an exploitative work situation, they may not want – but may nonetheless be forced through their identification as a trafficking victim – to return to their country of origin.¹⁵¹

The risks faced by noncitizen sex workers affirms what Quinn noted several years ago, that there is a “chasm between the rhetoric about and the reality of modern court reform movements”,¹⁵² and although problem-solving courts purport to be a great success, their “tale of triumph” is misleading and obscures more problematic features and negative experiences within these systems.^{153, 154, 155} The HTICs seem to reflect this chasm between rhetoric and reality. Troublingly, there is simply not sufficient empirical data and grounded analysis—indeed, almost any meaningful collection of evidence—to evaluate HTICs’ success on their own terms and to call attention to the fact that the multiple goals in “their own terms” are often incompatible in practice.

B. Existing analyses of HTICs and the sex trade industry with a focus on NYC

Although New York’s HTICs were heralded in NY and nationally as innovations at their inception in 2013, there have been few attempts to evaluate the efficacy of these courts on their own terms or to consider and problematize the implications of delivering social services to an ever-stigmatized population through the criminal justice system.

The few analyses of New York City’s HTICs in particular that have been done raise several important concerns. Some have considered the role of the HTICs in exacerbating rather than ameliorating abusive policing practices, while others have noted the total lack of input from affected populations (persons in or arrested for sex trade) in the development of these courts. Still others have examined the slippery slope of defendants’ rights in the context of obscure and opaque “deals” arranged to avoid detention, shedding light on the contradictory inner logics of “penal welfare”—services given by a shrinking state only to a class of persons under penalty.^{156, 157}

The relationship of policing to other forms of punitive surveillance, particularly that of undocumented migrants and the doubling down of federal government against such persons, some of whom are also vulnerable through their engagement in the sex sector, also requires very specific attention and has not been covered in existing scholarship on HTICs.¹⁵⁸

151 Ibid.

152 Quinn, Mae C. “The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform.” *Washington University Journal of Law & Policy*, Vol. 31, 2009.

153 Ibid., 58.

154 Shdaimah and Bailey-Kloch, “Can You Help With That Instead of Putting Me in Jail,” 11-12.

155 Leon and Shdaimah, “JUSTifying Scrutiny: State Power in Prostitution Diversion Programs,” 267-270.

156 Ray and Caterine, *Criminal, Victim, or Worker?*

157 Gruber, Cohen & Mogalescu, “Penal Welfare,” 50-54.

158 Whitford and Grant, “After Deadly Vice Sting...”

Our report engages substantively with work by a range of scholars, including Gruber, Cohen, and Mogalescu’s practice-based analysis of the “penal welfare” logics of the HTIC system. In this section, we turn to and summarize three data-centered studies, conducted by differently positioned organizations, that apply diverse frames to analyze information from defendants and other stakeholders in order to assess the HTICs’ practices. These reports include:

1. *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System’s Response*, Center for Court Innovation, 2017
2. *Consequences of Policing Prostitution: An Analysis of Individuals Arrested and Prosecuted for Commercial Sex in New York City*, Urban Institute, 2017
3. *Criminal, Victim, or Worker? The Effects of New York’s Human Trafficking Courts on Adults Charged with Prostitution-Related Offenses*, Red Umbrella Project, 2014

In December 2017, the Center for Court Innovation, a public-private partnership between the New York State Unified Court System and the Fund for the City of New York, released a mixed-method study on the life histories, experiences in the sex trade (including any sex trafficking victimization), and criminal justice involvement of 316 adults involved in the sex trade in New York City.¹⁵⁹ To understand “the overall court response to sex trafficking and the sex trade”, they also interviewed 28 criminal justice policymakers, practitioners, and community representatives affiliated with NYC’s HTICs. Notably, given the complex court histories of defendants who had been arrested multiple times, it was difficult for researchers to determine the number of adults in their sample who had been through HTICs for their prostitution cases, pointing to gaps in comprehensive and reliable data on how many people actually interact with the HTIC system.¹⁶⁰

Interestingly, 45% of the sample could be considered under federal law as having been trafficked at some point in time; however, the majority (77%) of those individuals met the legal definition solely because they had entered the sex trade before they were 18 years of age. In comparison, a minority (10%) of the total sample reported being trafficked through force, fraud, or coercion by a market facilitator.¹⁶¹

The majority of study participants cited financial constraints and lack of economic opportunities as the primary reason for their involvement in the sex trade, and 71% of the persons interviewed were involved in street-based work.¹⁶² The authors noted that sex workers’ complex experiences of coercion or voluntary collaboration in the sex trade did not map neatly onto dominant understandings and languages around “sex trafficking”, suggesting that the power dynamics and systemic forces at play are not adequately captured or addressed through the “sex trafficking” frame. In fact, participants themselves rejected the false “criminal/victim” binary generated by sex trafficking narratives, as “they felt forced or coerced due to financial realities” but not necessarily due to the influence of a specific actor.¹⁶³ The CCI Report

159 White, Elisa, Rachel Swaner, Emily Genetta, Suvi Lambson, Janell Dash, Issac Sederbaum, and Ariel Wolf. *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System’s Response*. New York: Center for Court Innovation, 2017. www.courtinnovation.org/sites/default/files/media/documents/2018-03/nyc_sex_trade.pdf.

160 Ibid.

161 Ibid., 21.

162 Ibid., 16.

163 Ibid., 24.

findings also point to the gendered and racialized dimensions in the NYC sex trade, with 86% of participants identifying as non-white, and trans women reporting greater risks to their personal safety at the hands of clients and law enforcement than cisgender participants.^{164,165}

Also in 2017, the Urban Institute released a case study analyzing the background and outcomes of over 1,413 individuals charged with prostitution-related offenses in NYC, all of whom had been represented by the Legal Aid Society's Exploitation Intervention Project and almost all of whom were prosecuted in the HTIC system.¹⁶⁶ The findings flag the multiple deleterious and inequitable impacts of the criminalization and policing of prostitution. A breakdown of the demographics draws attention to the marginalized identities held by most defendants: 98% identified as female, 83% identified as people of color (34% Black/African American, 32% Asian, 17% Latino/Hispanic), 35% reported having been trafficked into sex work at least once, and 14% indicated that they were undocumented.¹⁶⁷ Most defendants also reported being treated as criminals, not victims, by the police and the courts.¹⁶⁸

A 2014 report released by the Red Umbrella Project (RedUP), a funding and advocacy group run by a coalition of former and current sex workers, examined the HTICs in Brooklyn and Queens to understand how defendants navigated the system and its processes from arrest through exit.¹⁶⁹ They found that HTICs contribute to the re-victimization of defendants and disproportionately impact people of color, primarily Black defendants. As the report puts it, because of a squeeze between quotas and stereotypes, gender, class and race-based ideologies determine who is profiled as a sex worker, and from that who can be targeted within the HTIC as the right kind of victim. The report notes that the policing of sex workers mirrors the unconstitutional NYPD stop-and-frisk policy, which was deemed to be unacceptable by the Federal District Court of New York in *Floyd v. The City of New York*, inflicting the same discriminatory humiliation, burden and criminalization on women of color and transgender women as stop-and-frisk inflicted on people of color.¹⁷⁰ The HTICs, as a result, process disproportionately minority defendants, and discriminatorily expose them to the consequences of criminal justice involvement.

In addition to the racialized outcomes of arrests they observed, the RedUP report also flagged other structural biases—for instance, at the time of their writing in 2014, Mandarin speakers faced longer wait times in processing adjournments in contemplation of dismissal (closure of their criminal records) owing to a dearth of translators available, and there was a deficit in culturally competent courtrooms and social services equipped with interpreters and appropriate language support. While the capacity of the courts and service providers to serve some non-English speaking defendants seems to have improved over time,

164 Ibid.

165 "Cisgender" refers to individuals whose experiences of their gender match the sex they were assigned at birth.

Transgender people are those whose experiences of their gender do not match the sex they were assigned at birth [Dank, Meredith, Jennifer Yahner, Kuniko Madden et. al. *Surviving the Streets of New York Experiences of LGBTQ Youth, YMSM, and YWSW Engaged in Survival Sex*. Washington, DC: Urban Institute, 2015. <https://www.urban.org/sites/default/files/publication/42186/2000119-Surviving-the-Streets-of-New-York.pdf>].

166 Dank, Yahner, & Yu, *Consequences of Policing Prostitution*.

167 Ibid., 7.

168 Ibid.

169 Ray & Catherine, *Criminal, Victim, or Worker?*

170 Ibid.

the 2014 RedUP report also called attention to the ways in which HTICs fail to address the underlying economic injustices faced by many in the sex trade, including the inadequacies of mandated social services that largely focus on psychotherapy instead of pervasive structural issues (e.g., poverty, criminalization) and needs (e.g., housing, education).

To summarize, critics of the HTIC system warn that with the integration of the language of trafficking, violence, and trauma, the provision of “treatment” for defendants is tethered to a presumed “victim” identity, thereby differentiating between defendants that are “deserving” (e.g., first-time, young offender) or “undeserving” (e.g., repeat offender and/or different criminal charges) of penal welfare.^{171,172,173}

Others identify the coercive power made possible by informality in the criminal court system, as well as the risks attached to expanding judicial discretion in “problem-solving” courts like HTICs, which may curb constitutional protections.¹⁷⁴ Finally, critics have expressed fundamental concerns about the reliance on criminal courts to provide welfare services at all, charging that this form of service provision misses critical opportunities to intervene early through supportive, therapeutic, or preventative measures.¹⁷⁵

Recurring themes from this NYC history include the way that:

- “Alternatives” to harsh formality in practice lead to unbounded, and unreviewable practices by “problem-solving” courts
- Rhetorics of “tender regard” mask practices of extensive interference with private life, health and rights
- The gender specificity (“concern for women”) tends to reduce attention to due process concerns and traditional rights reviews by criminal justice monitors
- Actual service delivery falls short of resources needed for empowerment and life change
- The actual and diverse interests of “recipients” (women to start, all persons in street-level sex trade today) are nowhere taken into account
- Noncitizen sex workers risk harsh immigration consequences from HTICs, including during the ACD period when they have an open criminal case
- Specific trends around ideas of sex, vice and “cleaning up” urban public spaces, personal responsibility, and gendered violence deeply affect but do not rationally guide, or meaningfully predict, the practices and outcomes of these courts
- Specific actors (“moral entrepreneurs” such as developers, funders, business interests etc.) operating at the intersection of public and private accountability are central to these reforms

171 Gruber, Cohen & Mogalescu, “Penal Welfare,” 71-72.

172 Cohen, “Trauma and the Welfare State,” 985.

173 Corrigan and Shdaimah. “People with Secrets: Contesting, Constructing, and Resisting Women’s Claims about Sexualized Victimization.”

174 Quinn, “The Modern Problem-Solving Court Movement,” 79.

175 Shdaimah, “Taking a Stand,” 101.

C. Key legal frameworks affecting the HTICs

HTICs are situated within a complex web of overlapping federal, international, and state legal frameworks, which interact to shape the experience of those individuals whom New York identifies as sex workers.

Federal and international legal frameworks

“Trafficking” in U.S. and international criminal law means the use of force, fraud or coercion to move and hold someone in any labor sector, including sexual commerce.

22 U.S. Code § 7102, the Trafficking Victims Protection Act of 2000 (TVPA), codified trafficking as a federal crime. The TVPA defines “severe forms of trafficking in persons” as follows:

- **Sex trafficking:** the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act, in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; and
- **Labor Trafficking:** the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Notice that in U.S. trafficking law, movement into the sex sector and labor sectors are treated separately because sex work is not considered labor under U.S. law.¹⁷⁶

In the TVPA, the term “commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

The TVPA (and as revised, the TVPRA) increased federal protections for foreign national victims of trafficking by modifying eligibility requirements for government assistance and lawful immigration status, and also provides for civil remedies for trafficked persons. It created the T visa, which grants noncitizen trafficking victims and their families temporary residency and a pathway to citizenship.¹⁷⁷ The TVPA has been reauthorized four times, most recently in 2013.¹⁷⁸

The TVPRA (the Trafficking Victims Prevention and Protection Reauthorization Act) of 2013 added resources for state and local personnel to prosecute trafficking in cooperation with federal agencies.¹⁷⁹ It also required all law enforcement personnel to screen every individual arrested on prostitution grounds for trafficking, sexual assault, and domestic violence.¹⁸⁰ Additionally, the TVPRA added several provisions seeking to strengthen a ban on goods made through forced labor from entering the United States, through the subsection Business Transparency on Trafficking and Slavery Act.¹⁸¹ The TVPRA of

176 Note that, for both UN and U.S. definitions of trafficking, when persons are under 18, no force or fraud is required vis-à-vis movement into the sex sector.

177 United States, Congress, *H.R. 3244 - Victims of Trafficking and Violence Protection Act of 2000*, Section 107 (e). 2000. Congress.gov.

178 United States, Congress, *H.R. 898 - Trafficking Victims Protection Reauthorization Act of 2013*. 2013. Congress.gov.

179 Ibid., Section 201, (b) (2) (Q).

180 Ibid., Section 202 (C) (vi).

181 Ibid., Section 105 (c).

2013, like the TVPRA of 2008, increased reporting and information sharing requirements for federal, state and local agencies.¹⁸²

The UN Convention against Transnational Organized Crime and two supplemental Protocols

comprise the body of law that the UN uses to address trafficking in persons, e.g., the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air. The United States is a Party to the Convention and its supplemental Protocols.¹⁸³

- The UN Protocols not only provide for cooperation through information sharing, investigative aid where necessary, and extradition, but also through aid and training. Additionally, States Parties must prosecute organized criminal groups who traffic individuals and create necessary structures for doing so. It details that States Parties must protect victims and witnesses.¹⁸⁴

The Protocol to Prevent, Suppress and Punish Trafficking in Persons defines Trafficking as follows:

Trafficking: The recruitment, transport, transfer, harboring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹⁸⁵

Exploitation is defined as “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹⁸⁶

States Parties to this Protocol, including the United States, have agreed to maintain the confidentiality of trafficking victims, by implementing appropriate procedural safeguards in court proceedings. They have also agreed to “consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons,” including housing, counselling, medical aid, financial, occupational and educational assistance.¹⁸⁷ States Parties also agree to provide mechanisms for victims to claim compensation.¹⁸⁸

The Protocol against the Smuggling of Migrants by Land, Sea and Air addresses the situation of the many migrants who are smuggled by criminal organizations. Smuggling is defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a

182 See, e.g., Section 201; requires the Attorney General to report detailed information on immigration benefits granted to individuals identified as trafficking victims.

183 “United Nations Treaty Collection: Status of Treaties.” *United Nations*, United Nations, treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en#EndDec.

184 United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. New York: United Nations, 2014. <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

185 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Article 3 (a).

186 Ibid.

187 United Nations Office on Drugs and Crime, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, pp. 44.

188 Ibid.

person into a State Party of which the person is not a national or a permanent resident.”¹⁸⁹ Notably, many researchers have demonstrated that migrants are often highly vulnerable to exploitation and to being forced into sex work or other labor¹⁹⁰; moreover the identification of a person as a “smuggled migrant” (which generates fewer protections) or a “trafficked person” is left to the national authorities. The TVPA does not consider human smuggling to be trafficking, as it defines smuggling as an act to which the individuals who are smuggled consent.¹⁹¹

State legal frameworks

1. Relevant New York State prostitution laws

- Engaging in sexual conduct with another person in return for a fee is a criminal offense in New York State, constituting a class B misdemeanor,¹⁹² punishable by up to three months in jail and a fine of up to \$500.¹⁹³
- New York also criminalizes loitering for the purposes of engaging in prostitution, which encompasses such behaviors as “repeatedly attempt[ing] to engage passers-by in conversation,” “repeatedly beckon[ing] to,” or “repeatedly stop[ping] or attempt[ing] to stop motor vehicles” for the purposes of prostitution.¹⁹⁴ Loitering for the purposes of prostitution is a violation punishable by no more than 15 days imprisonment¹⁹⁵ (unless the person has previously been convicted of prostitution or loitering for the purposes of prostitution, in which case it constitutes a class B misdemeanor).¹⁹⁶

2. New York State anti-trafficking laws

In keeping with the nationwide push to combat human trafficking, New York State has enacted numerous pieces of legislation aimed at punishing traffickers and protecting victims.

- In 2007, the legislature passed new Penal Law provisions criminalizing sex trafficking and labor trafficking.¹⁹⁷
- In 2008, the NY state legislature passed the nation’s first so-called safe harbor law, the Safe Harbour for Exploited Children Act.¹⁹⁸ As NYS allows the prosecution of 16 and 17 in criminal court, the law amended New York’s Family Court Act and the Social Services Law to permit diversion of minors suspected of prostitution-related offenses from Criminal Court to Family Court, thereby allowing them to avoid juvenile delinquency adjudication.¹⁹⁹ It also required local social services districts to take affirmative measures to address “the child welfare services needs of sexually exploited children.” Thus,

189 Ibid., 54

190 Ibid.

191 “Fact Sheet: Human Trafficking.” *Office of Trafficking in Persons*, U.S. Department of Health and Human Services, www.acf.hhs.gov/otip/resource/fshumantrafficking.

192 N.Y. Pen. Law § 230.00. 192 N.Y. Pen. Law § 230.00.

193 N.Y. Pen. Law § 70.15. As of 2016, prostitution in a school zone is a class A misdemeanor subject to harsher penalties – up to one year in jail and a fine of up to \$1000. N.Y. Pen. Law § 230.03.

194 N.Y. Pen. Law § 240.37. In September 2016, the Legal Aid Society of New York filed a civil rights class action challenging the loitering statute, which they allege is both facially unconstitutional and unlawfully applied to target women based on race, gender, ethnicity, gender identity, and appearance. See http://www.legal-aid.org/media/207171/press_release_100316.pdf. At the time of writing, that lawsuit is still pending.

195 N.Y. Pen. Law § 70.15.

196 N.Y. Pen. Law § 240.37.

197 N.Y. Pen. Law §§ 135.35 makes labor trafficking a class D felony; 230.34 makes sex trafficking a class B felony.

198 Services for Exploited Children, 2008 Sess. Law New of N.Y. Ch. 569 (A. 5258-C).

199 N.Y. Fam. Ct. Act § 311.4.

a youth could ask to be moved to Family Court: however, because the supervision is more intensive and the process is longer and services are not always of sufficient quality and accessibility, youth seeking to minimize contact with the CJS might still opt for the HTICs.

- In 2010, the legislature amended its criminal procedure laws to allow victims of human trafficking to vacate prior prostitution-related offenses.²⁰⁰
- In 2015, the legislature made trafficking an affirmative defense to a charge of prostitution, prostitution in a school zone, and loitering for the purposes of prostitution.²⁰¹ Pursuant to New York Penal Law § 230.01, for any prostitution-related prosecution under New York law, “it is an affirmative defense that the defendant’s participation in the offense was a result of having been a victim of compelling prostitution, . . . a victim of sex trafficking, . . . or a victim of trafficking in persons under the trafficking victims protection act.”²⁰² New York law does not explicitly define what it means to be a “victim of compelling prostitution” or a “victim of trafficking,” although these terms are defined by implication in the criminal statutes criminalizing compelling prostitution and sex trafficking (both of which are class B felonies).²⁰³
 - ◆ **Notably, however, HTIC defendants forego their opportunity to plead an affirmative defense by reason of trafficking when they opt for pre-trial diversion instead of fighting the charges.** Once a defendant has entered the HTIC system, no determination is made whether they qualify as a “trafficking victim” under state or federal law, although the defendant may still be eligible to have prior convictions vacated pursuant to N.Y. Crim. Proc. Law § 440.10(1)(i).
- **The HTIC system was created pursuant to the New York State Unified Court System’s Human Trafficking Intervention Initiative, which is not a statewide legislative mandate, but is a judiciary-led and statewide court initiative.**²⁰⁴

Municipal ordinances and regulations

Local ordinances constitute yet another overlay in this legal patchwork. Many jurisdictions have ordinances prohibiting loitering, vagrancy, panhandling, as well as sleeping, lying, or sitting in vehicles parked in public places, which disproportionately affect individuals who engage in, or are profiled as engaging in, street-based sex work.²⁰⁵ For instance, the New York City Park Rules and Regulations subject individuals to civil penalties for “unlawful solicitation” or the engagement in “any commercial speech or commercial activity in any park” without a permit.²⁰⁶ These restrictions add an additional layer of complexity to a system already fraught with internal contradictions and conflicting impulses.

200 N.Y. Crim. Proc. Law § 440.10(1)(i).

201 N.Y. Pen. Law § 230.01.

202 N.Y. Pen. Law § 230.01.

203 N.Y. Pen. Law § 320.33: “A person is guilty of compelling prostitution when, being eighteen years old or more, he or she knowingly advances prostitution by compelling a person less than eighteen years old, by force or intimidation, to engage in prostitution.” N.Y. Pen. Law § 230.34: “A person is guilty of sex trafficking if he or she intentionally advances or profits from prostitution by” various activities including provision of narcotics, withholding immigration documents, use of force, etc.

204 Lippman, “Announcement of New York’s Human Trafficking Intervention Initiative.”

205 See, generally: *No Safe Place: The Criminalization of Homelessness in U.S. Cities*. Washington, DC: National Law Center on Homelessness and Poverty, 2014.

206 New York City Park Rules and Regulations, §1-04 Prohibited Uses.

III. What happens in the NYC HTICs: Mapping the structures and processes through key stakeholders' eyes

Each HTIC in NYC reflects the local court system in which it is situated, but all share a set of common goals and characteristics. We trace these commonalities across multiple axes—from program elements and official structure (how to enter, who decides, with what goals and what funding, etc.) to subjective experiences of these systems by those currently enmeshed in them (defendants, social service providers, court personnel, and others).

Our goal here is not to provide a comprehensive accounting of each individual program, but rather to provide examples of actors, policies and practices in these various categories to gain a better understanding of how they operate.

The recurring themes articulated above in the conclusion to Part B of Section II are revisited in our framework of analysis in the following sections, in which we map the HTIC structure and operations to bring to bear the problematic and inherently contradictory logics of purportedly “rehabilitative” service provision in a penal context.

The critical review of the history and genealogy of the NYC HTICs (their ideology, legal frames and political context) in Section I generated some concerning propositions about their operation in Section II. In this section, we deepen the analysis by adding original qualitative stakeholder data and paying particular attention to service provision in the HTIC context. As stated in the Introduction, our goal in presenting the more ethnographic insights that follow, coupled with the earlier sections engaging with critical scholarship and legal review, is to provide a basis for efforts to revisit, revise, and reform the policies and practices of the HTICs. We reiterate here that this report brings a spotlight to the social service provision and the experiences of those involved—the report does not focus on due process or equal protection of the law concerns in the HTICs, although these concerns also deserve serious inquiry and intervention.²⁰⁷

A. Overarching program structure

1. NYC HTIC goals: Disconnects between stated goals and reality of working goals

In announcing the creation of the state-wide network of HTICs in 2013, Chief Judge Lippman articulated a clear programmatic goal: “to intervene in the lives of trafficked human beings and to help them break

²⁰⁷ As legal scholar Issa Kohler-Hausmann has noted, much of the current scholarship on the criminal justice system has focused on incarcerated populations and the consequences of felony convictions. However, data indicate that misdemeanor—not felony—arrests constitute the bulk of criminal cases given the rise in quality of life policing and urban crime control strategies that target low-level offenses. Importantly, unlike felonies, the majority of misdemeanor arrests do not result in carceral sentences or even criminal convictions, forming the basis of Kohler-Hausmann’s argument that we overlook and fundamentally misunderstand misdemeanor justice. She argues lower courts are not primarily concerned with adjudicating guilt, but instead operate under a “managerial model” that sorts and regulates people over time, resulting in significant and concerning discretionary differentiation in the treatment of defendants [Kohler-Hausmann, “Managerial Justice and Mass Misdemeanors”]. In this era of mass misdemeanor arrests, which has had a distinctly gendered impact, it is also evident that little is known about the gender-specific challenges faced by women entering the criminal justice system, a system dominated by policies and practices designed for cisgender men [Swavola, Riley, and Subramanian, *Overlooked: Women and Jails in an Era of Reform*].

the cycle of exploitation and arrest.”²⁰⁸ This goal rests on the following understandings for its premise: trafficking is, at its base, equivalent with all prostitution, prostitution is exploitative, and prostitution is criminal. There is also an implicit belief that courts can be used as effective vehicles for delivering needed social services and that social services will be sufficient to “break” into the cycle. In Judge Lippman’s telling:

*When these victims arrive in our courts, even as defendants in criminal cases, it gives us an opportunity— an opportunity for judges, prosecutors, and defense lawyers to work together to link victims with the services they so desperately need. This new initiative will stop the pattern of shuffling trafficking victims through our criminal courtrooms without addressing the underlying reasons why they are there in the first place.*²⁰⁹

As the discussion of the origins of the HTICs makes clear, the foundational conceptual framework of the HTICs inherits and synthesizes quite different premises for court and police action in the sex sector and holds onto contradictory approaches. Is the problem exploitation, or is the problem arrest? Whatever the actual logic of the premise, Judge Lippman’s words set out the official mandate under which HTICs operate.

In order to assess the goals articulated in Judge Lippman’s aspirational vision of HTICs against the actual working goals of actors in the system, we asked defendants, public defenders, court staff, judges, and service providers to describe *their* understanding of the HTICs’ goals and to assess whether the HTIC with which they were associated was successful in achieving them.

Notably, all stakeholders generally agreed that the HTICs could provide a useful alternative to arrest and incarceration, which is the traditional criminal justice system response. People arrested for prostitution, like many misdemeanor defendants, are often in urgent need of resources and services, and HTICs may facilitate access for those with needs that might otherwise go unaddressed. One service provider noted:

I believe that the Human Trafficking Intervention Courts were designed as an alternative to incarceration for people charged with prostitution. The framework is that sex workers and trafficking survivors have functionally the same needs (counseling services and other concrete services) and that these mandated counseling services will serve as a deterrent to the both the sex industry and trafficking industry.

At the same time, there was widespread agreement that these courts are *inadequate* to address their stated goals, especially in light of the needs of the population they serve. In the electronic survey sent to service providers, eight individuals responded to a question asking how strongly they agreed that the HTIC courts met their stated goals and outcomes in serving clients arrested for prostitution. Of the eight that responded, half reported that they somewhat disagreed, two strongly disagreed, one strongly agreed, and one was undecided.

When asked to articulate their understanding of their role within the HTICs and the criminal justice system writ large, service providers noted that *they believed themselves to be essential to the HTICs’ mission of connecting defendants to services as an alternative to incarceration or other punitive measures*. In the words

²⁰⁸ Lippman, “Announcement of New York’s Human Trafficking Intervention Initiative.”

²⁰⁹ Ibid.

of one provider, their goal is to “connect individuals in the commercial sex industry to services [and to] avoid convictions that go on someone’s record.”

Service providers understood their role as critical to the prevention of future criminal justice involvement, and several articulated their goals in terms using the language of anti-trafficking terms. As another service provider stated:

[The goal is] to help clients get the support they need in order to avoid arrest in the future [and to help] stabilize the clients. [To] identify those who have been trafficked. To attempt to avoid anyone seeing jail time as a result of an arrest related to sex work.

The public defenders we interviewed placed less of an emphasis on connection to services and more of an emphasis on the HTICs’ potential to reduce conviction records and future criminal justice involvement, while noting its effects on their obligation to vigorously advocate on behalf of their clients in court. One public defender emphasized:

My understanding is that the goal of the community court is to divert individuals arrested on prostitution related offenses away from prison and into programming. Link clients to services and identify express needs and try to meet some of them. Reduce jail time, and lessen exposure to criminal convictions.

Notably, although the goal of facilitating exit from sex work features heavily in the rhetoric of the HTIC, this goal was not as prominent service providers’ and public defenders’ assessments of their roles, pointing to another disconnect between stated and working goals. Rather, service providers and public defenders were largely supportive of their clients’ goals and interests, regardless of whether they happened to involve leaving the sex trade. The same public defender noted:

I have never seen getting out of prostitution directly [as the goal of the HTIC] . . . my goal is to reduce the amount of arrests . . . so talk to clients about ways in which they can keep working but doing so safely and if they want to exit, helping them try to do so. Don’t believe that my function is for my clients to leave sex work but I don’t want them to have a criminal record.

Similarly, a service provider stated:

I believe the goal is to recognize that although exchanging sex for money is not legal in New York state, many folks in the commercial sex industry are not in it by choice—whether that means that there is force, fraud, or coercion of a third party, or merely a severely constricted range of options. And to further recognize that it is appropriate to respond to this situation with support and resources, rather than punishment.

Divergent understandings of the HTICs’ mission was also expressed by practitioners interviewed for the 2017 Center for Court Innovation report. The study found that several judges involved in designing the HTICs did not believe adults in the sex trade were capable of exercising choice and agency, and thus “saw their involvement in the HTICs as a moral imperative and their role as being to help rescue defendants from intense and ongoing experiences of victimization.”²¹⁰ While these judges saw the HTICs as facilitating

210 White, Elise, et al. *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System’s Response*, 35.

immediate exit from sex work, other stakeholders, namely service providers, moved away from this “rescue model” and instead regarded consent and agency as a spectrum and viewed the court’s mission as imparting tools that defendants might find helpful at some point in their lives, while recognizing the limitations of mandated and often brief sessions.²¹¹

Both the stated and working goals of the HTICs as expressed by these stakeholders—those in positions of relative power and authority—make evident the goals *missing* in this operation: *those of the defendants themselves*. As further expanded upon in the following section on service provision, the HTICs’ goals and practices are not grounded in community-based needs assessments or informed meaningfully by input from those most affected—the people facing arrest and court review and receiving the services.

B. Entering the HTIC system: Policing, arrest, and eligibility criteria

To fully understand why the HTICs look and function the way they do, it is important to understand the processes by which defendants are funneled into them. People facing adjudication in HTICs enter into the system through multiple steps. First, they have been *arrested* by the police for allegedly committing a prostitution-related offense or, if they are arrested for an offense unrelated to prostitution, they have been identified as having a “history” of prostitution; second, they have been *offered “diversion”* through an HTIC as an alternative to fighting the charge at trial, taking a plea with more traditional criminal sanctions, or challenging their arrest through the defense of having been trafficked. Finally, they *have opted into* the HTIC in the hopes of obtaining services and/or an adjournment in contemplation of dismissal (ACD).

It is important to note that HTICs often allow those who have complied with mandated services to have the opportunity to receive an ACD, which allows for the dismissal and sealing of the case, generally after a six-month period without rearrests for any criminal offense. Once a defendant enters the HTIC system, they forgo the ability to plead an affirmative defense by reason of trafficking. (This defense was provided for in the 2015 revision of the New York state code.²¹² For more detail, see *New York State anti-trafficking laws* in the section on *Key legal frameworks affecting the HTICs*).

1. Policing and arrest

The makeup of the population moving through the HTICs at any given time is a function of who is being policed and arrested for prostitution-related offenses. Many defendants are arrested through street-based police operations, especially around those highly policed areas thought to be “strolls.”²¹³ Others are apprehended through organized undercover stings conducted on the streets, in massage parlors, and via meetings arranged through online ads.

²¹¹ Ibid.

²¹² N.Y. Pen. Law § 230.01.

²¹³ Hail-Jares, Katie. “Bad Dates: How Prostitution Strolls Impact Client-Initiated Violence.” *Special Issue: Problematizing Prostitution: Critical Research and Scholarship (Studies in Law, Politics and Society, Volume 71)*. Ed. Austin Sarat. Emerald Group Publishing Limited, 2016, pp. 115-137.

Although individuals of all races, national origins, and social strata participate in sex work, and sex work takes a variety of forms (street, massage parlor, apartment, hotel, escort, on-line etc.), certain populations are far more likely to be profiled as sex workers than others, and certain sectors are much more heavily policed. In New York City, there was near universal agreement among public defenders, service providers, HTIC defendants, and social science researchers that police disproportionately target the streets, and therefore marginalized and vulnerable communities, for arrest for prostitution-related offenses. As a result, people of color, immigrants, and transgender women are highly overrepresented in the HTICs in New York City.^{214,215}

Between 2012 and 2015, more than 1300 individuals in New York City were arrested and charged for loitering for the purpose of prostitution.²¹⁶ While only 24% of the NYC population is Black and 29% is Hispanic or Latinx,²¹⁷ 85% of those arrested were Black or Latinx and 65% of all arrests took place in just five precincts: Bushwick, Belmont/Fordham Heights, East New York, Hunts Point, and Brownsville – neighborhoods with predominantly non-white populations that have been marked as “prostitution prone” by police.²¹⁸ During this same period, approximately 950 individuals were arrested for practicing massage without a license in New York state, 91.5% of whom identified as Asian. In New York City, the police in Queens, Manhattan, and in some instances Brooklyn make a practice of targeting East Asian women for prostitution-related offenses. These numbers were borne out during our field observations, where we observed that people of color—especially Black women and transgender women of color—were far more likely to be involved in a HTIC than white women or men. It is important to note that while estimates can be obtained of the number of people arrested on prostitution and related charges in NYC, no official data, despite extensive research, could be located on how many of those individuals engage with, enter, or exit the HTIC system.

Understanding this demographic in the context of not only of the sex sector, but of the overall practices of misdemeanor policing in NYC, makes clear that race matters in multiple ways, and is not simply explained by one vector.²¹⁹ In this report, we are not providing independent research on the underlying

214 Dank, Yahner, & Yu, *Consequences of Policing Prostitution*.

215 In April 2018, Congress passed and signed into law HR-1865, the bill known as the Fight Online Sex Trafficking Act (FOSTA) and the Stop Enabling Sex Trafficking Act (SESTA). The bill aims to curb online sex trafficking by increasing liability for content posted by third parties on websites; however, the consequences thus far have been immediate and devastating for sex workers who rely on the internet to advertise services, find and screen clients, as well as share and access critical information (such as “bad date lists”) – all of which contribute to their overall safety. Even before it was officially passed, FOSTA/SESTA had a chilling effect on common advertising and review platforms used by those who trade sex, including but not limited to Craigslist Personals and Backpage [McCombs, Emily. “‘This Bill Is Killing Us’: 9 Sex Workers On Their Lives In The Wake Of FOSTA.” *Huffpost*, 11 May 2018, https://www.huffingtonpost.com/entry/sex-workers-sesta-fosta_us_5ad0d7d0e4boedca2cb964d9].

216 Grant, Melissa Gira. “Interactive Map: See Where the NYPD Arrests Women Who Are Black, Latina, Trans, and/or Wearing Jeans.” *The Village Voice*, 22 Nov. 2016, www.villagevoice.com/2016/11/22/interactive-map-see-where-the-nypd-arrests-women-who-are-black-latina-trans-and-or-wearing-jeans/.

217 “U.S. Census Bureau Quick Facts: New York City, New York.” *U.S. Census Bureau*, 2016, www.census.gov/quickfacts/fact/table/newyorkcitynewyork/PST045216.

218 Grant, “Interactive Map: See Where the NYPD Arrests Women Who Are Black, Latina, Trans, and/or Wearing Jeans.”

219 Between 1990 and 2010, the number of misdemeanor arrest events New York State increased by 35% for white individuals, 105% for Black individuals, and 158% for Hispanic individuals. This uneven distribution was in due, in large part, to the spatial concentration of “broken-windows” policing strategies in predominantly Black and Hispanic neighborhoods. There is ongoing debate and investigation into whether the intensity of arrests in particular neighborhoods was a response to actual crime conditions or to the racial makeup of those spaces; regardless, the result has been a disproportionate impact on Black and Hispanic communities [Kohler-Hausmann, “Managerial Justice and Mass Misdemeanors”].

factors and statistics regarding the manifestations of race and racism in the HTIC, but are highlighting the impact these factors have on the quality of justice and care provided to and experienced by the HTIC defendants.

Interactions with police serve as points of entry for the HTICs, which means that the makeup of the defendant population is wholly a function of discretionary police practices and police understandings of the meaning of race, gender, and place in prostitution offenses. As such, the sociodemographic makeup of the defendants in any given HTIC reflects whomever local police tend to profile as sex workers and is not necessarily representative of the actual population of people engaging in sex work in a particular jurisdiction.

Beyond the issue of profiling and arrest, defendants in HTICs throughout the state reported experiencing high levels of violence at the hands of police. They discussed patterns of abuse and harassment, and complained about what they saw as the unfairness of the undercover tactics used to entrap them. When asked about the fate of the clients she was with at the time of her arrests, one defendant said:

The first one was a normal guy who I just met because we both got caught up in the situation, 'cause we were like codefendants, I guess. The other guy never appeared in court. . . . [I think that] he was the police or he worked for the police . . . but it happens, which I feel is not right. I know I am doing wrong, but I don't know . . . Don't set me up. Let me get myself in trouble, but don't set me up!

Defendants also reported experiencing verbal harassment, manhandling, and physical assault. These practices as described are troubling and could constitute violations of both state law and police protocols; some may be crimes in themselves, including rape. Another defendant described a litany of police abuses:

They really are disrespectful. I've had a police officer stick his finger in my pussy. I've had them lifting up my dress. I've had them [say] 'oh you're just a bird bitch, you ain't nothing.' 'You're the scum of the earth, why would you sell your body?' Um, they never ask, 'Hey, are you being trafficked?' No! They automatically think, 'Oh, this bitch really wants to sell her ass.' . . . They think they know the whole situation so well but yet, they don't.

Service providers and public defenders confirmed these accounts. One service provider voiced a concern about their clients, stating that “undercover [officers] have [] sex and then arrested client[s]. Others degrade and dehumanize the clients in the process of arrest.”

Defendants with extensive histories of prostitution-related arrests reported being repeatedly targeted by officers familiar with their arrest histories. Police profile these defendants regardless of whether they are engaging in sex work at the time of arrest. One defendant elaborated:

I'm like labeled now, I guess, in society. Because when they look at my rap sheet, all they see is like 50, 60 prostitution arrests. Now when I am out there and I am not prostituting . . . the officers know me because I used to prostitute, so if they see me and they need a girl, they are gonna take me.

Staff in some of the New York City HTICs were similarly critical of NYPD's profiling tactics:

I don't think the vice squad in Manhattan has any knowledge or interest in how to work with survivors or really care[.]. And for people that they know and have seen around for years . . . , who are people who are probably in a not-so-good situation, they get treated the worst.

These stories of profiling, harassment, false arrest, physical and verbal abuse, excessive force, sexual assault, and generalized disrespect underscore a central paradox of New York's HTIC system: using police as gatekeepers is fundamentally and irreconcilably at odds with the courts' purportedly rehabilitative mission. Indeed, defendants who believed that they had been profiled and arrested discriminatorily—including both of the transgender defendants we interviewed—were less receptive to HTIC-affiliated social services because their involvement in the criminal justice system was degrading and unfair.²²⁰

In spite of the HTICs' attempted reframe of defendants as victims, defendants' first contact with the system via police is more often than not itself a point of further traumatization and victimization, which can undermine the system's overall goals in troubling ways.

2. Eligibility criteria for HTICs

In contrast with prostitution diversion courts in cities like Fort Worth or Columbus,²²¹ New York's HTICs impose very few eligibility restrictions on defendants who wish to participate. To be eligible, defendants must be arrested and charged with a prostitution-related (or prostitution-associated) crime. Charges commonly faced by HTIC defendants include prostitution (N.Y. Penal Law § 230), loitering for the purposes of engaging in a prostitution offense (N.Y. Penal Law § 240.37), and practicing massage without a license (N.Y. Educ. Law § 6512).

The extent or nature of a defendant's prior convictions will not preclude participation in an HTIC, although an extensive record may affect the length of the mandate in terms of number of required sessions or the plea deal offered after mandate completion (see section below on *Exiting the HTIC System*).

New York's HTICs do not restrict eligibility on the basis of age, gender or citizenship.

- Program staff from certain HTICs reported having served defendants as young as 17 years of age. Although New York's Safe Harbour Law technically allows for minors ages 16 and 17 arrested for prostitution offenses to be diverted from Criminal Court to Family Court, New York Penal Law still

²²⁰ The harmful effects of the initial arrest experience were also captured in the CCI report, which noted that defendants' negative interactions with law enforcement during the arrest created distrust that remained throughout their involvement in the criminal justice system. Moreover, trans women, who constituted 18% of the 304 adults interviewed in the study on sex work in NYC, also reported significantly more negative experiences with police officers than cisgender participants—this included a higher prevalence of arrest (for prostitution and non-prostitution offenses) as well as higher rates of being harassed because of their gender, being threatened with violence, and having an officer not arrest them in exchange for sex [White, Elise, et al. *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System's Response*]. The police profiling, verbal abuse, transphobia, violence, criminalization, and community ostracizing experienced by trans women on the street, often linked to their actual or assumed engagement with sex work, has also been documented [Hail-Jares, Katie, Catherine Paquette, and Margot Le Neveu. "Meeting the New Neighbors: A Case Study on Gentrification and Sex Work in Washington D.C." *Challenging Perspectives on Street-Based Sex Work*. Ed. Corey Shdaimah, Ed. Katie Hail-Jares, Ed. Chrysanthi Leon. Philadelphia: Temple University Press, 2017.]

²²¹ Yale Global Health Justice Partnership, *Diversion from Justice*.

grants district attorneys discretion to criminally prosecute anyone 16 years or older in criminal court as an adult, which may account for the presence of minors in certain HTICs.²²²

- New York’s HTICs impose no sex or gender identity-based eligibility restrictions. However, most programs reported that few, if any, of their defendants are cisgender men.^{223,224} Similarly, courts reported that, of the transgender defendants they see, nearly all are trans women.²²⁵

C. Operating within the system: Court operations and courtroom culture

1. Court operations

Although day-to-day court operations and culture vary between jurisdictions, New York City HTICs hold proceedings one day a week and are public courts. Dedicated public defenders from Legal Aid or regional defender offices will attend court along with their clients, although private court-appointed or independently retained attorneys may also represent HTIC defendants. A single judge presides over the HTIC docket, and the district attorney will frequently assign responsibility for the HTIC caseload to specific individual assistant district attorneys. The NYC HTICs have representatives from affiliated service providers present in court to provide support.

On designated court dates, defendants sit in court waiting for their cases to be called. They will generally appear a minimum of two times—once for an initial appearance and again for follow-up appearances, either to attest that they have completed the mandated conditions or to seek an extension of time to meet the conditions.

2. Courtroom culture

In view of their rehabilitative mission, HTICs claim that they are less adversarial and more therapeutic in their approach to working with defendants.

Although the HTIC model strives to be more collaborative than adversarial, the public defenders we interviewed did not express concern that the NYC HTICs compromised their obligation to be “zealous advocates” of their clients’ interests. This lack of conflict may be due to the particular configuration of NYC HTICs, where public defenders’ offices negotiated a program over time to better serve their clients’ interests and minimize some adversarial contact while being able to remain zealous advocates for individual sex worker clients, and for all their clients over all. Moreover, some defense attorneys noted that they

222 New York was the first state in the nation to enact a safe harbor law. Pursuant to Title 8-A Safe Harbour for Exploited Children Act, acts of prostitution committed by persons under age 18 may be addressed in Family Court instead of Criminal Court by the filing of a petition to have the minor declared a Person in Need of Supervision in lieu of a criminal accusatory instrument. One HTIC respondent reported that the safe harbor laws enabled those involved to provide a minor defendant with “a lot of funding for housing and counseling” compared to those over age 18 [Wigle Weiss, Karen. “A Review of the New York State Safe Harbor Law.” *ECPAT USA*, April 2013, <https://d2jug8yyubo3yl.cloudfront.net/26999B2F-7C10-4962-918C-E964709E745D/8d5cfab4-a75e-4dd6-97c8-2f9752d16b5d.pdf>].

223 NY Crim. Proc. Law §170.80(1).

224 Dank, Meredith, et. al. *Surviving the Streets of New York Experiences of LGBTQ Youth, YMSM, and YWSW Engaged in Survival Sex*.

225 In some courts around the country there are programs that limit participation to cisgender women, a form of gender bias [Yale Global Health Justice Partnership, *Diversion from Justice*].

used the space of the HTICs for another kind of advocacy: to “humanize” their clients. In the course of commenting on the HTICs’ lack of cultural competency with respect to transgender defendants, one public defender noted:

In my role it means shifting the lens away from my clients’ private background and not letting the judge ask questions about reproduction, and taking hormones, and ‘what sex is your client’? That doesn’t matter, so I am often educating the court and staff about basic human decency.

However, as is often the case in criminal courtrooms, proceedings in the HTICs can be chaotic and difficult to follow, especially for the uninitiated and for non-native English speakers. Moreover, dehumanizing language or conduct on the part of judges or court staff frequently undermine the broader mission of the HTICs by transforming what is meant to be a safe and nonjudgmental space into a site of marginalization. For example, study respondents reported observing or experiencing open mockery and disrespect from court officers, especially towards transgender defendants. At one court observation, a court officer disclosed that other court officers would habitually mock individual defendants and would refer to HTIC court dates as “hoe day”. A New York City-based defendant made similar observations:

Oh, gosh... [The courts’ staffs are] rude. A lot of the court systems that I’ve went through—Queens, Manhattan, and Bronx court—and the staffing is very rude. Most of them are very rude. The correctional court officers who work there treat you like you’re beneath them. And ethically that is just not what you are supposed to do to people.

Even when HTICs do manage to strike the gentler, more humanizing tone they strive for, the sexual nature of the charges and mandates defendants face implicates a separate set of complex ethical considerations. Service providers and public defenders observed that judicial approaches can border on voyeuristic, with judges taking an arguably unnecessary level of interest in the private lives of defendants. When individuals appear in court to provide an update on their progress, judges may ask defendants probing questions about their lives in open court. Although personalization of the judicial relationship is one component of the specific environment that “problem-solving” courts strive to cultivate, it can verge on the overly, even invasively, personal. Referencing this dynamic, one public defender said:

I try to guard my clients’ privacy as best I can when they are in this fish bowl courtroom. Unlike other offenses, when my clients are getting arraigned the judges are looking through their rap sheet... they are making judgments about their gender, whatever gender that is perceived to be, and they are making judgments about their past.

Defendants also mentioned that the courtroom experience triggered feelings of powerlessness. One defendant said that she “didn’t feel like [she] had any say over anything [in court],” but noted that, following a phone conversation with her defense attorney, she “felt like [her] voice was going to be heard better ...”²²⁶ Others defendants expressed skepticism about the sincerity of the courts’ purportedly rehabilitative mission. One characterized the HTICs as “just an alternative to incarceration ... [that allows

226 Many defendants expressed similar sentiments, highlighting the extent to which a sense of procedural fairness can contribute to a more positive overall courtroom experience [Shdaimah, “Taking a Stand,” 91, 97-101; Lind, E. Allan and Tom Tyler. *Social Psychology of Procedural Justice*. Springer-Science+Business Media, LLC, 1988].

courts to] feel like they are doing something, helping something, giving you information or something, instead of just ... costing the state two hundred something dollars for sleeping on a cot every day and getting fed.” Another maintained that “the courts on the whole don’t really care [about defendants]. They just [think] like ‘okay, the government funded for this program, the program [is] harassing us to send them girls, so [we] might as well as do it.’”

Yet many defendants also expressed appreciation for the care and attentiveness shown by judges and court staff. One defendant said:

I have been through so many courts and I have never seen a court like that. Ever in my life. I was really impressed. I was grateful to be there to have the opportunity to just experience that. It was good.

Perhaps, because the courtroom dynamic depends so heavily on the attitude of the judge and court staff, survey respondents noted that HTICs tend to be personality rather than policy-driven. As one service provider noted, this personality-driven aspect can cause variability in the quality of defendants’ experiences:

Overall, almost everyone working in the HTICs is extremely committed to helping vulnerable populations, and are generally kind and approachable. However, sometimes this creates systems where things are driven by personalities rather than policies. I would recommend that policies get cemented in place so that all clients can receive equal treatment in the court and that when someone gets a less experienced attorney or service provider, they don’t get a worse deal.

Another service provider lamented:

[P]eople’s personalities in the court matter. So things are not quite as standardized across the board [as they should be]. It matters who is sitting on the bench. It matters who is there from the DA’s office. It matters what kind of defenses they get from the defense attorney. Things are not completely equal across the board. What happens in court is based on people’s personal philosophies. I see this [issue] in this court part, and it is something that happens from Queens to Brooklyn to Bronx. It is all different. I think that that feels unfair.

This lack of standardization was most evident when respondents discussed the specific personas of the various HTIC judges. Some judges are reportedly quite hands-off, processing one case after another without inquiring about defendants’ histories or experiences with their service providers. One public defender described the HTIC judge they appear before as “pretty passive. He is just really nice, but not involved. Doesn’t push back when people ask for a plea. In other boroughs, they push back.” Staff and defendants heaped praise upon judges who expressed a special investment in defendants’ well-being or who offered flexibility when defendants struggled to complete their mandates. One service provider noted:

The judge is really invested in the cases. I don’t think she likes to have to issue a warrant [for failure to appear]. Her thing that she says to clients is “just come to court and don’t worry about not having done any sessions.”

The variation in respondents’ perceptions of courtroom culture reflects the localized, personality-driven character of these courts. This variability persists within the larger state-wide network of which each HTIC is a part.

D. Exiting the HTIC system: ACDs and system-wide confusion

According to the goals of the HTICs, defendants who successfully complete the conditions of their mandate will receive an adjournment in contemplation of dismissal (ACD). An ACD allows the court to dismiss and seal a defendant's charge after a set waiting period during which the criminal proceeding is suspended in accordance with New York Criminal Procedure Law, Section 170.55. Pursuant to a typical ACD, the charge is automatically dismissed and sealed if a defendant goes six months without being rearrested and no request is made to put the case back on the docket. However, for the vulnerable and over-policed populations that the HTICs serve, this is often easier said than done. As one service provider noted:

[With an] ACD, if someone commits another crime the case will be added to this infraction and the charge will not be dropped. This is very difficult for a lot of our clients because they are experienc[ing] a lot of poverty and job instability. We are asking people to stay out of trouble when trouble is bound to find them; we try to work as hard as we can to work with individuals to not be subject to re-arrest.

While district attorneys might hesitate to offer an ACD to defendants with extensive criminal histories, but they may nonetheless offer an opportunity to plead to a less serious charge, such as disorderly conduct (a non-criminal offense in NYS), on the condition that the defendant complete their HTIC service mandate.²²⁷ It should be noted that whereas other prostitution "diversion" programs have fixed program durations and requirements with an established set of outcomes that apply to all defendants,²²⁸ the NYC HTICs differ in that there is no uniform standardization across courts: rather, program characteristics (length of mandate, number of required sessions, ACD offer, etc.) can vary court-by-court depending on the county and prosecutor, creating uncertainty and anxiety for many defendants.

HTIC judges and prosecutors try to exhibit flexibility and leniency in dealing with non-compliance; they will generally overlook failure to complete services in a timely manner and will issue bench warrants only if a defendant consistently fails to appear in court. According to the Center for Court Innovation, judges rarely give jail time and discourage criminal convictions, even for those with longer criminal backgrounds or who are continually noncompliant.²²⁹ However, defendant confusion on the conditions of their ACDs, coupled with the opaque relationship between policing and judicial practices, render this leniency ambiguous from the perspective of defendants, many of whom feel vulnerable to arrest and criminal sanction (including jail time) during the HTIC and ACD processes and who put their lives on hold while under the scrutiny and surveillance of the criminal legal system.

Further complicating matters is the fact that arrests remain visible on defendants' records during the general six-month period before the records are sealed. Having an open case for this length of time exacerbates challenges related to immigration, employment, housing, education, and poses a real challenge even for those individuals who successfully complete their HTIC mandate.²³⁰ Moreover, both

227 White, Elise, et al. *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System's Response*.

228 Leon and Shdaimah, "JUSTifying Scrutiny: State Power in Prostitution Diversion Programs," 255.

229 White, Elise, et al. *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System's Response*.

230 Ibid.

the original charge and any associated bench warrants remain on defendants' record until defendants complete the terms of an ACD. Thus, HTICs are structured such that, irrespective of their rehabilitative aims and victim-centric rhetoric, defendants experience many of the same collateral consequences that ordinary criminal defendants do.

E. Evaluating efficacy: Research and data collection, and their absence

Because New York City's HTICs have been operating since 2013, it would seem reasonable that data have been collected and analyzed to evaluate the system, ideally according to process and justice-oriented outcome indicators. These data could help policymakers quantify and evaluate the effects of the diversion model on defendants' lives and on the criminal justice system more generally. Do HTICs facilitate meaningful, positive changes in defendants' lives, or do they impose additional hurdles? Have HTICs reduced or increased overall contact with the criminal justice system for affected populations? What, if any, fiscal impact (at city or state level across criminal justice, housing, and health systems) do they have? As of yet, there has been no coordinated state-wide effort to aggregate and analyze relevant data, and these questions remain unanswered.

Although some individual service providers collect data for their own recordkeeping and grant-seeking purposes, and court staff maintain databases to track case status and disposition-related information, respondents were generally unable to provide us with concrete quantitative data. For instance, we lack hard numbers as to how many people are diverted to HTICs, the types of services they receive, the efficacy of these services, the average length of mandates, what becomes of their cases, how the current system differs in criminal justice engagement from what came before it, and how defendants' actually experience these programs. This lack of information makes it difficult to evaluate whether New York's HTICs are successful or even to determine what success looks like in this context. Both qualitative and quantitative data could be useful, if collected under conditions that respect the privacy of defendants and within a consistent and coherent rubric of defining terms driven by defendant-informed metrics of "success".²³¹ While data are important to justify the continuation of the HTICs, identify their unintended consequences and weaknesses, and make changes to minimize harm to defendants, evaluation processes should be designed such that they do not unduly consume scarce resources, ratify any expansion of the service management component of the criminal justice system, or deflect resources from more innovative, effective and less penal approaches.

²³¹ Data collection of this sort was also recommended by Restore, an HTIC service provider. *Client Findings from the Human Trafficking Intervention Courts*. New York: Restore NYC, 2014. https://issuu.com/restorenyc/docs/clientfindingsreport_2014.

IV. Deep dive into service provision in the HTICs

The focus of the remainder of this report—and an important locus for future research—is the efficacy and ethical concerns inherent in using HTICs embedded in the criminal justice system as a means of delivering social services. Our health justice framework places the voices and respect for the agency of the most affected participants at the center of the inquiry, followed by a concern for ethical social service delivery: both of these perspectives raise serious concerns about the possibility of providing respectful, ethical and efficacious services under the coercive frame of prosecution and criminal justice procedures.

In general, HTICs require that defendants enter into a pre-plea agreement that prescribes them to a set of services to complete, i.e., a “mandate,” the scope and intensity of which vary according to defendants’ criminal record, service needs, service provider capacity, and individual jurisdiction’s practices. Most HTICs, including Manhattan, the Bronx, Brooklyn, and Queens, report that they typically mandate defendants to between five and ten sessions with a local service provider, although the Brooklyn HTIC reported that it will, at times, require as few as one session. Some HTICs require that defendants obtain mental health or substance abuse treatment—including inpatient treatment—in addition to the sessions with their primary service provider. Courts should not be in the business of ordering cookie cutter treatments: any requirement that defendants undergo a mental health or substance use assessment in order to determine individualized needs should be at the point of contact with a service provider (not the courts) to minimize the risk of expanding the authority of the criminal justice system over services. In most cases, HTICs will offer an ACD upon successful completion of the required services. As noted in the section on *Exiting the HTIC System*, the lack of uniformity of mandates and consistency or review of mandates (at least from the perspective of defendants) across courts contributes to the confusion, uncertainty, and precarity experienced by those who encounter the system.

HTIC mandates typically require each defendant to attend sessions with a designated service provider in the community. Although the nature of services varies widely from organization to organization, most organizations, according to their mission statements, provide individual, peer, and/or group counseling, case management, crisis intervention, and referrals.²³²

HTIC prosecutors generally have a list of service providers on hand to which they refer defendants. The array of service providers is particularly robust in New York City, where there are organizations catering to all manner of needs and subpopulations. In some cases, defense attorneys will discuss the various organizations with their clients and suggest ones that best fit their needs. Now that the HTICs have been operating for several years, a network of HTIC-connected service providers and public defenders has emerged. Each HTIC-involved service provider we were able to identify is listed in Appendix III.

²³² We did find evidence of one organization affiliated with the HTICs that does provide transitional and crisis housing. For more information, visit the GEMS: Girls Education and Mentoring Services website at <http://www.gems-girls.org/>.

A. Addressing defendant “needs”—what is known, what is needed, and how are services provided?

According to its stated goals, HTICs are intended to be a vehicle to connect service providers with a population that is believed to have high needs and to be difficult to access. However, we found no evidence that formal community-level needs assessments or research had preceded the establishment of HTICs in order to set the appropriate scope and range of services. As Section I on the history of trafficking narratives makes clear, the HTIC model is derived from a set of *ideological* beliefs about the experiences of people in the sex sector, not evidence-based and community-informed inquiry.

Secondly, courts strive to match defendants with organizations that have the ability to address their individual needs, including cultural competency and foreign language capabilities. However, the distinct relationships between the courts and defendants, courts and service providers, and service providers and defendants warrants clearer articulation of principles and guiding authorities in order to put in place appropriate and effective mechanisms of accountability and practices that actually benefit defendants’ interests and needs.

At present, no formal and standardized needs assessment is conducted by the courts to determine the scope of the service mandate; this includes a lack of clarity on the principles guiding to which provider the defendant is assigned. In some instances, the defense attorney might introduce a client to a service provider if staff from that provider happen to be present in the courtroom during the client’s initial appearance, in which case the service provider may meet with the defendant outside the courtroom for a preliminary assessment. In most cases, however, a needs assessment is not undertaken prior to setting mandates for services. The courts should not be authorized to evaluate individualized defendant needs, nor should they act as a regulatory body in the management and provision of social services [See analysis below and in *Conclusions*]. Insofar as they are requiring defendants to complete a mandate, the courts’ responsibility should consist of (and be limited to) connecting defendants with competent and community-accepted providers, which will be further discussed in the section on *Resource constraints and quality control*.

The proper site of needs determination is with the service provider, who in theory is professionally trained in ethical engagement with and service provision for marginalized populations, including those who are court involved due to the criminalization of prostitution. Individual service providers in our study reported carrying out assessments of clients and their needs in the first sessions, and while there is no uniform guidance or standardized needs assessment protocol across HTIC-affiliated providers, each individual service provider holds responsibility for being able to assess and respond to the range of needs of their clients (defendant and non-defendant alike).

“Needs” that persons in the sex sector have flagged include access to stable housing, a range of health services, childcare, immigration assistance and financial assistance.^{233,234} In many ways, these are simply basic questions of resource availability in marginalized and poor communities, but the dominant language of

233 For a research-oriented view contextualizing the discourse of needs for people in street based sex work, see Hail-Jares, Shdaimah, & Leon, *Challenging Perspectives on Street-Based Sex Work*.

234 Shdaimah and Bailey-Kloch. “Can You Help With That Instead of Putting Me in Jail?”

“needs” and “services” for “trafficking victims” (a population that is both stigmatized and fetishized, as our genealogy of policy responses to women selling sex in Section I makes clear), obscures this fundamental resource question. In some cases, as with all persons, specific services, including trauma counseling, drug and alcohol counseling and other treatment therapies, and mental health services are in fact, much needed, but barriers of poverty, citizenship status, and criminality make accessing these services difficult. The paradox we explore here then is how keeping needed services within a criminal frame works—or doesn’t. We note as well, the actuality of being trafficked does not figure in the court and service providers work at these moments: detection of trafficking plays a role in defense strategies prior to entering the HTICs, or in vacatur of convictions [see *Key legal frameworks affecting the HTICs*].

Overall, while many service providers are motivated and capable, it remains an open question as to whether social services accessed through the HTICs and contingent on criminal justice system involvement are appropriate from a health justice framework as well as effective in terms of their ability to meet the many needs of defendants. As we discuss at greater length in the *Conclusions and Recommendations* section, many defendants and non-defendants alike sorely need high-quality and accessible resources and services, but the current structure of the HTICs make the program another agent of coercive control and loss of autonomy by defendants, even while they are generally preferable to traditional criminal justice system processes and non-specialized criminal courts.

To progress towards a more compassionate and rehabilitative problem-solving model, the HTIC courts, and criminal justice system more largely, could consider steps to minimize its outsized role and involvement in defendants’ lives and to invest more intentionally in “opportunity structures” outside of the court system.²³⁵ This would include, as supported by our findings that criminal justice system contact in and of itself generates risk of harm, a shift in approach to resolving charges as expeditiously as possible and to *introducing* defendants to providers and resources, while ultimately allowing them to decide if and how they would like to partake in services.

1. Mandated versus voluntary services

As an initial matter, many of the service providers we surveyed and observed recognized the inevitable tension that arises when therapeutic or rehabilitative services are *mandated*. On one hand, service providers were for the most part confident that defendants would not access their services without a court mandate; on the other, service providers also recognize that the involuntary nature of the system likely undermines the uptake of services. One survey respondent noted that “most/all of the HTIC clients ha[d] not returned for long-term counseling, even though [her organization] offer[s] it. Mandating counseling and services is not an effective or productive way to provide services.”

Several service providers describe defendants as not being “ready” for services, or highlighted that defendants had difficulty accessing and receiving services due to the various barriers they may be facing in their lives. “Readiness” for change, a term derived through psychosocial models that seek to describe stages of intentional behavior change, is intended to capture the universe of factors that must be present to support

²³⁵ Ibid.

a person to decide and be able to seek and use services provided.²³⁶ “Readiness” is not framed as a judgment on clients, but is understood as a measure of voluntariness and self-determination that providers can use to gauge “where the client is” and how best to meet them there.²³⁷ Service providers were candid about their limited ability to provide services that defendants found valuable—or at least valuable enough to justify the effort to overcome barriers. One service provider acknowledged that some defendants simply “don’t have the time or space [to attend mandated sessions] and want to plead out.”

This view of “readiness” suggests, in part, the need for research into the design of services and the organizational capacity of service providers. However, it also resonates with the more fundamental critique that the criminal justice system is the wrong place to deliver services to this population and that defendants face problems that their organizations simply lack the capacity to address, as will further be described in subsequent sections.

2. Responsiveness to defendant needs and circumstances

This raises second-order questions about the overall *responsiveness* of services offered through HTICs to the diverse needs of their defendant population. Social service providers throughout the state reported that the primary issues defendants struggle with relate to housing insecurity and homelessness, safety, employment, immigration, childcare, and poverty. Although some service providers have capacity to assist with some of these issues, the primary focus of most HTIC mandates is counseling and case management, regardless of whether defendants express an actual interest in or willingness to engage such services. Moreover, some service providers acknowledged that complying with service mandates can often impose additional burdens on defendants, such as being forced to travel and take time away from other obligations in order to attend sessions, to confront language barriers, and to grapple with feelings of distrust towards service providers. For defendants focused on meeting basic needs such as food, shelter, and safety, participation in a counseling-centered and court-mandated service plan may require more time and energy than they can realistically provide.

For their part, defendants we interviewed were generally satisfied with the attention and personal services they received through HTIC-affiliated service providers. However, we note here this positive approval may reflect a substantial degree of sampling bias since they were recruited through those service providers.²³⁸ Moreover, the compassionate services received by some defendants in the HTIC system should be available to all individuals on a voluntary basis and dissociated from criminal justice system involvement.

Importantly, the services respondents said they most appreciated were *long-term voluntary support services* as opposed to the handful of sessions mandated by the HTIC. This aligns with service providers’ general perception that the most effective way to promote uptake of services is through voluntary provision as opposed to court enforced mandates. The functional relationship between HTIC-mandated sessions and connections to voluntary support services needs further research to understand its operation.

236 O’Hare, Thomas. “Court-Ordered versus Voluntary Clients: Problem Differences and Readiness for Change.” *Social Work*, Vol. 41, No. 4, July 1996, pp. 417–422.

237 Ibid.

238 Other experiences of women who have had less positive experiences in this system are discussed in Shdaimah, “Taking a Stand,” 107-108 and Ray & Caterine, *Criminal, Victim, or Worker?*

3. Resource constraints and quality control

A consistent theme among service provider organizations is the concern that HTIC-created demand outstrips their ability to provide timely, comprehensive services. This is especially true with respect to defendants with specialized needs. For instance, only a few New York City-based service providers have the capacity to serve clients who speak Korean, Mandarin, or other East Asian languages, and long waiting lists for capable providers can prolong the length of defendants' mandates.

An average rate of mandate completion was difficult to determine, but our own inquiries produced information on timelines that ranged from as fast as 1 month to upwards of 6 months. It seems that most individuals complete their mandates within 3-4 months. Completion depends on service capacity and takes longer if there are waitlists to access services. Completion also often depends on individual defendants, and the external circumstances or factors that may play out in people's lives. The 2014 RedUP study corroborates that time to mandate completion can be longer when limited provider capacity is met with specialized defendant needs: Mandarin-speaking defendants who obtained an ACD generally took between five and six months to do so, as compared to a usual timeline of 1.5-3 months in Brooklyn and 2-4 months in Queens.²³⁹

Of further concern is the possibility that the influx of HTIC defendants might limit the ability of service provider organizations to work with non-mandated clients from the broader community. Many of the service providers we surveyed already have more clients than they can handle and, if service provider capacity remains static while diversion programs in the state continue to grow, HTICs may ultimately reduce access to services outside of the criminal justice context.

Relatedly, many service providers expressed acute awareness of funding constraints. It is unclear how state funding for organizations serving HTIC defendants is allocated and with what level of consistency, although since 2016 onwards, the New York City Council has earmarked funds (totaling between \$750,000-\$1,000,000/year) through its "Support for Victims of Human Trafficking Initiative" for service provider organizations affiliated with the NYC HTICs.²⁴⁰ The organizations we surveyed are funded primarily via grants and private donations. Major sources of grant funding included such entities as the United States Department of Justice Office for Victims of Crime, the New York Office of Temporary Disability Services, and Open Society Foundation, among others. Some social service organizations reported receiving funding earmarked specifically for their HTIC-associated programs, while others receive no HTIC-specific funding and serve defendants using their general funds. While service providers need to be outfitted with adequate levels of resource and funding to carry out their work effectively, the controlling and disempowering dimensions of the HTICs, embedded as they are within the criminal justice system, raises questions about whether public and private funds earmarked for HTIC-associated providers would be better invested in services desired by communities and where people engage on a voluntary basis.

²³⁹ Ray & Catherine, *Criminal, Victim, or Worker?*, 7

²⁴⁰ *Expense Funding*. The City of New York, <http://council.nyc.gov/html/budget/database.shtml>. Accessed March 21, 2018. Search "trafficking"

Both defendants and HTIC staff cited funding disparities as a primary driver of the varying quality of HTIC-affiliated service providers. Organizations serving youth reportedly had far more resources at their disposal than organization that serve adults, particularly with respect to housing assistance. Multiple service providers reported that housing is the most challenging service that needs to be addressed, particularly in New York City, where housing stock is at a premium and rates of homelessness are at their highest level since the 1930s.²⁴¹ Surveys indicate that housing insecurity is the single most pressing challenge faced by sex workers,^{242,243} who may engage in transactional sex to secure housing or be denied housing as a result of a conviction. Despite the acute level of need for the populations served by the HTICs, neither the city nor the service providers are equipped to respond adequately: there are simply not enough accessible affordable housing units or shelter beds to furnish defendants with a safe and affordable place to stay.

As service provider caseloads have increased in volume, HTICs and affiliated service providers have sought to enlist additional organizations in an effort to fill service gaps. There appears to be no standardized process or guidance for vetting new service provider organizations, or holding existing ones accountable to standards of competency, and this lack of standardization can create disparities in the quality of services provided to HTIC defendants. There is a fine line to walk here: while courts should not be in the business of monitoring and evaluating service providers, they should be equipped to set up contact with well-regarded and community-accepted providers who are capable of assessing and meeting defendant needs on a long-term basis if the defendant chooses to remain in services voluntarily after their case is resolved. As explained further in the *Conclusions and Recommendations*, oversight mechanisms to ensure that responsive and competent services are being delivered in a timely manner falls on providers, their funders as appropriate according to grant terms, and other regulatory bodies *outside* of the criminal justice apparatus.

While the focus in this section is on service providers, it is important to note that there are a range of actors involved in HTICs who also must be taken into consideration in conversations around funding, quality, and totality of resources distributed and consumed. HTIC staff reported that the courts receive no HTIC-specific funding, but rather are funded through general court administration funds, which do not appear to have been increased to accommodate the statewide HTIC expansion. As noted in the recommendations section, more research is needed to understand the flows of money: to whom are funds going both within and across HTIC components, for what goals, and with what level of adequacy in light of need and actual provision of services?

241 “Basic Facts About Homelessness: New York City.” *Coalition for the Homeless*, 2018. www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/.

242 Thukral, Juhu and Melissa Hope Ditmore. *Behind Closed Doors: An Analysis of Indoor Prostitution in New York City*. New York: Sex Workers Project of the Urban Justice Center, 2005. sexworkersproject.org/publications/reports/behind-closed-doors/

243 Thukral, Juhu and Melissa Hope Ditmore. *Revolving Door: An Analysis of Street-Based Prostitution in New York City*. New York: Sex Workers Project of the Urban Justice Center, 2003. sexworkersproject.org/publications/reports/revolving-door/.

B. The ethics of social service provision in mandated settings

The current structure of New York’s HTICs creates tension between the court-enforced mandates and the ethics of social service provision. Social workers and other service providers (including psychologists, psychiatrists, counselors, etc.) are trained in the professional ethics of their respective fields, which emphasize the centrality of respecting client autonomy, securing informed consent, fostering self-determination, and avoiding coercion in therapeutic relationships.^{244,245,246} These values are difficult, if not impossible, to square with the HTIC system, which is predicated on mandates, consequences, and social control.²⁴⁷

To note, these tensions predate the HTICs and have long existed for therapeutic service providers engaging with court-involved clients who can expect punitive consequences for refusing services. As one social worker and scholar wrote in 1996:

Mixing social control and therapy places the practitioner and the profession in an especially precarious position, given that many mandated clients are from oppressed ethnic and racial populations [...] providing court-mandated intervention for a client who rejects the problem definition and only technically complies with treatment sunders the spirit of informed consent, highlights the inherent falsity of the treatment contract (Croxtton, 1988).²⁴⁸

While the HTICs have strategically used the rhetoric of “trauma” to position defendants as “criminal/victims” and to justify the value of trauma-informed social services, the system itself—including the service mandate, in which defendants may feel their engagement is not voluntary—has potential to re-traumatize defendants for whom helplessness, loss of control, and denial of autonomy are defining elements of past traumatic experiences.^{249,250} Moreover, service providers reported that using arrest as the gateway to their services created barriers to engagement, which also flags an ethical dilemma for providers. In one provider’s telling, “there are people who have had BS arrests, some who haven’t worked [in sex work] in their life at all or others who think the arrest was wrongful and think ‘I shouldn’t have

244 “Social workers’ primary responsibility is to promote the well-being of clients. In general, clients’ interests are primary... Social workers respect and promote the right of clients to self-determination and assist clients in their efforts to identify and clarify their goals.” [Code of Ethics of the National Association of Social Workers. Washington, DC: National Association of Social Workers, 2017. <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English>.]

245 O’Hare, “Court-Ordered versus Voluntary Clients: Problem Differences and Readiness for Change.”

246 *Ethical Principles of Psychologists and Code of Conduct*. Washington, DC: American Psychological Association, 2017; 2014 *ACA Code of Conduct*. Alexandria: American Counseling Association, 2014.

247 “...targeting people for arrest in order to offer services is a grave form of coercion that violates numerous social work ethical standards across the National Association of Social Workers (NASW) Code of Ethics (Standards 1 and 6), Council on Social Work Education (CSWE) Educational Policy and Accreditation Standards (Policies 2.1.2 and 2.1.5), and the International Federation of Social Work (IFSW) Ethical Principles (Principles 4.1 [1 and 2] and 4.2 [3–5]). Furthermore, providing social supports and services through criminal courts, even if on a voluntary basis, assumes that participants in these programs should be under surveillance by the criminal justice system.” [Wahab and Panichelli, “Ethical and Human Rights Issues in Coercive Interventions With Sex Workers,” 345.]

248 O’Hare, “Court-Ordered versus Voluntary Clients: Problem Differences and Readiness for Change.”

249 Shdaimah, “Response - Prostitution/Human Trafficking Courts: Policy Frontline as Fault line,” 20.

250 Substance Abuse and Mental Health Services Administration. *Trauma-Informed Care in Behavioral Health Services*. Treatment Improvement Protocol (TIP) Series 57. HHS Publication No. (SMA) 13-4801. Rockville: Substance Abuse and Mental Health Services Administration, 2014.

to do this.” How are social service providers, sensitive to the ethics of their field, to respond to these concerns?

As Leon and Shdaimah have noted, service providers with rehabilitative goals may reconcile the tensions between their personal and professional ethics (their “moral abidance”) and the coercive nature of the criminal legal system (“law abidance”) by exhibiting care and compassion in their one-on-one relationships with clients.²⁵¹ Prostitution “diversion” programs, such as the HTICs, therefore “can be understood as more institutionalized adaptations of attempts to bring existing laws and penal policy in line with moral and practical sensibilities.”²⁵² The authors, however, caution that the good intentions of service providers, which may even lead some defendants to have positive experiences and receive services of real value, cannot resolve the fundamental problem of nesting social services in a punitive criminal legal context that has neither the resource capacity nor the intention to advance broader structural and systems-level change.

1. Problems with a one-size-fits-all model

At their core, HTICs operate on the assumption that all defendants—as imagined by the statements setting HTICs’ mandates—are “exploited prostitutes”, victimized, desperate to leave the sex sector, and traumatized. It is imagined that defendants must ultimately benefit from the services that affiliated providers offer. Interviews with defendants and service providers reveal that this is not always the case; defendants do not always find the available services to be useful or responsive, and providers acknowledge that they are unable to assist with some of their clients’ most basic material needs. As described above, while service providers report conducting assessments in the first session, there was no evidence of a uniform guidance for defendant assessment prior to determining a service mandate. As such, the specific interests and needs of differently-situated defendants in a criminal justice context, particularly (but not limited to) trans individuals²⁵³ and those with noncitizen immigration status, is not clearly differentiated in the current HTIC model, and this lack of specificity and attention to structural positioning further contributes to discrepancies between what is offered by HTICs and what is useful or desired by defendants.

Because the HTIC service delivery model imposes service mandates irrespective of demonstrated need, it can compromise fundamental tenets of social service provider ethics, such as promoting equity and justice, challenging unjust policies and practices, and upholding self-determination, full participation, and human dignity.^{254,255} Making engagement in services a mandated component of the penal system, as opposed to a voluntary choice, thus fundamentally alters the dynamic of the service provider/client relationship.

251 Leon and Shdaimah, “JUSTifying Scrutiny: State Power in Prostitution Diversion Programs.”

252 Ibid., 268.

253 Bailey-Kloch and Shdaimah found that transgender defendants in Baltimore’s prostitution diversion program report fewer mental health and substance use issues than cisgender defendants, and that their resource and service needs differ in significant, but often unrecognized, ways from cisgender participants. For instance, their findings indicate that transgender defendants were often motivated to participate in sex work because of the discrimination and stigma they face in areas such as housing and employment [Bailey-Kloch, Marie, et al. “Finding the Right Fit: Disparities Between Cisgender and Transgender Women Arrested for Prostitution in Baltimore.” *Journal of Forensic Social Work*, Vol. 5, No. 1-3, 2015, pp. 82–97].

254 Wahab and Panichelli, “Ethical and Human Rights Issues in Coercive Interventions With Sex Workers.”

255 Deboise, Crystal. “Human Trafficking and Sex Work: Foundational Social-Work Principles.” *Meridians*, Vol. 12 No. 1, pp. 227-233.

2. Enlisting service providers in surveillance

Another ethical conundrum that frequently arises in the context of mandated service provision is that service providers are expected to report on defendants' overall mandate compliance to the court. While we do not know the extensiveness of reporting requirements or practices in NYC, because the granting of an ACD is contingent on mandate completion, service providers are responsible for providing information used to assess defendant progress by the court.²⁵⁶ This forces service providers to play two incompatible roles, acting as counselor, confidant, and advocate as well as monitor, possible adversary, and whistleblower. There is a lively debate within the social work literature on the ethics of this posture: some contend that mandating defendants to services, monitoring their engagement, and punishing non-compliance through the criminal justice system only increases barriers to accessing resources and support as defendants lose trust in the systems that purportedly exist to help them.²⁵⁷

The lack of data on the HTICs means that these claims and concerns hover among service providers and are raised as concerns by advocates without obvious resolution. It is clear, however, that within the broader social work, mental health, and behavior change literatures (including that regarding adherence to HIV as well as substance use prevention and treatment regimens), evidence tends to support the argument that enhancing voluntariness and readiness is more sustainable and effective in achieving therapeutic goals.^{258,259}

C. Defendant experiences of court-mandated social services

Defendants' accounts of their experiences with HTIC-affiliated service providers ran the gamut from sincere gratitude for their assistance and relief at the opportunity to avoid jail time to resentment of, skepticism about, and frustration with the HTIC mandates.

1. Avoiding jail time

For many defendants, the most salient aspect of their HTIC experience was the opportunity to avoid a harsher sentence. "They worked with me," said one defendant. "[A]t least I didn't get jail time for it. I got counseling [as] opposed to going to jail. So I was alright with that." In New York City, the specter of spending time on Rikers Island—the city's notorious jail compound—looms large, and one defendant readily characterized the HTIC as "a better option instead of sending them right to Rikers Island."

Similarly, defendants cited their fear of jail time in discussing their motivation to follow through with their mandates:

²⁵⁶ White, Elise, et al. *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System's Response*, 32.

²⁵⁷ Wahab and Panichelli argue that the history of social workers acting as agents of moral and social control over sex workers has contributed to a climate in which sex workers "fear social workers as much if not more than the police, as we are legitimately seen as the service gatekeepers as well as the ones who take their children away." [Wahab and Panichelli, "Ethical and Human Rights Issues in Coercive Interventions With Sex Workers," 347.]

²⁵⁸ Shearer, Robert A., and Guy D. Ogan. "Voluntary participation and treatment resistance in substance abuse treatment programs." *Journal of Offender Rehabilitation*, Vol. 34, Issue 3, 2002, pp. 31-45.

²⁵⁹ Nordqvist, Ola, et al. "Assessing and achieving readiness to initiate HIV medication." *Patient Education and Counseling*, Vol. 62, Issue 1, 2006, pp. 21-30.

*I know that if I don't go to sessions it would be thirty days in jail. That's what I think I remember...which would be only 15 days, but who the hell'd wanna go to jail!? I'm going to do these sessions wherever they are.*²⁶⁰

I didn't want to go to jail. Even though jail here is better than LA, I didn't want to go to jail. It's still jail.

In their analysis of how women in prostitution diversion programs express agency within the framework of coercive conditions and limited choices, Shdaimah and Leon note that agreeing to enter a diversion program in order to avoid incarceration or other punitive criminal justice sanctions (probation, a criminal record, etc.) often represents “a strategic choice that is not the same as acceptance of the values or goals of the program.”²⁶¹ The decision to participate, while not free from coercion, is thus a “system savvy” calculation that defendants make in the context of constrained options.

2. Positive relationships with service providers: Paying attention to humanity under the shadow of the HTICs?

In addition to the opportunity to avoid harsher sanctions, many of the defendants we interviewed expressed appreciation for and gratitude to the social service providers they had been assigned through the HTIC. These expressions of appreciation are the linchpin of our critique. While they might appear to legitimize the HTICs, we argue the opposite implication—this study reveals the fundamental importance of high-quality, ethically-driven connections between competent providers and “ready” clients. Good connections arise because of provider ethics and professionalism, despite the lack of guidance and meaningful policy oversight for service provision in the HTICs. This hit-or-miss benefit puts into high relief the more dominant failures (profiling and abuse by police, unaccountable arrests for street level clients, disrespect of defendants, chaotic judicial process, lack of understanding of rights and opportunities to get clarity on expectations, unequal access to these same services for non-English speaking defendants, etc.) that dominate in the HTICs.

One defendant described her service provider as:

so sincere. . . She really cares. I felt like somewhat [of] a disappointment because [I was arrested] again, so I didn't want to sit with her face to face again. So I tried to decline the sessions and plead guilty to the crime. But the judge was like 'we don't want to do that.'

She wept when speaking of her service provider, who served as a source of unconditional support and never cast judgment, even after her re-arrest. The judge's posture is itself worth of attention. Future analysis and research on HTICs might focus on the extent to which they encourage judicial postures of “protectionism” which might seem beneficent, but which in the U.S. criminal justice system run directly counter to the Constitutional and other principles of justice for the rights of defendants. When, for adults, is such discretionary protectionism in operation in HTICs permissible, and under what constraints?

²⁶⁰ Based on the evidence obtained by researchers, defendants will not receive 15- or 30-day jail sentences for missing their sessions. This reflects the perception of a defendant, when being asked about their participation in an HTIC.

²⁶¹ Shdaimah and Leon, “First and Foremost They're Survivors,” 332.

Other defendant recounted a similar experience:

[The service provider] never changed. She was that one constant thing in my life. She never got an attitude. She never got mad that I didn't come back. She was there. She was just as happy to see me a year later, knowing that I was still doing the same thing.

Strong bonds between defendants and service providers developed only gradually, and most defendants reported initial distrust of the providers and resistance to the mandated sessions. This was especially true of defendants who wished, or felt compelled, to continue engaging in sex work and feared that the mandate might jeopardize their ability to do so.

As one defendant said:

At first, I am like, I'm just gonna get these court sessions out and then go back to being with [her boyfriend, who had engaged her in sex work]. Now if I was [prostituting], I guess it's [the arrest] fair. I am not going to sugar coat it. We are breaking the law to New York anyway. I mean if I was living in Nevada I would be prostituting right now! They don't arrest us over there for that. Why we don't get arrested there and we get arrested here?

Others expressed skepticism about providers who focused specifically on the service needs of sex workers. In describing her initial impression of her assigned service provider, one defendant said: “At first when I found this place I was like ‘What? A place for hoes? No way!’ I thought they were bugging out. I thought everyone was crazy.”

Of the defendants who indicated experiencing significant positive changes in their lives since engaging in services, all had voluntarily sought out additional support from provider organizations after completing their HTIC mandate. Some maintained consistent relationships with their providers, while others re-initiated contact during a period of crisis.

Several of the defendants who maintained post-mandate relationships with their providers reported accessing a wide variety of resources other than counseling, including educational opportunities, legal assistance, procurement of identification documents, and occasionally even housing assistance. One such defendant remarked that her provider had helped her get a state ID and passport, which she said “helped [her] become more independent and not necessarily . . . dependent on [her] mom.”

The fact that service providers recruited the interview subject in our sample means it is may not be representative. Many defendants never complete their mandated sessions or develop relationships with service providers, meaning that their views on the quality and utility of HTIC-affiliated services are not reflected in our sample.

3. Ambivalence toward or dissatisfaction with available services

Other defendants indicated that they did not have service needs that they need their provider's help with, so they did not return for voluntary follow-up after the mandatory sessions culminated. One defendant, a victim of police profiling, told us that she had not received referrals from her provider “given that [she] was already at an adult day health center [and the provider] felt [she] didn't really need anything” else.

Another defendant was highly critical of the ubiquity of counseling as the dominant feature of most HTIC mandates:

They are going about it all wrong. Counseling isn't gonna do shit. Let's be real. Yeah, it helps with the emotional part but if you want a prostitute to get off the streets and away from her pimp you gotta give her money. Or help her financially. Because right now that's her only financial situation. That's her only means of survival. If she feels like that is the only way she's going to survive in this world, that's all she is going to do.

Additionally, even individuals who reported appreciating their service provider often reported that the referrals and other services made available to them were things they already knew about or had access to:

They give you a lot of referrals for housing, work, addiction. However, when I got arrested, I was already in an outpatient program that I chose to go back to. So I really didn't need her to link me up in that aspect because I was already in one.

4. Post-mandate follow-up and tracking

Although many of the defendants we interviewed cultivated ongoing relationships with service provider organizations, staff at these organizations indicate that this is the exception rather than the rule.

Organizations are frequently unable to provide consistent follow-up services once a court-ordered mandate has ended. Sometimes this is due to client attrition; other times it can be attributed to resource constraints or a lack of capacity to provide appropriate or responsive services.

Conversations with defendants, service providers, and staff indicate that re-arrest is common, although we lack the statistics necessary to conduct a thoroughgoing assessment. Without these data, we are unable to determine whether and to what extent the HTICs are achieving one of their stated primary goals—facilitating exit from sex work and thereby breaking cycles of criminalization.

V. Conclusions and Recommendations

Conclusions

This report provides a close examination of the NYC HTICs, revealing the continuing impacts of local histories and gendered ideologies and beginning investigations into their complex and often contradictory interactions between and among criminal justice and service delivery approaches. Fundamentally, our concerns with HTICs arise with the conflation of trafficking and sex work and with the overreach of courts as managers of social service provision. These problematic approaches are intertwined and exacerbated through criminal justice actors mandating social services as part of a claimed “problem-solving” approach to the adjudication of these cases. All of these problems arise in the context of today’s municipal criminal justice systems, which are racialized and over-punitive to the poor (including non-citizen poor), and for which attention to gender-specific needs only arises in the sexualized context of prostitution arrests.

The fact that the court-led HTICs are called “human trafficking” courts, yet only address prostitution-related crimes and no other forms of trafficking, exposes the conflation of all sex sector activities with trafficking, allowing the City to ignore trafficking abuses in other sectors. U.S. trafficking law addresses exploitation regardless of labor sector, and the demand for cheap labor in exploitative conditions exists in all sectors and workplaces, including but not limited to: agriculture, construction, sex and domestic work. Moreover, a criminal justice response to trafficking should be treated as only one component of a much more worker-empowerment approach to the harms.²⁶²

Alongside this myopic reduction of attention to the street-level sex sector through the misnomer of “trafficking”, the HTICs also operate without regard for the actual interests, needs, and decision-making capacities of the persons who appear as HTIC defendants. The identification of trafficking in the context of misdemeanors reveals the contradictions: if someone is a trafficking victim, why should there be an ACD at all? The answers appear to lie not only in the desire of prosecutors to hold onto contact with potential witnesses to any trafficking case they might pursue, but also from the “rescue” mentality that permeates the rationales and practices of so many actors in the HTICs. The rescue mentality is sustained by the on-going association of all sex work with trafficking as detailed earlier in the report, which in turn generates a justification to many different actors to hold defendants under the control of the CJS for “their own good”.

From the perspective and interests of a trafficked person, trafficking should be a complete defense to their prostitution charge (and thereby move them out of the jurisdiction of the HTICs), or be of use in vacating a prior conviction of a prostitution offense. Moreover, the emphasis on the rhetoric of trafficking in these courts might lead advocates to reforms in the wrong direction: the key reform is *not* more accurate “trafficking” identification, as trafficking identification as a basis for HTIC eligibility would not make sense in these courts as outlined above, and, to the extent that courts are facilitating access to social services, they should be doing so for *all* defendants, irrespective of “victim” status.

262 Janie A. Chuang. “Exploitation Creep and the Unmaking of Human Trafficking Law.” *The American Journal of International Law*, Vol. 108, No. 4, 2014, pp. 609–649.

Furthermore, as the interviews with service providers attest, mandated social services are difficult to provide in a truly non-coercive, just, and respectful manner, thereby creating tensions for both defendants and service providers—the former painted as victims and treated as criminals, the latter caught in a professional ethics quandary.

Taken together, there are two fundamental contradictions of the HTIC approach:

- *The naming and justifications given for the NYC Human Trafficking Intervention Courts reflect a fundamental mischaracterization, obfuscating what actually happens or can happen within the HTIC initiative and facilitating not only counter-productive labeling, but harmful sorting of defendants.*

The courts address only low-level street prostitution; they are not interested in actual trafficking victim status as defined under state and federal law. At their best, they are interested only in respectful practices and opening a gateway to services that might meet the needs of imagined victims (trauma counseling, etc.).

To the extent persons within the HTICs believe all street-level prostitution is exploitative, akin to “sex trafficking” as imagined historically, the HTICs are still misguided, as they do not remove the defendants from the scope of the criminal law: the very conduct (loitering, offering to sell sexual services, selling sexual services, i.e., prostitution) that provide the rhetorical justification for the HTICs still remain a crime in NY. As a matter of criminal law, the defendants are not treated as victims; while being trafficked is a defense to a prostitution charge provided for in NY, access to the services provided by the HTICs depends on a defendant forgoing this defense and accepting an adjudication of their *prostitution offense* as if still a criminal defendant.

- *The HTICs’ actual practices within this “trafficking framing” are equally contradictory to the stated service provision goals and problematically build up a court overreach, setting up criminal courts as managers of social services.*

Dismissal of a charge/conviction under the HTIC requires completing a range of services, almost all of which focus on individual behavior change through counseling, and which may or may not be appropriate to the reasons and causes motivating a defendant to sell sex, and in almost no case provide sufficient assistance or structural improvements for persons to exit selling sex, even if desired. If a defendant fails (which happens frequently, either because the services are inapt or barriers to completion too high), they are in the same position (both in regard to the criminal justice system and to the need for a livelihood) as before receiving services. Defendants may want and need a variety of services, but the goal of the state and city authorities should be to address these needs through consultation with the most affected in order to strengthen the overall accessibility of services and resources for marginalized populations. This consultation should proceed with particular attention to interactions of race and gender for cis and transgender women; needs around housing, health care, mental health and drug use counseling and treatment; and the rights of non-citizen defendants, among other issues.

The language of decarceration, rehabilitation, and other rhetorics of help and change claimed by HTICs crumble under the weight of these paradoxes and unacknowledged fault lines. The title of this report, *Un-Meetable Promises*, illustrates this point: the problem is not just that the promises of the HTICs have not been met, but that they *cannot* be met within the terms of NY law, the criminal justice system and the current systems of accessing services. One part of the problem is the mismatch of access points, services

and needs; another component is the incongruity of criminalizing sex work yet, through trafficking rhetoric, telling a story of vulnerability detached from the impacts of criminalizing selling sex as a livelihood. These fundamental contradictions cannot be remedied by incremental changes in the criminal justice system at the point of post-adjudication court contact.

As such, the recommendations that follow do not seek to bridge the chasm between rhetoric and reality in the HTIC context. Instead, recognizing the paradoxical nature of HTICs, they flag open contradictions and provide ideas for how the court system can reconsider its role and scope of involvement in order to reduce immediate harms to sex workers as individuals and as communities caught in oppressive structures and cycles of surveillance, policing, arrest, prosecution, diversion, and incarceration.

The recommendations that follow are grounded in principles of human rights, harm reduction, and accountability while operating within a commitment to greater change: the complete decriminalization of sex work and associated practices, with criminal law interventions (including policing) reserved to a limited and minimal use in response to violence, coercion, theft (including theft of services) and other exploitative practices committed against persons in the sex sector.

In the long run, the implications of these findings reinforce the only way out of the contradiction: the imperative for states to work toward the decriminalization of sex work, which means moving persons buying and selling sex, if no other crime is present, out of the jurisdiction of the criminal justice system. Engagement with the criminal justice system tends to increase harms against people selling sex (whether or not they identify as sex workers) by reinforcing stigma and isolation and diminishing their ability to protect themselves individually or by working together. Moreover, it limits avenues to pursue justice for abuses committed against them, access community and state resources, and seek assistance for vital services.

Notably, this report and other research demonstrate that involvement in the criminal justice system also heightens vulnerability to interpersonal and institutional violence, including at the hands of law enforcement. While decriminalization will not by itself end stigma and related violence against sex workers—transformation is also needed of deeply embedded and intertwined structures of racism, misogyny and transphobia, amongst others—it is a requisite first step in that direction.

The gulf between promise and delivery in the HTIC system is irreparable without the decriminalization of sex work, and continued CJS contact, however well-intentioned by the courts themselves, is so often detrimental to health and justice for persons in the sex sector. Given this, we argue throughout the recommendations that follow that the HTICs must reform their model to be concerned primarily with *clarity of mission, brevity of engagement, decency of practice*. That is, they must institute uniform standards for practice and treatment for all defendants that are non-judgmental, respectful, and compassionate and that seek to minimize defendant contact with and time in the criminal justice system through minimal service mandates and expeditious dismissal and sealing of charges without an ACD period.

To the extent that the HTICs maintain influence in facilitating access to social services, their approach should be to *initiate* contact with community-based and -respected providers without acting as gatekeepers, managers, or punitive enforcers of service engagement. In this scenario, the role of the courts shifts to being a springboard for defendants to be connected with providers with whom they can choose their level and duration of involvement.

While more research is warranted for many of the revisions, especially through establishing mechanisms and policies to collect the information necessary to understand systematically which defendants actually engage with the HTICs and what their needs and experiences and outcomes are before, during, and after the HTIC process, such research and evaluations should not forestall timely reforms, unduly consume resources and funding, or create additional procedural hurdles for defendants.

Because HTICs function within the NYS court system, the primary set of actors addressed in these recommendations are the New York State Unified Court System, which established and supports the Human Trafficking Intervention Initiative, and the Center for Court Innovation, which has played a core role in the implementation of HTICs and offers research and guidance to jurisdictions considering similar court-based responses to “trafficking”.²⁶³ The remainder of the recommendations are geared toward entities that exist outside of the jurisdiction of the court system, but whose ongoing practices and frameworks impact the HTICs (i.e., law enforcement, service providers, and policymakers).

Recommendations

Part I: Regarding HTIC Policies and Practices

To the New York State Unified Court System, Center for Court Innovation, and HTIC Court Personnel:

1. Review and revise the structure and purpose of court-facilitated service provision and related mandates in order to promote voluntariness and expeditious disposition of cases with the ultimate goal of minimizing harms associated with criminal justice system involvement for defendants.

Summary and justification for recommendations

As discussed in the conclusions section, the HTICs should not be positioned as managers of social services, gatekeepers to accessing services, or authorities with the power to punish defendants for non-engagement or failure to comply with mandate requirements. In moving towards a more compassionate and rehabilitative model, time in court and program requirements should be refashioned such that they are less intensively supervisory and minimally disruptive of defendants’ lives.

- HTIC program requirements and prosecutorial policies should be consistent for all defendants irrespective of criminal history and should be structured around the goal of expeditious case disposition (dismissal and sealing of charges or non-criminal disposition), which can be accomplished in part through lighter and shorter service mandates that serve to set up (but not regulate or control over time) contact between defendants and service providers.
- After the initial contact with service providers is facilitated through the HTICs, defendants should have the option to continue involvement in the services if and when they desire.

2. For prostitution and related offenses, the process of granting ACDs and requiring a six-month waiting period should be reviewed with an eye towards removing ACDs completely, such that charges are immediately dismissed and sealed after the completion of the service mandate.

²⁶³ Malangone, Danielle, Robyn Mazur, and Miriam Goodman. *Responding to Sex Trafficking in Your Jurisdiction: A Planning Toolkit*. New York: Center for Court Innovation, 2015. <https://www.courtinnovation.org/publications/responding-sex-trafficking-your-jurisdiction-planning-toolkit>.

Summary and justification for recommendations

At present, defendants who complete the conditions of their mandate and are granted an ACD by the court typically must further wait a six-month period before their charges are eligible to be dismissed and sealed. During these six months, they cannot be re-arrested for any offense, and the original arrest, charge, and any associated bench warrants remain visible on their record. This waiting period harms defendants who are subject to over-policing and discriminatory profiling (and therefore are at higher risk of re-arrest); defendants who are noncitizens, undocumented, or have any kind of immigration status that might make them susceptible to targeting by immigration enforcement agencies; and defendants who encounter access barriers (e.g., housing, employment, other needs) or legal vulnerabilities (e.g., defendants with other open cases) due to having a visible record.

- As a matter of policy, prosecutors should review and eliminate the six-month waiting period for all defendants in order to maximize the likelihood that charges are successfully dismissed and sealed and to minimize unnecessary stress and time demands on defendants.
 - An immediate dismissal and sealing of charges should be granted for all defendants upon completion of mandate without an ACD period, and ACDs should be used in rare cases as the exception rather than the norm.
- 3. Create standards, train, and enforce monitoring and accountability for practices which can ensure that courtrooms are driven by policies, not personalities, and that these policies align with the purported non-adversarial mission of HTICs.**

Summary and justification for recommendations

Defendants' experiences in the courtroom ranged dramatically from feeling shamed, dehumanized, and powerless to feeling cared for and respected. Moreover, the opaqueness of HTIC practices and variability of prosecutorial policies across counties create conditions of constant anxiety and fear of criminal sanction for defendants. This inconsistency in personal experiences, as well as the sheer variation and unpredictability of HTIC practices such as around mandate length and ACD offers, should be diminished such that all defendants receive non-judgmental, respectful, and appropriate treatment in court. Judges and court staff should adhere to standards that reflect the purported compassionate mission of HTICs and create regularity and predictability in defendants' experiences of court processes and in interactions with court actors.

- Defense attorneys must be meaningfully engaged at all points at which substantial liberty or equality interests are at stake as defendants navigate the HTIC processes.
- Courtroom policies and standards should be established to create and maintain a courtroom culture that aligns with the HTICs' claims to offer a more humane and respectful approach. This includes the resolution of the current variability and unpredictability of HTIC practices and requirements across counties and courts through the creation of uniform standards.
 - ◆ Judges and prosecutors currently have disproportionate power to dictate courtroom practices and culture: however, development of these system-wide standards requires affected community input as well as that of other stakeholders and should guarantee basic rights protections.

- ◆ The history of these courts demands careful review work to ensure that court practices do not substitute “tender regard” for real rights protection of a limited class of defendants.
- ◆ All courts should work to provide actual protection of rights and create politics that show respect for all defendants. This work can only proceed with the full and active participation of all players, including public defenders, prosecutors, court personnel, service providers and affected communities.
- All judges and court personnel working in HTICs should be required to receive education and training on standards, including in cultural humility^{264,265} and structural competency,^{266,267} that would support their ethical and rights-promoting engagement with people affected by the dynamics and histories of structural oppression, trauma, addiction, discrimination on the basis of gender identity, and trafficking as relevant to the varied populations they serve.
- Non-clinical court staff should be mindful of confidentiality of any health-related service provision in their discussions of defendants’ progress.
- Policymakers and court personnel should review and revise the rhetoric used to describe the work of the HTICs and the persons under their supervision. The HTICs are built upon a reductive and inaccurate “sex trafficking”-centric narrative: it is misleading and makes respectful engagement with defendants in the HTICs more difficult. Failure to recognize the full spectrum of sex work experiences compromises any HTIC program’s ability to meet the needs of all defendants and engage constructively with defendants in the HTIC process.
- Mechanisms should be put in place for defendants to safely and confidentially report negative experiences in the courtroom to judges (when the judge is not the source of the complaint) and to a central monitoring structure, without risk of retaliation, and for responsible parties to be held accountable.

The CCI Planning Toolkit has a relevant section (*Operations and Procedural Justice: Adopting a Trauma Informed Approach*), which lays out “suggestions for creating a safe and secure [courtroom] environment.”²⁶⁸ The suggestions emphasize confidentiality requirements to minimize publicly shared information, and even allude to the need for confidentiality when cases intersect with social service providers, though they stop short of articulating concerns over the role of service providers in reporting defendant compliance and mandate progress to the courts.

Many of the suggestions outlined in the Toolkit have yet to be reflected in the experiences of actual defendants moving through the HTIC system. While the CCI suggestions are incomplete and imperfect, the current silence belies any claim to meet stated goals. At a minimum:

264 Hunt, Linda. “Beyond Cultural Competence: Applying Humility to Clinical Settings.” *The Social Medicine Reader: Social and Cultural Contributions to Health, Difference, and Inequality*, v.2. Ed. Gail E. Henderson et al., 2nd ed., Duke University Press, 2005, pp. 133–137.

265 Tervalon, Melanie, and Jann Murray-Garcia. “Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education.” *Journal of Health Care for the Poor and Underserved*, Vol. 9, No. 2, 1998, pp. 117–125.

266 Metz, Jonathan M., and Helena Hansen. “Structural Competency: Theorizing a New Medical Engagement With Stigma and Inequality.” *Social Science & Medicine*, Vol. 103, 2014, pp. 126–133.

267 Metz, Jonathan. “Structural Competency Meets Structural Racism: Race, Politics, and the Structure of Medical Knowledge.” *Virtual Mentor*, Vol. 16, No. 9, 2014, pp. 674–90.

268 Malangone, Mazur, and Goodman, *Responding to Sex Trafficking in Your Jurisdiction*, 21.

- The CCI Toolkit recommendations on courtroom cultures and practices can be used as standards against which some aspects of the HTICs can be evaluated, while more complete, justice- and health-informed standards are being developed in consultation with affected communities.

4. Create a transparent system of data collection, analysis, and review in order to systematically evaluate the impacts and implications of HTICs for defendants’ lives and the criminal justice system more broadly.

Summary and justification for recommendations

The New York State Unified Court System makes strong claims regarding the ability of HTICs to divert and rehabilitate defendants through the provision of effective services, yet in the five years since its launch, there have not been comprehensive evaluations of, nor mechanisms for affected communities to participate in the review of, the court initiative. This is despite the fact that the Center for Court Innovation’s planning toolkit (intended for jurisdictions considering court-based diversion programs) emphasizes repeatedly the critical importance of data collection in “any response to human trafficking or prostitution, as it can help identify victim/defendant needs, manage operations, report essential performance information, assess goal achievement, identify areas for improvement, and offer invaluable statistics to funders and policymakers.”²⁶⁹

To our knowledge, there has not been a coordinated and court-wide effort to aggregate and analyze data relevant to understanding the efficacy of HTICs. At present, comprehensive and high-quality data, or even any data, are missing with regards to basic process measures. Qualitative and quantitative data may be useful and even necessary to evaluate whether or not the HTICs are meeting any of their claims of effectiveness, and we also argue that such evaluations must be conducted cautiously as to protect defendants and avoid the expansion of criminal justice system authority.

- Data collection and evaluations must protect the privacy of defendants and must use metrics informed by defendants’ understandings of “success” and “progress”.
- Generating evidence against which the claims of the HTICs can be evaluated should not consume undue resources, detract from investments in alternatives to penal processes, or bestow the criminal justice and court systems with additional monitoring or regulatory powers over defendants as well as social services and their providers.
- Key points on which ethically gathered data are needed include:
 - ◆ The number of people diverted to HTICs,
 - ◆ The average length of mandates,
 - ◆ The number of ACDs granted,
 - ◆ The disposition of HTIC cases across courts, specific judicial practices, and over time,
 - ◆ Rates of re-arrest, etc.

²⁶⁹ Ibid., 13. The CCI toolkit includes detailed and comprehensive guidelines on when, how, by whom, why and what data should be collected and analyzed, including performance indicators. To our knowledge, collection under these guidelines has not been carried out and/or made publicly available.

In addition, evaluative outcome and impact information should also be collected and analyzed. This information could include but is not limited to:

- ◆ Defendants’ experiences of HTICs and time in court,
- ◆ The fiscal impact of HTICs, and
- ◆ The influence of HTICs on the larger criminal justice system and cycles of criminalization, etc.
- ◆ Impact evaluations of the HTICs should consider and integrate findings from analyses conducted by service providers regarding defendants’ experiences of the service mandates and any changes in their quality-of-life measures. These evaluations should in particular assess the match between requested/needed services and what is provided, with attention to specific barriers such as those faced by trans defendants, non-citizens, and defendants with children.

To compare and contrast this list against the performance indicators and data elements recommended by CCI, see Appendices D and E of the CCI Planning Toolkit.²⁷⁰

- Research should also be conducted so that information is publicly available on how funding operates within and across HTIC components and affiliated actors.
 - ◆ To whom are funds going, in what amounts, for what goals, and in what levels of adequacy to meet the varied needs of defendants?
 - ◆ Are funds sustainable and sufficient in resourcing service providers over time?
 - ◆ Is funding being allocated in ways that ensure that non-defendant populations are not being displaced for services?
 - ◆ How is funding allocated across the diversity of actors involved in HTICs, including but not limited to:
 - HTIC-affiliated social service providers (NGO and municipal agencies)
 - Court personnel (for basic functioning including security etc.)
 - Judges and judicial chambers
 - Prosecutors/DA offices and staff
 - Defense attorneys and staff (public defenders and legal assistance across Manhattan, Queens, Bronx, Brooklyn, Staten Island)
 - Police
 - Other

To justify the continuation of HTICs and to inform its future structure and operations, such data should be ethically collected and used in accordance with principles of community involvement, accountability, transparency, and harm reduction.

See also data collection recommendation regarding police monitoring and oversight in section to *Reduce the surveillance, profiling of, and violence against sex workers by police officers.*

5. The interactions of noncitizen immigration status and local prostitution policing and adjudication policies need particular attention to avoid state and local actions with severe health and rights consequences. The HTICs need to be insulated such that noncitizen defendants are not made further vulnerable to immigration consequences as a result of HTIC involvement.

²⁷⁰ Ibid., 36-42.

- The New York State Unified Court system, with appropriate state and local authorities, should investigate the implications of, and issue guidelines reducing, the risk of ICE and other immigration enforcement authorities targeting and taking actions against immigrants, whether undocumented or with status, who are involved in HTICs or other criminal and civil cases related to misdemeanor prostitution arrests.
- NYS and NYC should ensure that their criminal courts and processes are not used by federal immigration authorities in ways deleterious to criminal justice principles and the basic rights of non-U.S. national defendants.
- The specific way that immigration “policing” (i.e., the way that prostitution offenses may circumvent the policies of NYC as a “sanctuary city”) exacerbates the negative integration of ICE enforcement and policing in NYC deserves further study and action as needed [see *Specific concerns for noncitizen populations* in Section II].²⁷¹
 - ◆ Key tenets of “procedural justice” require that, to the maximum extent possible, local policing should be decoupled from federal immigration enforcement, and police officers should not be engaged in seeking out violations of federal immigration law, including by refraining from inquiring persons about their immigration status.²⁷²

6. Remove any threat of extending criminal justice system and policing surveillance for persons originally arrested for low-level prostitution offenses, including during the ACD waiting period (should it continue to be an aspect of the HTIC system).

- If HTIC defendants do not appear in services or are non-compliant in appearing for court dates, judges and prosecutors should refrain from further punitive actions, including in regard to pleas, and instead re-schedule court dates and allow defendants extended time to complete service mandates, as necessary.
 - ◆ Judges and prosecutors should make explicit to defendants that missteps or an inability to make a service appointment or court date will not automatically nor invariably result in a punitive response, such as jail time, and that policies exist to enable defendants’ success in the court (e.g., through rescheduling court dates and allowing defendants extended time to complete their mandates).
 - ◆ Courts should consider what practices and structures are needed to make it possible for defendants without stable addresses and forms of communication to be notified of court dates and other obligations. This may include supporting social service providers and relevant legal services and casework managers to carry out meaningful outreach that facilitates defendants’ ability to make their court dates.
- Policing to enforce warrants needs to be monitored carefully for abusive practices and “net widening” effects.

²⁷¹ Whitford and Grant, “After Deadly Vice Sting...”

²⁷² Procedural justice is grounded in the notion that police departments must adopt, both internally and externally, principles and practices that emphasize respect, transparency and accountability, public engagement, and fairness and neutrality in order to build legitimacy and public over time [Quattlebaum, Megan, Tracey Meares, Tom Tyler, et al. *Principles of Procedurally Just Policing*, The Justice Collaboratory at Yale Law School, 2018, https://law.yale.edu/system/files/area/center/justice/principles_of_procedurally_just_policing_report.pdf].

- For defendants who are not offered an ACD or dismissal and sealing of charges after completing their HTIC mandate due to extensive criminal histories, or re-arrest for similar prostitution offenses, district attorneys should use their discretion to provide for alternative pleas to non-criminal offenses such as disorderly conduct. They should not be subject to increased penalties, including fines, or lengthened mandates or time under court surveillance.
 - ◆ Rights to adequate representation and due process should be protected during the ACD period as well.

7. As the NY State Unified Court System and relevant municipal and state policymakers evaluate the function of the HTICs, other initiatives should be explored, including those that link appropriate services to persons facing misdemeanor prostitution charges without arrest and with minimal criminal justice system involvement.

Summary and justification for recommendations

Affected communities, with sex worker leadership supported by concrete structures facilitating participation, must be engaged at the outset in the consideration, design, implementation and review of any new responses to prostitution offenses.

As described in Section I of the report, pre-arrest and pre-booking “diversion” programs are emerging nationwide as alternatives to court engagement with many street-level petty offenses, especially those associated with mental health or drug use. While there are some promising elements in these programs, they are still models of service delivery within an over-arching frame of the penal system. Models that may be considered, if supported and led by affected communities, include the Law Enforcement Assisted Diversion (LEAD)²⁷³ program implemented in several cities including Albany, NY, as well as the Pre-Arrest Diversion (PAD)²⁷⁴ initiative being piloted in Atlanta/Fulton County, GA.

- Any pre-booking or pre-arrest program should be designed with strong transparency and accountability mechanisms for all actors, appropriate funding for service providers in particular, and the leadership of community advocates and individuals affected by criminalization (e.g., people who are homeless, use drugs, engage in sex work, etc.).
 - ◆ One factor that may assist in the fulfillment of these principles and standards, and also set apart some pre-arrest/pre-booking programs from court-based “diversion” such as the HTICs, is the management of the program by an agency separate from the police and prosecutors, as is the case in some LEAD programs,²⁷⁵ and the Atlanta/Fulton County PAD initiative.²⁷⁶
- Access to social services in a pre-booking or pre-arrest model should not be contingent on contact with law enforcement.
 - ◆ Some pre-arrest and pre-booking models have implemented social contact referral systems, in which eligible individuals can be referred to the social services in the program by non-police community members without any threat of arrest.

²⁷³ “What Is LEAD?” *LEAD National Support Bureau*, www.leadbureau.org/.

²⁷⁴ “Atlanta/Fulton County Pre-Arrest Diversion Initiative.” *Atlanta Fulton County Pre-Arrest Diversion Initiative*, prearrestdiversion.org/.

²⁷⁵ “Our Work.” *Katal Center for Health, Equity, and Justice*, www.katalcenter.org/our_work.

²⁷⁶ “Pre-Arrest Diversion Quarterly Newsletter.” *Atlanta/Fulton County Pre-Arrest Diversion Initiative*. 30 Apr. 2018, us14.campaign-archive.com/?u=02a65f07d04d188a4b106d739&id=f5fd2d5058.

- ◆ Police should not be allowed to make referrals in situations *without* probable cause for arrest, as doing so can have a net-widening effect and increase contact with law enforcement for individuals who would not have otherwise had a police encounter.
- As with HTICs, social services offered through pre-arrest or pre-booking programs should be informed by comprehensive community-based needs assessments and must be adequately resourced to meet the range of possible needs identified.
- Any pre-arrest or pre-booking program should be premised on voluntary enrollment with minimal participation and completion requirements and no, or minimal threat, of criminal charges or prosecution.

Part II: Regarding the Policing of Prostitution

To Law Enforcement and Policymakers:

1. Reduce the surveillance, profiling of, and violence against sex workers by police officers.

Summary and justification for recommendations

Because policing serves as the primary point of entry for defendants into HTICs, policing practices must be substantially reformed to align with Constitutional protections and best practices, including concepts of procedural justice.²⁷⁷ Police involvement (initial contact, on-going monitoring, etc.) should be kept to an absolute minimum and focused on responding to practices of violence, coercion, fraud and other forms of harm perpetuated against persons in the sex sector.

The population of defendants arrested for minor prostitution offenses and moving through the NYC HTICs and criminal justice system reflects discretionary policing tactics, including discriminatory profiling based on a range of location-specific, gendered, and racialized assumptions of “who looks like a sex worker”.

In addition to biased profiling, accounts of abuse, harassment, excessive force, sexual assault, (including coercive demands for sex), and disrespect by police officers discredit the compassionate and rehabilitative claims of HTICs. The abuse, in turn, also leaves defendants less receptive to the social services in this system.

To the extent that police are involved in interacting with diversion-eligible sex workers, we suggest the following guidelines with the overarching recommendation that police contact should be kept to a minimal:

- Under no circumstances should the policing of prostitution be increased as a direct or indirect result of the establishment of an HTIC and a claim to be “getting sex workers to services”.
 - ◆ As required by principles of procedural justice, investigatory stops should be limited to circumstances in which law enforcement has reasonable suspicion that a criminal offense is being committed that threatens public safety; moreover, they *should not* be used in a “widespread, programmatic manner”.²⁷⁸ Thus, policing prostitution under the pretense of linkages to social services does not fulfill the demands of procedurally just policing.

²⁷⁷ Quattlebaum, Meares, Tyler, et al. *Principles of Procedurally Just Policing*.

²⁷⁸ *Ibid.*, 39.

- ◆ There should be ongoing and publicly accessible data collection, monitoring of, communications, and oversight by civilian actors (both governmental and non-governmental) of local police departments to assess numbers, jurisdictional distribution and demographic composition of arrests under relevant municipal ordinances and state codes (the full range of applicable and pretextual bases for arrests of people in the sex sector) to ensure that policing under pretext of “helping” does not occur.
 - ◆ Data collected for these purposes must, in turn, be protective of privacy rights of persons in HTICs, complying with Constitutional, health, and social service ethical standards.
- HTIC personnel (especially judges) should institute regular committees empowered to review cases within the HTICs, with defense attorneys and social service providers as appropriate, to ensure that abusive or traumatizing police practices are not undermining the access and engagement of defendants with services.
 - Police departments and the Mayor’s office should enact policies and training that de-emphasize arrests for misdemeanor prostitution offenses and focus instead on providing referrals and linkages to services on a pre-arrest or pre-booking basis [See recommendation section on pre-arrest/pre-booking diversion processes].
 - Police should discontinue prostitution stings and other degrading practices.
 - Police should receive training on the dynamics of sex work (and the various means by which people come to it), as well as trauma, addiction, racism within NYC and in policing, poverty, and discrimination as they may figure in the sex sector, in addition to training regarding the meanings and diversity of gender identities.²⁷⁹
 - ◆ Local groups representing affected communities should have key roles in designing and participating, as desired, in these trainings.
 - Police training should incorporate principles grounded in human rights and procedural justice and provide concrete awareness education to help police avoid discriminatory practices, such as the profiling and/or misgendering of transgender or gender non-conforming individuals, or people of specific racial, ethnic, or income groups.
 - ◆ Any recommendations that may arise from an on-going class action lawsuit against the city for abusive policing practices should also be actively integrated into this training.²⁸⁰
 - ◆ As many of these practices are unlawful and/or violations of police conduct rules and commitments, training on the nature of appropriate remedies and system-level responses is also needed.
 - Police officers should support and not interfere with sex worker peer health, education and other rights-oriented outreach efforts in the neighborhoods they patrol.

279 See part four on *Practicing Procedural Justice with Particular Groups*, which pays particular attention to the role of procedural justice in police interactions with LGBTI individuals, immigrant communities, and racial minorities, and young people: https://law.yale.edu/system/files/area/center/justice/principles_of_procedurally_just_policing_report.pdf

280 At time of writing, NYC is facing a civil-rights class action lawsuit that was filed against the City of New York and officers of the New York City Police Department on behalf of women who the plaintiffs allege have been wrongly arrested for inherently innocent conduct under New York Penal Law Section 240.37. “According to a class-action lawsuit filed September 30, 2016 by the Legal Aid Society of New York and Cleary Gottlieb Steen & Hamilton LLP, transgender women are especially victimized, and have been arrested in “sweeps” of places where they gather as a community.” Cortes, Ricardo. “An Arresting Gaze: How One New York Law Turns Women into Suspects.” *Vanity Fair*, 3 Aug. 2017, <https://www.vanityfair.com/culture/2017/08/nypd-prostitution-laws>.

Part III: Regarding Service Provision in the HTIC Context

Summary and justification for recommendations

The central argument for HTICs rests on their linkages to substantial rehabilitative social services that address individual defendants' needs, with the rhetorical assertion that 1. all defendants are victims ("trafficked" into the sex sector), and 2. that all sex work is inherently exploitative and/or violent. Even without troubling this self-contradictory narrative of victimhood, our assessment of the social services against their own terms reveals that they are failing to fulfill defendants' actual needs and desires for services. Since the New York State Unified Court System launched the Human Trafficking Intervention Initiative in 2013, these claims of rehabilitation of "trafficking victims" through service mandates have not been reviewed and evaluated.

As the report details, HTIC prosecutors generally have a list of service providers for mandated referrals, but both providers and defendants have expressed concerns that:

1. This mandated structure does not *reliably* provide services, as services are often insufficient in quantity and/or quality due to provider-side constraints,
2. The involuntary nature of the mandate and HTIC system undermines the uptake of services as defendants may not be ready or willing to engage, and
3. Defendants do not receive services they find useful/responsive to their needs, especially as few services address the more fundamental issues such as housing insecurity, lack of educational opportunity, job training and poverty.

To HTIC Court Personnel, the New York State Unified Court System, and the Center for Court Innovation:

1. HTICs should identify and facilitate defendants' introductions with social service providers who are delivering services according to community needs and through community-based and-respected organizations.

- Before identification of service providers, the New York State Unified Court System and CCI should conduct, with meaningful involvement of sex workers and other impacted groups, a community needs assessment that determines the interests and life goals of sex workers impacted by the HTIC and the services and structural changes that would be most responsive to needs that they identify.
 - ◆ Responsiveness of services includes substance as well as the quality, distribution, accessibility and acceptability of these services to the diverse population arrested for prostitution offenses (including in regard to national status, gender identity and language).
- The New York State Unified Court System should establish a publicly reviewable, standardized process for selecting new service providers to be affiliated with the Human Trafficking Intervention Initiative.
 - ◆ The intentions of the courts in selecting service providers should be simply to initiate contact with those providers and resources that are reputable in affected communities, *not* to evaluate the needs of individual defendants, dictate how they engage with services, nor monitor and manage service providers.
- The Center for Court Innovation and New York State Unified Court System should compensate affiliated service providers with sufficient and sustainable resources, funding, and workforce so that they can meet the new client volume brought by defendants and guarantee that non-mandated clients are not displaced.

To Service Providers, HTIC Court Personnel, the New York State Unified Court System, and the Center for Court Innovation:

1. Re-evaluate HTIC structure in light of service providers' obligations under professional ethics guidelines.

Summary and justification for recommendations

This report makes clear that the current structure of the HTICs creates tensions between court-enforced service mandates issued in a penal context and the ethics of social service provision. While this incompatibility cannot be fully resolved without the decriminalization of sex work, it can be minimized to enhance providers' capacity to deliver services in line with their ethical commitments as well as to reduce barriers to defendant uptake and engagement.

- Service providers should aim, and be provided support by the HTIC structure, to center defendant autonomy, foster conditions for “readiness for change” as understood in social service philosophies, avoid coercion, and encourage self-determination.
 - ◆ Service providers should allow defendants to serve as co-designers in their session plans, prioritize needed services, and drive the goal-setting process.
 - ◆ Service providers should not be pressured by the HTICs to facilitate exit from sex work as the primary goal of the mandate, unless so identified by the defendant. Relatedly, providers should be trauma-informed and trained in harm reduction without perpetuating rescue mentalities and victim narratives.
 - ◆ Efforts should be made to accommodate and provide alternatives to defendants who express reluctance, distrust, or fear of a particular program or treatment.
- Service providers should not face the constraints of “dual loyalty” by over-broad obligations of reporting to the criminal justice apparatus of the HTIC; service providers' only reporting duties to the courts should be in regard to successful completion of mandates.
 - ◆ HTICs should respect the confidentiality of the counselor-client relationship and refrain from using counselors, social workers, and other service providers as tools for continued surveillance of defendants.
 - ◆ In particular, information shared in a therapeutic setting should never be deployed to sanction or punish.
 - ◆ Policies and practices of the HTIC judges and other court personnel should avoid placing providers in situations where they are forced to report punishable actions (“dirty urine”/drug use) or other treatment compliance reporting.

To Service Providers, Policymakers, and non-CJS Bodies Involved in the Regulatory Review of Social Services:

- 1. Service providers should have the capacity and practices in place to ensure that they are assessing needs and providing services that are readily available, accessible, acceptable, and quality-assured to all populations in need, defendants and non-defendants alike. The responsibility should rest with service providers (not The Center for Court Innovation and New York State Unified Court System) to monitor, evaluate, and accordingly revise which and how services are delivered.**

- Service providers should demonstrate cultural humility^{281,282} and structural competency^{283,284} as well as the training and ability to provide services and assistance that responds to needs and intersectional discrimination (along lines of race, gender, health and national status, etc.) from a non-stigmatizing, harm reduction philosophy.
- Service providers should have the capacity to administer HTIC service mandates in a timely fashion to facilitate expeditious dismissals of the original charge.
 - ◆ In this vein, the time to complete a HTIC mandate should not be unduly prolonged because of a lack of providers available to meet a defendants’ specialized needs (e.g., in cases where non-English language services are required).
- Service providers should have the capacity to assess and meet the individualized needs identified by defendants through methods and approaches that are evidence-based (this includes counseling and mental health needs, needs the defendant feels willing and ready to address, and fundamental resource needs linked to structural inequities).
- Service providers should at minimum be local, as in community-based and -respected, and ideally, they should be in regular consultation with key actors and led by impacted groups (i.e., sex worker-led organizations) to devise policies and programs that deliver acceptable and accessible services.
- Prioritizing the defendants’ perspectives and input, service providers should be monitored and evaluated regularly to assess that their services continue to meet stringent standards of availability, accessibility, acceptability, and quality.
 - ◆ Oversight and evaluation processes should be ongoing and include confidential and safe mechanisms for defendants to provide feedback.
 - ◆ Ethics and standards should be informed by the regulatory professional and ethics regimes that apply to that particular service sector (e.g., professional codes of conduct set by national associations).
 - ◆ Oversight and evaluation processes to hold service providers accountable to the standards outlined above should be conducted by service providers, funders as appropriate to the terms of their grant, and other regulatory bodies outside and independent of the criminal justice apparatus.
- Mandated services should not place an undue burden on defendants. Efforts should be made to accommodate defendants’ schedules and at times competing obligations, as well as provide defendants with childcare, transportation, and language support as needed so that they can attend sessions.

281 Hunt, “Beyond Cultural Competence: Applying Humility to Clinical Settings.”

282 Tervalon and Murray- Garcia, “Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education.”

283 Metzl and Hansen, “Structural Competency: Theorizing a New Medical Engagement With stigma and Inequality.”

284 Metzl, “Structural Competency Meets Structural Racism: Race, Politics, and the Structure of Medical Knowledge.”

Appendices

I. Methodology

After receiving approval from Yale University's Human Subjects Committee, researchers from SWP and GHJP jointly conducted this research between May and December 2016.

Researchers employed a variety of data collection methods, including internet-based literature reviews surveys, phone interviews, in-person interviews, and field observations aimed at mapping, describing, and evaluating New York's HTICs:

- Peer-reviewed as well as non-academic literature were reviewed. Internet research was also used to identify active courts and potential staff contact information.
- Field observations in four of the five boroughs with active courts were conducted, including Queens, Bronx, Brooklyn, and Manhattan.
- Nine semi-structured in-person interviews were conducted with past court participants. Individuals were recruited with the help of court service providers or defense attorneys. Verbal consent was obtained prior to the interview and pseudonyms were used to maintain anonymity. Individuals were asked about their entry into the court through policing, their experiences in this specific court part and mandated service sessions, and their opinion or thoughts about the court.
- Confidential phone or in-person interviews were conducted with eleven service providers, court staff, and criminal defense attorneys from 9 HTICs spread through New York City and State. Interviewees included public defenders, judges, resource coordinators, and service providers. Interview questions aimed to get at the court process, the involvement and role of the individual being interviewed, and opinions on the HTIC model or a specific court.
- Interviews were also done with three expert stakeholders not directly involved in the running of a court.
- An electronic survey was distributed via email to a listserv of 8-12 NYC social service organizations associated with the HTICs at the time of our research, in order to assess HTIC caseload, perceptions of client experiences, and recommendations. Of the service providers who were contacted with the electronic survey, ten individual providers submitted verified responses.

Interview List

- Phone interviews
 - ◆ New York State:
 - 2 Judges and 3 court resource coordinators, representing 5 courts
 - ◆ New York City:
 - 2 public defenders and 4 coordinators/service providers, representing 4 courts
 - 9 past HTIC defendants, representing 3 courts
 - 3 experts (RedUP, CCI, Legal Aid)

- Electronic survey
 - ◆ 10 service providers submitted verified responses

Data analysis

- Thematic analysis served as the primary mode of assessing the data collected.
- Phone interview notes were compiled by court. Participant interviews were summarized using a quick notes template.
- Comparisons across all sets of data were used to identify patterns and determine a framework for emergent themes. Participant audio files were reviewed two times each and select quotes representing emerging themes were extracted and transcribed.
- Assessments of the data were made in light of current standards of ethics, constitutional rights, and both U.S. and New York law.

II. Limitations

This study represents a snapshot of the HTICs at the moment in time when these data were collected. These courts are constantly changing in accordance with short bursts of funding, shifts in service providers, turnover in court personnel, etc. Accordingly, this report on practices from 2016 should be regarded as a source of guidance as to the general structure and function of New York's HTICs, rather than as a definitive roadmap of their current policies and practices.

As with much qualitative research, these data are not intended to be generalizable, but instead are meant to illustrate the viewpoints of a diverse array of actors within the systems being studied. Although we strove to cultivate as representative a sample as possible, we were necessarily limited by resource and access constraints.

With respect to the HTIC defendants, we interviewed a total of nine individuals whom we selected through convenience sampling based on referrals from HTIC-associated service providers. Although we sought to offset the relatively small defendant sample size by ensuring some measure of diversity in location, gender, and race, resource limitations prevented us from interviewing non-English speaking defendants, who constitute a substantial portion of the population moving through New York's HTICs. Furthermore, the fact that social service providers facilitated our contacts with the defendants we surveyed means that our respondents were likely more actively engaged with the social service component of HTICs than is typical among the defendant population at large.

With respect to the court personnel and social service providers we interviewed, our data were necessarily limited by constraints on the interview subjects' time, knowledge, and willingness to provide comprehensive and accurate answers to our questions. Our understanding of court operations is more three-dimensional and complete in those locations where researchers were able to conduct field observations. That said, these observations were relatively infrequent and took place over a long period of time, so their generalizability is limited.

III. 2016 Service Providers

At the time of writing this report in 2016, this was the information we had of social service organizations providing services to NYC HTIC defendants.

The following service providers are regularly present in HTIC courtrooms to provide support to defendants:

1. Brooklyn Justice Initiatives, see Center for Court Innovation website at <https://www.courtinnovation.org/programs/brooklyn-justice-initiatives>
2. Bronx Community Solutions, see Center for Court Innovation website at <https://www.courtinnovation.org/programs/bronx-community-solutions>
3. Community Healthcare Network, see website at <http://www.chnny.org/>
4. Garden of Hope, see website at <http://gohny.org/>
5. GEMS: Girls Education and Mentoring Program, see website at <http://www.gems-girls.org/>
6. New York Asian Women's Center, now known as "WomanKind," see website at <https://www.iamwomankind.org/>
7. RESTORE, see website at <http://restorenyc.org/>
8. Safe Horizon, see website at <https://www.safehorizon.org/>
9. Sanctuary for Families, see website at <https://sanctuaryforfamilies.org/>
10. STEPS to End Family Violence, see website at <https://www.egscf.org/programs/steps/>

The following service providers are available to HTIC defendants on an individualized basis:

11. Hidden Victims Project (Center for Court Innovation)
12. Sex Workers Project, see website at: <http://sexworkersproject.org/>

IV. Sample feedback metric for defendants

Borough: _____

Is this your first time through any HTIC? Y N

On a scale of 1 to 5, with 1 being the worst and 5 being the best, how would rate your experience with the HTIC? Please circle one only:

1 2 3 4 5

Did you attend services through HTIC? Y N

Did you benefit from these services? Y N

If no, why not? _____

If yes, how did you benefit? _____

What was the best thing about your experience with the HTIC? _____

What was the worst thing about your experience with the HTIC? _____

What would you change to improve the HTIC? _____

What would you keep the same? _____

Please add any comments you would like to share with the HTIC staff and judges.

V. Sample online survey for service providers

What is your current job title? _____

What is the highest level of education you have achieved? _____

Please indicate any professional licensures you have received (such as LCSW, LMSW, LMHC, LAC)

What is your current gender identity? (Select all that apply)

Man Woman Transgender man (FTM) Transgender woman (MTF)

Gender Queer Gender Nonconforming Two-spirit Hijra

Other (please specify) _____

Which race/ethnicity best describes you? (Please check all that apply)

African American, Black, or Afro-Caribbean Asian or Asian American Hispanic/Latino

Middle Eastern or Arab American Multiracial/Multiethnic White

Prefer not to respond

What is the motivation for working in your current occupation? _____

How long have you worked at your current organization: How many years? _____

How long have you worked at your current organization: How many months? _____

What additional training relevant to your work in the AP8/Human Trafficking Intervention Courts are you interested in receiving?

Human Trafficking 101 Human Trafficking advanced screening Criminal Justice Advocacy

Trauma Informed Care Cultural Competency Training How to work with sex worker communities LGBTQ competency Case Management for justice involved populations

Other _____

If you are referring to previously collected data to answer any of the following questions, check yes .

What is your current AP8/HTIC individual client case load? _____

What is your current AP8/HTIC group caseload? _____

What is the average number of sessions you are providing individual clients in the AP8/HTICs? _____

What is the average number of group sessions you are providing to clients in the AP8/HTICs? _____

How many of your clients identify with the below?

_____ Man (not transgender) _____ Woman (not transgender) _____ Transgender Woman (MTF)
_____ Transgender Man (FTM) _____ Gender Queer/Gender Non-Conforming _____ Intersex
_____ Not Specified

As far as you can tell how many clients fall within the following age ranges?

Under 18 _____ 18-24 _____ 25-34 _____ 35-44 _____ 45- above _____

How do the majority of your clients identify their race and/or ethnicity?

- African American, Black, or Afro-Caribbean Asian or Asian American Hispanic/Latino
 Middle Eastern or Arab American Multiracial/Multiethnic White
 Prefer not to respond

In your current AP8/HTIC caseload approximately how many clients hold any of the below status?

U.S. Citizens _____ Legal Permanent Residents/Green Card Holders _____
Undocumented _____ Tourist Visa/ other temporary visa _____

What is the most common source of income of your clients/how do your clients get by?
(Check all that apply)

- Formal Work (receive paycheck) Borrowing money from friends Supported by family
 Sex Work (including massage parlors, salons, online sex services, etc.)
 Government Benefits (i.e., cash assistance, food stamps, etc.)
 Other informal work (unregulated work, and “off the books”)
 Not specified Other (please specify) _____

On average, how many of your AP8/HTIC clients were arrested for any of the below?

Arrested for prostitution related offenses _____ Arrested for massage parlor related offenses _____
Arrested for something else _____ Unknown/Not asked _____

How many of your current AP8/HTIC clients have EVER been arrested for something other than prostitution? _____

As far as you know approximately how many of your clients are currently in any of the below human

trafficking situations. For the purpose of this question please apply the Federal Definition of severe forms of trafficking in persons. “severe forms of trafficking in persons” means (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery (<https://www.law.cornell.edu/uscode/text/22/7102>).

Trafficked into forced labor _____ Trafficked into the commercial sex industry _____

Trafficked into both sex and labor _____ Not currently trafficked, but trafficked in the past _____

Never have been trafficked _____ Unknown/not asked _____

Has the population of clients arrested for prostitution-related crimes served by your program changed over the past year? If yes, please share below how has the population changed?

In your current role what services do you provide your HTIC clients? (check any that apply)

- Group Counseling Individual Supportive Counseling
- Individual Counseling with a Licensed Therapist Case Management and referrals
- Assistance with housing applications Assistance with rent
- Shelter/Safe house placement Employment Readiness
- Financial Assistance Emergency fund for housing
- Emergency funds for food assistance Medical/Health Care Services
- Food Assistance Public Benefits coordination
- Peer support services Know your rights education
- Immigration Legal Services GED, ESL, Literacy, or High School completion assistance
- Post-Conviction Relief Legal Services Substance Abuse services

Other (please specify) _____

What do your AP8/HTIC clients report as their top three service needs? _____

What are the top three harms/problems your AP8/HTIC clients are facing? _____

In my opinion, the (above) services are:

- Available through the AP8/ HTIC service providers and meets clients' needs
- Not available through the AP8/HTIC service providers
- Available through the AP8/ HTIC service providers but does not meet clients needs
- Not sure

Which of the following are common barriers AP8/HTIC clients' experience in participating in your program? (check all that apply)

- Language capacity Safety concerns Distrust of service provider agency
- Mental Health concerns Travel to program sessions Work and/or other life obligations
- Excessive HTIC mandates Childcare access Low interest in engaging in sessions
- Housing insecure/Homelessness Not enough service providers to meet the volume of cases
- Client needing services outside of program service scope

Other (please specify) _____

How have your clients described their arrest experiences? _____

Please check all that apply related to your clients reported experiences with the police.

- Report being treated fairly Report being treated unfairly
- Report experiences of physical/verbal harassment Report experiences of sexual harassment
- Report instances of unnecessary force Report being misgendered
- Falsely arrested Report officers requesting sex in exchange for not being arrested
- Report being told to stay in contact with officers after arrest

Other (please specify) _____

Please check all that apply related to your clients reported experiences in the courts?

- Satisfied with result Dissatisfied with result
- Confused by the process Neither satisfied nor dissatisfied

Other (please specify) _____

How satisfied are your clients with their mandated services/required sessions?

Very Satisfied Satisfied Somewhat satisfied Dissatisfied

Somewhat dissatisfied Very dissatisfied Neither satisfied nor dissatisfied

Other (please specify) _____

If your program provides long term services, how many of your clients choose to continue services? _____

If your program does not provide long term services, how many of your clients are referred and enroll in long term services? _____

What do you believe are the goals of the Human Trafficking Intervention Courts (AP8/HTIC)?

How strongly do you agree that the courts have meet their intended goals/outcomes in serving clients arrested for prostitution?

Strongly agree Agree Somewhat agree Disagree Somewhat disagree

Strongly Disagree Neither agree nor disagree

How strongly do you agree that your program has met the intended goals/outcomes of intervention for clients in the AP8/HTICs?

Strongly agree Agree Somewhat agree Disagree Somewhat disagree

Strongly Disagree Neither agree nor disagree

What are your organization's goals in the AP8/HTICs? _____

What recommendations would you make to improve AP8/HTICs (e.g., policy changes, practical tools, client services, funding, training initiatives, and outreach and community initiatives)? _____

Is there anything else you would like to tell us about your experiences as a service provider working in the AP8/HTICs? _____

