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Response

Prostitution/Human Trafficking Courts: Policy Frontline as Fault Line

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Introduction

Amy Cohen's genealogy examines Manhattan's early 20th century Women's Court, Midtown Community Court of the 1990s, and more recent Human Trafficking Intervention Courts that began operating in 2013.¹ The latter two courts are part of the modern problem-solving court movement, which seeks to address "root causes" through therapeutic means.² Some see this as one expression of the criminal justice system's recurring pendulum swings from punishment to rehabilitation.³ In each historical moment, women who were identified as sexually deviant were regulated and molded

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1. See Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1336 (2016) (describing New York's initiative, whereby "mostly female defendants are prosecuted for prostitution offenses"); on the early 20th century night courts see also Mae C. Quinn, *Revisiting Anna Moscovitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the "Problem" of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665 (2006); on the mid-Manhattan Courts of the 1990s see Robert Victor Wolf, *New Strategies for an Old Profession: A Court and a Community Combat a Streetwalking Epidemic*, 22 JUST. SYS. J. 347, 355 (2001).

2. ROBERT VICTOR WOLF, CTR. FOR COURT INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE 1 (2007), <http://www.courtinnovation.org/sites/default/files/Principles.pdf> [<https://perma.cc/P965-7TQL>].

3. Daniel B. Kennedy & Thomas M. Kelly, *The Swinging Pendulum of Correctional Reform*, 6 CRIM. JUST. REV. 44, 46 (1981) (highlighting the contradictions at the center of the American criminal justice system and proposing community service as a "middle ground" alternative to punishment).

by New York’s prostitution courts to be(come) responsible citizens.⁴ Cohen’s nuanced historical examination reveals important differences in the shifting interplay between: 1) social welfare, defined as the “material services that offenders themselves desire;”⁵ 2) social control, defined as the “moral and social enculturation and pedagogy;”⁶ and 3) individual responsibility, defined as “the extent to which courts treat crime, poverty, and rehabilitation as the subject of an individual’s autonomous control.”⁷ Her analysis draws upon and reinforces conceptions of agency and victimhood through discourses that reflect changing economic and social conditions.⁸ In this response, I describe prostitution courts as adaptations responding to conflicting logics that are revealed when policies are implemented on the ground. It is not surprising that these adaptations do not fundamentally challenge or change existing criminal justice policy and are largely drawn from dominant social narratives. The similarity of outcomes among these policies, despite their different historical contexts, may also be a result of the necessarily limited nature of such reforms.

I. Prostitution Court as Response Breakdown and Opportunity

Court adaptations, such as those reviewed in Cohen’s genealogy,⁹ grow out of contradictions at the site of implementation. As classic examples of what Michael Lipsky has called “street-level bureaucrats,”¹⁰ criminal justice personnel are charged with carrying out prostitution policy on the ground within a reality of resource limitations, conflicting or impossible top-down mandates, and work within hierarchical structures where they often feel powerless.¹¹ Nevertheless, criminal justice personnel may exercise high levels of discretion vis-à-vis the targets of policies and service recipients (e.g. the people engaging in sex work).¹² They may also use their discretion for moral entrepreneurship,¹³ i.e. to choose actions that

4. Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 TEXAS L. REV. 915, 918 (2017) (recounting the historically dominant “responsibilization” model of problem-solving courts).

5. *Id.* at 921.

6. *Id.*

7. *Id.* at 922.

8. *Id.* at 927 (noting, for example, that women in prostitution were viewed by early twentieth-century reformers as victims of capitalist exploitation).

9. *Id.* at 966–71 (highlighting local efforts to treat trauma among prostitution defendants).

10. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 3–4 (1980).

11. STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE 4 (2003) (explaining how public administration structures and procedures constrain worker identities and discretion).

12. Evelyn Z. Brodtkin, *Reflections on Street-Level Bureaucracy: Past, Present, and Future*, 72 PUB. ADMIN. REV. 940, 942–43 (2012).

13. Yeheskel Hasenfeld, *Organizational Forms as Moral Practices: The Case of Welfare Departments*, 74 SOC. SERV. REV. 329, 336–37 (2000).

better comport with their sense of personal and professional values and beliefs.¹⁴ Such discretion most often challenges policy as it is enacted at the individual level.¹⁵ However, it is not clear whether these challenges have broader influence.

Studies of problem-solving justice, such as drug courts and prostitution diversion courts, have documented that these programs are often initiated and sustained by professionals as a means to challenge existing policy by reasserting discretionary power, creating opportunities to influence lives and responding more effectively to crime.¹⁶ Police, lawyers, judges, and probation officers who implement prostitution policy are very likely to recognize and grapple with the mismatch between policy on the books and realities on the ground. In my interviews with criminal justice personnel involved in prostitution diversion programs in Baltimore and Philadelphia, they reported struggling with the contradictions and difficulties of prostitution policy. One such struggle was shared by a Baltimore police officer who attended one of the initial stakeholder meetings that led to the formation of Baltimore's Specialized Prostitution Diversion Program.¹⁷ These early meetings were designed to ascertain the need for, and receptivity to, alternative criminal justice responses to prostitution. At this meeting, a group of police officers shared their critiques of existing policy and procedures. They had concerns for their own safety and were frustrated by the inherent limitations in the existing enforcement methods, which led to far fewer arrests of customers than of providers. The most troubling aspect of their work was the moral quandaries that they faced in arresting

14. Corey Shdaimah & Bethan McGarry, *Social Workers' Use of Moral Entrepreneurship to Enact Professional Ethics in the Field: Case Studies from the Social Justice Profession*, BRIT. J. SOC. WORK 48, 21 (2018); Alexandra Müller, et. al., "You Have to Make a Judgment Call."—*Morals, Judgments and the Provision of Quality Sexual and Reproductive Health Services for Adolescents in South Africa*, 148 SOC. SCI. & MED., Jan. 2016 at 71, 71.

15. Katrin Kriz & Marit Skivenes, *Street-Level Policy Aims of Child Welfare Workers in England, Norway and the United States: An Exploratory Study*, CHILD. & YOUTH SERV. REV., May 2014, at 71, 71–72.

16. JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 106 (2001). For an overview of how drug courts responded to mandatory sentencing guidelines that overly circumscribed judges' authority, see Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1515 (2003); Linda Muraresku, "Just to Be There": A Probation Officer's Reflection on Project Dawn Court, in CHALLENGING PERSPECTIVES ON STREET-BASED SEX WORK 40 (Katie Hail-Jares, Corey Shdaimah, & Chrysanthi Leon eds., 2017). See also Tara D. Warner & John H. Kramer, *Closing the Revolving Door?: Substance Abuse Treatment as an Alternative to Traditional Sentencing for Drug-Dependent Offenders*, 36 CRIM. JUST. & BEHAV. 89, 105–06 (2009) (finding community-based treatment programs in Pennsylvania to be a more effective response to crime involving substance abusers).

17. The name of the diversion program was eventually changed to the Specialized Pretrial Diversion Program (thus retaining the original acronym), both in response to the stigmatized nature of a program that targeted prostitution as well as to expand the program to include individuals who were arrested for a broader range of crimes where prostitution was believed to be a factor in the crime or in the defendant's history.

individuals whom they saw not only as lawbreakers but also as victims. This was best illustrated by the story of an officer who described a sting operation in which he posed as a customer. The alleged offender entered his car and placed a bag on the seat. When he began the arrest, the woman bolted from the car clutching the bag to her chest. As previously arranged, back-up officers pursued the running woman. The officer became emotionally distressed at this point in the storytelling and his colleague explained that the officer realized that there was an infant in the bag. Fearing that his colleagues would tackle the woman and injure the baby, the officer ran after the back-up officers, shouting for them to desist. The storytellers' helplessness and moral ambivalence encapsulated the planning group's view of prostitution as both a crime and a form of victimization. This was a foundational impetus for change. Such ambivalence was compounded by the fact that many criminal justice personnel see themselves as an agency of last resort, especially for those arrested for low-level crimes. In prostitution cases, defendants' circumstances often reflect a breakdown or failure of other systems (the economy, housing, health, mental health, community networks),¹⁸ reinforcing a sense that punitive interventions are morally dubious and ineffective.

As Cohen's genealogy of New York prostitution courts demonstrates, the types of ambivalence created by policies that are perceived as ineffective or unjust change over time.¹⁹ They are influenced by the larger societal context that both makes these fault lines visible and suggests each era's particular response. If the early prostitution courts reflected historical concerns about the excesses of capitalism and a changing social context of immigration and urbanization,²⁰ today's courts may be said to reflect precarity and helplessness in the face of seemingly intractable poverty, violence, and addiction.²¹ In the discussion that follows, I share evidence from research that corroborates and further explains Cohen's claim that victimization is a dominant lens in the current iteration of prostitution courts.²² Despite the important differences outlined by Cohen, responses in all three moments share fundamental similarities both regarding *who* is targeted and the limited, conservative nature of the reform.

Drawing and expanding on ideal victim theory, Rose Corrigan and I

18. SHARON S. OSELIN, LEAVING PROSTITUTION: GETTING OUT AND STAYING OUT OF SEX WORK 166 (2014) (referring to the structural and economic constraints that keep street prostitutes "in the trade").

19. Cohen, *supra* note 4, at 917–19.

20. *Id.* at 923, 926.

21. Sanford F. Schram, *The Great Disconnect: Occupy and Political Science*, 12 PERSP. ON POL., 455, 459 (2014) (reviewing OCCUPY THE FUTURE (David B. Grusky et al. eds., 2012) & OCCUPYING POLITICAL SCIENCE: THE OCCUPY WALL STREET MOVEMENT FROM NEW YORK TO THE WORLD (Emily Welty, et al. eds., 2013) and noting the prevalence of casual labor in an insecure job market).

22. Cohen, *supra* note 4, at 919.

have argued that criminal justice personnel draw on a number of factors in order to “make sense of” women²³ who are involved in sexual crimes and place them on trajectories that will ultimately support or refute their legal claims.²⁴ Trajectories that are shaped through ongoing interactions between claimants and criminal justice personnel take place within what we call an “arena of intelligibility,” which is the contested space in which women’s cases are processed.²⁵ One of the crucial factors that make women and their claims intelligible is whether their narratives fit within normative rationales of why women act the way they do. If we comprehend women charged with prostitution as victims of childhood abuse who are severely compromised by trauma, leaving them prey to unscrupulous and exploitive traffickers and customers, we are much more likely to see them as victims deserving of empathy even as we continue to categorize them as lawbreakers.²⁶ Prostitution defendants are aware of these normative understandings and may use them to shape their interactions with criminal justice personnel, to garner needed resources, and to reframe their own decisions and life pathways.²⁷ Indeed, most problem-solving justice initiatives have a performative aspect in which defendants are called upon to acknowledge and act upon what criminal justice personnel have come to see as hallmarks of acceptance and responsibility.²⁸ In contemporary prostitution programs, defendants are asked to disclose their suffering and trauma, and make

23. From this point on, I refer to women. Even though all genders are represented among individuals arrested for prostitution, most prostitution diversion programs serve only cisgender women. For a description of U.S. court-affiliated prostitution courts, including eligibility criteria, see DARIA MUELLER, CHI. COAL. FOR THE HOMELESS, TREATMENT COURTS AND COURT-AFFILIATED DIVERSION PROJECTS FOR PROSTITUTION IN THE UNITED STATES, CHI. 60 (FOR THE HOMELESS, Nov. 1, 2012, at 60, *available at* <https://www.issueab.org/resources/14135/14135.pdf>, [<https://perma.cc/6P7C-QBSR>]). An exception is Baltimore City’s Specialized Pre-trial Diversion (SPD), which is open to all regardless of gender. The SPD, which has approximately 88% cisgender woman, 11% transgender women, and 1% cisgender men, reflects the city’s prostitution docket in regard to gender. Marie Bailey-Kloch, Corey S. Shdaimah, & Philip Osteen, *Finding the Right Fit: Disparities Between Cisgender and Transgender Women Arrested for Prostitution in Baltimore*, J. OF FORENSIC SOC. WORK, Jan. 2015, at 82.

24. Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women’s Claims about Sexualized Victimization*, 65 CATH. U. L. REV. 429, 434 (2016).

25. *Id.* at 446–49.

26. Corey S. Shdaimah & Shelly A. Wiechelt, *Converging on Empathy: Perspectives on Baltimore City’s Specialized Prostitution Diversion Program*, 22 WOMEN & CRIM. JUST. 156, 161, 164 (2012) (spotlighting the perceptions of women engaged in prostitution who seek dignity and compassion in Baltimore’s diversion program).

27. Corey Shdaimah & Chrysanthi Leon, “*First and Foremost They’re Survivors*”: *Selective Manipulation, Resilience, and Assertion among Prostitute Women*, 10 FEMINIST CRIMINOLOGY, 326, 340–41 (2014) (noting how women in prostitution may co-opt gendered norms around victimization to “avoid punishment and to elicit sympathy”). See also JILL A. MCCORKEL, *BREAKING WOMEN: GENDER, RACE, AND THE NEW POLITICS OF IMPRISONMENT* 8 (2013).

28. JOANN MILLER & DONALD C. JOHNSON, *PROBLEM SOLVING COURTS: A MEASURE OF JUSTICE* 165 (2009); Nolan, *supra* note 16, at 61–89.

commitments to address these through therapy.²⁹

II. Critical Questions

Characterization of suffering and trauma as historically contingent social constructions does not mean that they are fictional or manipulative. The overwhelming majority of the women in my studies have experienced egregious and long-lasting harms that are often exacerbated by their experiences in street-based sex work, including increased vulnerability and the consequences of criminalization.³⁰ However, victimhood and its attendant trauma are two of many possible explanations for their activities, and their particular resonance is contextually dependent. Didier Fassin and Richard Rechtman have chronicled the rise and persistence of trauma as a dominant explanation that grants legitimacy (and thus access to resources) to victims of many kinds of suffering, including war, natural disasters, and myriad forms of individual harm.³¹ Critical scholars and advocates must ask three questions:

1. *Why do particular explanatory frameworks resonate while equally salient explanations have not found cultural or programmatic purchase?*—For example, the absence of steady, living-wage work that supports families is a reason for engaging in sex work, yet these have not been the focus of either public debate or a central component of prostitution diversion programs.³² Within a trauma focus, why has individualized trauma, such as childhood sexual abuse, dominated the discussion when systemic forms of trauma, such as racism and poverty, have been ignored, despite evidence that these, too, are traumatizing?³³

2. *Why are particular responses selected from among the many*

29. Nolan, *supra* note 16, at 111–32.

30. See generally TEELA SANDERS, *SEX WORK: A RISKY BUSINESS* (2005); Jane Scoular, *What's Law Got to Do With It? How and Why Law Matters in the Regulation of Sex Work*, 37 J. OF L. & SOC. 12, 20 (2010); Joanna Brewis & Stephen Linstead, 'The Worst Thing is the Screwing' (1): *Consumption and the Management of Identity in Sex Work*, 7 GENDER, WORK & ORG. 84, 87 (2000).

31. DIDIER FASSEIN & RICHARD RECHTMAN, *THE EMPIRE OF TRAUMA: AN INQUIRY INTO THE CONDITION OF VICTIMHOOD* 29–30 (2011).

32. See Eva Rosen & Sudhir Alladi Venkathesh, *A "Perversion" of Choice: Sex Work Offers Just Enough in Chicago's Urban Ghetto*, 37 J. CONTEMP. ETHNOGRAPHY 417, 417–18, 425 (2008) (explaining that sex work enables individuals with little means to provide economically for themselves and their families, while also allowing them quick and easy access to work on an as-needed basis).

33. See Alex L. Pieterse, Nathan R. Todd, Helen A. Neville, & Robert T. Carter, *Perceived Racism and Mental Health Among Black American Adults: A Meta-Analytic Review*, 59 J. OF COUNSELING PSYCH. 1, 6 (2012); Judith Baer, MiSung Kim, & Bonnie Wilkenfeld, et al., *Is it Generalized Anxiety Disorder or Poverty? An Examination of Poor Mothers and their Children*, 29 Child & Adolescent SOC. WORK J. 345, 347 (2012).

possible ways to address those explanations?—For example, if the excesses of capitalism cause social dislocation, why is the response to teach women to be useful servants rather than to alter exploitive practices? If women are victims of human trafficking, why are they charged with the criminal offense of prostitution? Even less clear, in a trauma-informed policy, is why prostitution arrests continue to focus on women selling sex. Although some U.S. jurisdictions have devoted resources to apprehending and prosecuting alleged traffickers, few have targeted demand either in addition to, or instead of, supply, although these have long been discussed and implemented elsewhere.³⁴

3. *How far can such explanations be taken within existing systems?*—For example, former public defender Mira Baylson describes the contradictions of agency and victimhood that emerge in defense of women charged with prostitution.³⁵ If victimization and trauma are coercive forces that lead women to prostitution, then why is there no receptivity to defenses asserting an absence of *mens rea* in prostitution cases? Similarly, why are suspected victims of human trafficking arrested and tried for prostitution? And why does access to treatment for many remain embedded in the criminal justice system that uses punishment as a tool for rehabilitation, when helplessness in the face of coercive power is a key element of the experience of trauma and retraumatization?³⁶

These questions reveal alternatives not taken as well as the limited nature of prostitution diversion programs. We see this in the similarity of New York's prostitution court iterations. Cohen convincingly shows how each court differs with changing historical and social contexts. In all 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

34. On Norway and Sweden, see MAY-LEN SKILBREI & CHARLOTTA HOLMSTRÖM, PROSTITUTION POLICY IN THE NORDIC REGION: AMBIGUOUS SYMPATHIES 103 (2013).

35. Mira Baylson, *Victim or Criminal? Street-Level Prostitutes and the Criminal Justice System*, in CHALLENGING PERSPECTIVES ON STREET-BASED SEX WORK 136 (Katie Hail-Jares, Corey Shdaimah, & Chrysanthi Leon, eds., 2017).

36. CTR. FOR SUBSTANCE ABUSE TREATMENT, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., U.S. DEP'T OF HEALTH AND HUMAN SERV., HHS PUB. NO. (SMA) 13-4801, TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES NO. 57, TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 113–14 (2014).

null processing or expungement).³⁷

Alternative criminal justice responses to prostitution in each era are appealing for many reasons. Their acceptance among criminal justice personnel may be driven by the simple fact that they do not see themselves empowered to make broader change in society. Their roles in the system combine with workplace constraints to prohibit criminal justice personnel like prosecutors or judges from criticizing the laws that they must uphold. Still others may be unable to imagine broader societal changes or how to bring them about.³⁸ Conceptual tools, such as trauma, that become culturally available may change criminal justice understandings of the causes of and responses to prostitution and provide a different possibility of moral action. It is less clear whether these conceptual tools will fundamentally reshape practices or merely remain limited forms of tinkering. All three of New York's prostitution court iterations served very important functions for those participants who benefited from them. They also assisted front-line criminal justice personnel, by assuaging their moral distress³⁹ and providing a renewed sense of efficacy.

Yet, these programs have not led to fundamental or widespread changes in our conception of women who sell sex. They play into and reinforce narratives of victimization that have harmful consequences for sex workers, including a failure to consider alternatives that may truly enhance their safety and opportunities. Such narratives also justify interventions that surveil and control sex workers in order to "save" them for their own good, ignoring the factors that make sex work a viable option, often in comparison to other undesirable options.⁴⁰ U.S. society remains

37. Cohen, *supra* note 4, at 942 ("treatment and punishment, like social welfare and social control, are not opposite but rather mutually constitutive projects").

38. Thomas Haskell posits that in order to act on moral change, actors must recognize a moral problem, have some sense of how to address it (what he calls "recipe knowledge"), and see themselves capable of bringing about or participating in actions to do so. Thomas Haskell, *Capitalism and the Origins of the Humanitarian Sensibility*, 90 AM. HIST. REV. 339, 357–58 (1985). On the limitations that culture places on social imagination in deciding what we consider to be a problem and whether and how these problems should be addressed, see Ray McDermott & Hervé Varenne, *Culture as Disability*, 26 ANTHROPOLOGY & EDUC. Q. 324, 338 (1995).

39. A concept that has been well-developed in the nursing literature, moral distress describes the tension that professionals experience when they are unable to do what they believe is morally right due to institutional, cultural or professional conflicts and constraints. See Cynda H. Hylton Rushton, *Defining and Addressing Moral Distress: Tools for Critical Care Nursing Leaders*, 17 AACN ADVANCED CRITICAL CARE 161 (2006). For an overview of such tensions in the field of criminal justice, see Jane Fenton, *An Analysis of 'Ethical Stress' in Criminal Justice Social Work in Scotland: The Place of Values*, 45 BRIT. J. SOC. WORK 1415 (2015).

40. Ksenia Maryasova, *Project ROSE Aims to Change Lives, Traumatizes Sex Workers Instead, Critics Say*, STATE PRESS, (Oct. 14, 2014), <http://www.statepress.com/article/2014/10/project-rose-aims-to-change-lives-traumatizes-sex-workers-instead-critics-say/>, [<https://perma.cc/6ZR5-QVXV>]. See Edith Kinney, *Policing, Protectionism, and Prevention: Prostitution, Sexual Delinquency, and the Politics of Victimhood in Thai and American Antitrafficking Campaigns*, in CHALLENGING PERSPECTIVES ON STREET BASED SEX WORK 152–81 (Katie Hail-Jares, Corey Shdaimah, & Chrysanthi Leon, eds., 2017).

disapproving of sex work, using the criminal justice system to punish those who sell sex even when we see them as victims and not fully blameworthy. The scholarly literature, including my own, demonstrates that prostitution diversion programs are important resources for many of the people who participate in them, particularly when compared to current U.S. alternatives. It remains unclear whether the accumulation of these small changes for a small number of people will change our understanding of the world and lead to wider change that will expand the options or enhance the well-being of the women who currently engage in sex work. Amy Cohen's genealogy shows us that what is most likely to change in different historical moments is the individualized pathology identified as the "cause" of deviant women's illegal actions. Over the decades, however, individual women and their behavior remain the constant target for change rather than the social or economic forces that circumscribe their choices and compromise their safety and well-being.