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Human Trafficking and Prostitution Courts: Problem Solving or Problematic?

Becca Kendis

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— Comment —

HUMAN TRAFFICKING AND
PROSTITUTION COURTS: PROBLEM
SOLVING OR PROBLEMATIC?

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INTRODUCTION

Wendy was full of gratitude on the day she graduated from CATCH Court, “a program for victims of human trafficking, prostitution, and

sexual exploitation” in Franklin County, Ohio.¹ After experiences of physical and sexual violence, the court helped her to heal. She explained, “I turned from a caterpillar into a beautiful butterfly . . . And I have [CATCH Court] to thank for giving me a place where I could open up and grow and get rid of the ugliness that was holding me back.”²

Jenna successfully completed a similar program in one of New York City’s Human Trafficking Intervention Courts, but did not share the same positive assessment of her experience. Unable to balance the time-consuming, court-mandated treatment sessions with her class schedule and responsibilities as a single mother, she ultimately had to drop out of college.³ “The sessions hampered my ability to create a better environment for myself and my children so I wouldn’t have to rely on sex work.”⁴

Over the last several decades, public interest in human trafficking has increased,⁵ and federal and state governments have responded with a number of different legal and extra-legal strategies. Human trafficking and prostitution courts (HTPCs),⁶ which adopt key principles from the popular problem-solving court model, have been hailed as an innovative and humane approach to addressing human trafficking and prostitution in state courts. Similar to other problem-solving courts (e.g. drug

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1. CATCH CT., <https://www.catchcourt.org/> [<https://perma.cc/H7ZK-H7Z5>] (last visited Dec. 18, 2018); Glenn Mcentyre, *Former Addicts, Prostitutes Graduate from CATCH Court*, 10 TV (Sept. 27, 2013, 6:17 PM), <https://www.10tv.com/article/former-addicts-prostitutes-graduate-catch-court> [<https://perma.cc/DJY8-P3YX>].
 2. Mcentyre, *supra* note 1.
 3. Jenna Torres, *How New York City’s Treatment of Sex Workers Continues to Harm Us*, REWIRE.NEWS (Sept. 22, 2015, 5:03 pm), <https://rewire.news/article/2015/09/22/new-york-citys-treatment-sex-workers-continues-harm-us/> [<https://perma.cc/J4FT-CC2W>].
 4. *Id.*
 5. See John A. Martin, *Addressing Human Trafficking in the State Courts: Background and Approach, in a Guide to Human Trafficking for State Courts*, HUM. TRAFFICKING CTS. 5, 13 (2014), http://www.htcourts.org/wp-content/uploads/00_EntireGuide_140726_v02.pdf [<https://perma.cc/2WXV-6HHP>].
 6. Some of these specialty court programs define the population they serve as human trafficking victims, while others identify their participants as individuals engaged in prostitution. In reality, most of these programs serve a wide spectrum of individuals in the commercial sex trade, from voluntary sex workers to sex trafficking victims. Although human trafficking technically encompasses sex and labor trafficking, even the courts using the human trafficking framework are focused on sex trafficking and commercial sex involvement. See *infra* Part IV (briefly discussing and criticizing the exclusion of labor trafficking victims).

courts, veterans' courts, and mental health courts), HTPCs typically adopt a collaborative and interdisciplinary approach, "take into consideration the needs of victim-defendants and seek to address such needs as a way to intervene in and prevent further trafficking exploitation" or further criminal justice system involvement.⁷

While media outlets often focus on stories of victimization and expressions of gratitude from successful graduates of these specialized court programs, not every participant is happy about their involvement.⁸ Critics have characterized these programs as "less problem-solving than problematic" due to their tendency to "encourage special interest control of criminal courts, foster undesirable police and judicial practices, and fail to meaningfully address societal problems," specifically the criminalization of prostitution.⁹

In order to analyze the effectiveness of HTPCs, it is necessary to identify the problem that they are trying to solve. There exists a great deal of variation in HTPCs' mission statements and frameworks. Rather than attempt to analyze each, this Comment will consider HTPCs' effectiveness in addressing two broadly defined problems: (1) human trafficking and commercial sexual exploitation, and (2) the current "system that penalizes and incarcerates those engaged in prostitution while providing them little assistance."¹⁰ This framing reflects two common views regarding HTPCs and other problem-solving courts: some view problem-solving courts as direct interventions to the broader problem,¹¹ while others view these programs as "stopgap measure[s]" or

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7. *Human Trafficking Task Force e-Guide*, § 6.4, *Human Trafficking Courts*, OFF. FOR VICTIMS OF CRIME TRAINING AND TECH. ASSISTANCE CTR., <https://www.ovcttac.gov/taskforceguide/eguide/6-the-role-of-courts/64-innovative-court-responses/human-trafficking-courts/> [<https://perma.cc/MUT5-B358>] (last visited Dec. 18, 2018).
 8. *See, e.g.*, Liz Robbins, *In a Queens Court, Women in Prostitution Cases Are Seen as Victims*, N.Y. TIMES (Nov. 21, 2014), <https://www.nytimes.com/2014/11/23/nyregion/in-a-queens-court-women-arrested-for-prostitution-are-seen-as-victims.html> [<https://perma.cc/A738-XRGT>] (stating that almost one dozen women interviewed at the Human Trafficking Intervention Court in Queens said "that they did not feel like trafficking victims, but victims of the police").
 9. Mae C. Quinn, *Revisiting Anna Moscowitz's 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, 710–11 (2006).
 10. Chrysanthi S. Leon & Corey S. Shdaimah, *JUSTifying Scrutiny: State Power in Prostitution Diversion Programs*, 16 J. POVERTY 250, 267 (2012).
 11. *See, e.g.*, Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1343 (2016) ("[Human Trafficking Intervention Courts] have been spurred by

“workarounds” to ineffective and inappropriate laws, policies, and procedures.¹²

Part I of this Comment provides context by defining terms used to describe commercial sex involvement and addressing prominent ideologies regarding agency and victimization in commercial sex. Part I also summarizes the four approaches to regulating commercial sex and outlines the negative impacts of the United States’ approach on individuals involved in the sex industry. Part II provides additional background by describing the evolution of the modern problem-solving court and placing HTPCs in this context. Part III applies common critiques of problem-solving courts to the HTPC model. Part IV analyzes the effectiveness of HTPCs as a direct intervention to commercial sex involvement, ultimately finding that these courts do not seem to adequately address all the factors underlying involvement and barriers to exiting the sex trade. Part V considers HTPCs’ effectiveness as a “stopgap” solution to the harms created by the current system. The conclusion argues that both frames—HTPCs as a solution to trafficking and exploitation and HTPCs as a workaround to the broken system—are problematic. Finally, this Comment ends with a call for systemic change and identifies a space for HTPCs in a new system.

I. COMMERCIAL SEX INVOLVEMENT: KEY TERMS, IDEOLOGIES, AND REGULATORY SCHEMES

A. Key Terms Defined

1. Trafficking

Although awareness of human trafficking is on the rise and the term is seemingly becoming an increasingly common part of our vocabulary, there are still numerous misconceptions about what human trafficking is and who counts as a victim.¹³ Even among individuals, interest

advocates and activists who see these courts as tools to directly reduce violence against women, if not combat a global slave trade in sex itself.”).

12. Elise White et al., *Navigating Force and Choice: Experiences in the New York City Sex Trade and the Criminal Justice System’s Response*, CT. INNOVATION 44 (2017), https://www.courtinnovation.org/sites/default/files/media/documents/2018-03/nyc_sex_trade.pdf [<https://perma.cc/GX3R-7JRW>] (describing the Human Trafficking Intervention Court judges’ feelings about the programs, including the thoughts of one judge who appreciated that these programs have been “a way to address the complicity of the court system in perpetuating injustice,” but voiced concern with this ‘contradiction in having victimized individuals arrested and going through the court system,’” as it has punished known victims).
13. *See Myths & Misconceptions*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/what-human-trafficking/myths-misconceptions> [<https://perma.cc/963X-RTKY>] (last visited Mar. 29, 2019).

groups, and entities that focus on addressing human trafficking, there are significant debates over how the term should be defined.¹⁴ These debates have influenced the construction of legal definitions of human trafficking,¹⁵ which not only are important for the purposes of prosecuting perpetrators but also impact eligibility for government funding, service provision, and legal protections for victims.¹⁶

As defined by the federal Trafficking Victims Protection Act (TVPA) of 2000,¹⁷ human trafficking includes both sex and labor trafficking.¹⁸ Victims of “severe forms” of human trafficking include:

1. adults who are induced into performing a commercial sex act through the use of force, fraud, or coercion;
2. minors who are induced into performing a commercial sex act, *regardless* of the existence of force, fraud, or coercion; and
3. individuals of any age who are “recruit[ed], harbor[ed], transport[ed], provi[ded], or obtain[ed] . . . 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.”¹⁹

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14. Nicole Footen Bromfield & Moshoula Capous-Desyllas, *Underlying Motives, Moral Agendas and Unlikely Partnerships: The Formulation of the U.S. Trafficking in Victims Protection Act through the Data and Voices of Key Policy Players*, 13 *ADVANCES IN SOC. WORK* 243, 244 (2012).
 15. *See id.* at 246, 248–57 (discussing the influence of various ideologies on the formulation and passage of the federal Trafficking Victims Protection Act of 2000).
 16. *See generally* Meghan McCann, *Human Trafficking: An Overview of Services and Funding for Survivors*, NAT’L CONFERENCE OF STATE LEGIS. (Apr. 2018), http://www.ncsl.org/documents/cj/Human_Trafficking_FINAL_32391.pdf [<https://perma.cc/S3UJ-MYKJ>] (describing services, benefits, and funding sources for victims of human trafficking).
 17. Pub. L. No. 106-386, 114 Stat. 1464 (codified as 22 U.S.C. §§ 7101–7112 (2012)). The TVPA was reauthorized in 2003, 2005, 2008, and 2013. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, §§ 2–3, 117 Stat. 2875-76; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, § 2, 119 Stat. 3558-59 (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 103, 122 Stat. 5044, 5046; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.
 18. 22 U.S.C. § 7101(b)(3) (“Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor . . .”).
 19. §§ 103(8), (13).

While a number of victim services and benefits are available only to individuals fitting within the parameters of this definition,²⁰ the TVPA also recognizes adult sex trafficking victims who have not been induced by force, fraud, or coercion under a broader definition of “victim[s] of trafficking.”²¹

All fifty states have enacted legislation addressing human trafficking since the TVPA became law in 2000. However, the content of these laws vary from state to state, reflecting different criminal justice priorities.²² Definitions of human trafficking differ across states as well, although many states have adopted the TVPA’s language.²³ For the purposes of this Comment, however, the terms “human trafficking” and “sex trafficking” will generally align with the federal definition of “severe forms of trafficking in persons.” Furthermore, any discussion of sex trafficking victims will refer to individuals over the age of majority, unless otherwise indicated.

2. Commercial Sexual Exploitation

Many individuals engaged in the sex industry are subjected to forms of exploitation that do not fit cleanly under legal definitions of trafficking that require a showing of force, fraud, or coercion.²⁴ Commercial sexual exploitation (CSE) is a term that has been used “to describe those who sell or trade sex to meet survival needs, or in which vulnerability is exploited by a buyer, trafficker, or pimp.”²⁵ While this definition overlaps with legal definitions of sex trafficking victimization, CSE has been employed as an umbrella term that also encompasses experiences falling somewhere between sex trafficking and voluntary sex work on a continuum of victimization and agency.

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20. Julianne Siegfriedt, *When Sex Trafficking Victims Turn Eighteen: The Problematic Focus on Force, Fraud, and Coercion in U.S. Human Trafficking Laws*, 23 WM. & MARY J. WOMEN & L. 27, 29–32 (2016) (critiquing the limitation of certain resources and funds to trafficking victims who fit within the parameters of the federal definition).
 21. TVPA §§ 103(9), (14) (defining “victims of trafficking” as including individuals who are “recruit[ed], harbor[ed], transport[ed], provi[ded], or obtain[ed] . . . for the purpose of a commercial sex act”).
 22. See, e.g., Erin N. Kauffman, *The Uniform Act on Prevention of and Remedies for Human Trafficking: State Law and the National Response to Labor Trafficking*, 41 J. LEGIS. 291, 292 (2014).
 23. *Id.* at 300, 310.
 24. LARA B. GERASSI & ANDREA J. NICHOLS, SEX TRAFFICKING AND COMMERCIAL SEXUAL EXPLOITATION: PREVENTION, ADVOCACY, AND TRAUMA-INFORMED PRACTICE 5 (2018).
 25. *Id.* at 4–5.

3. Sex Work

The term sex work is typically used to describe voluntary engagement in commercial sex acts.²⁶ Some sex workers make a fully autonomous choice to engage in this work: they choose sex work over (or in addition to) other employment options, they have control over their own profits and finances, they engage in autonomous decision-making in regards to their customers and logistics of the exchange,²⁷ they feel free to stop engaging in sex work at any time, and they do not experience force, fraud, or coercion of any degree.²⁸ Often, however, sex workers face limited or constrained control in at least some of these areas. The term “sex work” has also been used to “describe those involved in commercial sex as a form of labor, regardless of whether commercial sex involvement is a constrained choice or to meet survival needs or whether any vulnerability is present.”²⁹ This broader definition overlaps with CSE. This Comment will attempt to limit use of the term “sex work” to fully autonomous engagement, while recognizing that this line is rarely clear.

B. A Note on Overlap and Fluidity of Key Terms

The application of these terms to individuals and their unique circumstances can be incredibly complicated. As already noted, there is a great deal of overlap between these different categories of commercial sex involvement. People involved in commercial sex may simultaneously fall under more than one of these categories.³⁰ Individuals’ interpretations of their own agency and victimization often conflict with legal definitions and service providers’ assessments. For example, a seventeen-year-old may view her involvement in commercial sex as voluntary but would be considered a victim of a severe form of sex trafficking under federal law.³¹ Individuals also often shift between categories over periods of time. “As youth ‘age out’ of trafficking, they may be considered exploited or willing sex workers, depending on the circumstance, as opposed to a sex trafficking victim.”³² Additionally, sex workers are at high risk of becoming victims of sex trafficking or

26. *Id.*

27. In other words, sex workers have control over the “who/when/where” decisions.

28. GERASSI & NICHOLS, *supra* note 24, at 5–6.

29. *Id.* at 6.

30. *Id.*

31. *See* 22 U.S.C. § 7102(11) (2012).

32. GERASSI & NICHOLS, *supra* note 24, at 6.

CSE, and some sex trafficking victims who escape the control of their trafficker begin selling themselves for sex.³³

Unfortunately, the law does not recognize this complexity of experience.³⁴ Individuals who fall within the legal definition of a sex trafficking victim often have access to certain protections and forms of assistance that are otherwise denied to individuals involved in commercial sex who do not meet the definition or are unwilling to self-identify as a victim.³⁵ Additionally, commercial sex is criminalized in the United States, and victimization status may—although certainly does not always—protect against criminal prosecution.³⁶

C. Ideological Understandings of Agency and Victimization

Ideological debates over commercial sex involvement usually center around victimization and agency. While there is no shortage of academic literature covering the various schools of thought on this topic, Lara Gerassi and Andrea Nichols concisely summarize the major viewpoints and their weaknesses: “Radical feminists and abolitionists tend to view all sexual commerce as victimizing, largely denying agency of willing sex workers, whereas neoliberal and liberal feminists tend to emphasize agency and choice, in some cases marginalizing victimization and service needs.”³⁷

While the concepts of voluntary sex work and forced sex trafficking are often presented as a dichotomy, an alternative perspective recognizes a continuum of agency and victimization that incorporates structural realities as well as the complex and varied experiences of individuals involved in commercial sex.³⁸ The above definition of terms seeks to embrace this more nuanced perspective.

33. *Id.*

34. *See generally* Siegfriedt, *supra* note 20 (critiquing the parameters drawn between victims of severe human trafficking under the TVPA and other individuals involved in commercial sex).

35. *See, e.g., id.* at 29–30; *Resources Available for Victims*, U.S. DEP’T OF HOMELAND SECURITY, <https://www.dhs.gov/blue-campaign/resources-available-victims> [<https://perma.cc/9Q7Y-ZYRQ>] (last visited Apr. 2, 2019).

36. Christine Anchan, *Protecting the Imperfect Victim: Expanding “Safe Harbors” to Adult Victims of Sex Trafficking*, 23 WM. & MARY J. WOMEN & L. 117, 121–30 (2016) (discussing safe harbor laws intended to protect minor trafficking victims from criminalization, as well as the limitations of attempts to protect adult victims from criminalization).

37. GERASSI & NICHOLS, *supra* note 24, at 7.

38. *See id.* at 6–8, 245; Francesca Bettio et al., *Sex Work and Trafficking: Moving Beyond Dichotomies*, 23 FEMINIST ECON. 1, 17 (2017).

D. Regulatory Approaches and the Harms of Criminalization

There are four different approaches to regulating commercial sex: prohibition, abolition, decriminalization, and legalization. Prohibition refers to the criminalization of sex work and all corresponding activities, including selling, purchasing, procuring, etc.³⁹ Abolition is a regime under which the sex worker is decriminalized while the client remains criminalized.⁴⁰ Decriminalization “removes all laws related to sex work.”⁴¹ Legalization also removes criminal penalties for all activities related to sex work, while imposing heavy governmental regulations.⁴²

Advocates for prohibition often argue that removing criminal penalties for sex work would facilitate sex trafficking. The counterargument, however, is that “decriminalization of sex work does not mean eliminating criminal penalties for sex trafficking and there is simply no evidence that suggests decriminalization will lead to more trafficking.”⁴³ While a comprehensive analysis of the costs and benefits of these four policies is outside of the scope of this Comment, the harms caused by the current criminalization of all commercial sex activity is relevant to the following analyses.

The harms of criminalization have been studied extensively. Criminalization stigmatizes individuals involved in the commercial sex trade and increases the chance that they are “undervalued, socially excluded, and discriminated against.”⁴⁴ As a result of the overlap and fluidity between sex trafficking and sex work, these negative outcomes impact both autonomous sex workers and sex trafficking victims. In fact, criminalization may make sex workers more vulnerable to exploitation and trafficking victimization.

As a result of criminalization, both sex workers and trafficking victims face a heightened risk of experiencing violence, including “sexual assault, rape, robbery, exploitation, and trafficking.”⁴⁵

39. Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 56 (2016).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 64.

44. Ine Vanwesenbeeck, *Sex Work Criminalization Is Barking up the Wrong Tree*, 46 ARCHIVES OF SEXUAL BEHAV. 1631, 1632 (2017).

45. SUZANNAH PHILLIPS ET AL., INT'L WOMEN'S HUMAN RIGHTS CLINIC AT CITY UNIV. OF N.Y. SCH. OF LAW, CLEARING THE SLATE: SEEKING EFFECTIVE REMEDIES FOR CRIMINALIZED TRAFFICKING VICTIMS 22 (2014), <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=1619&file=Annex1> [<https://perma.cc/KU5S-TAFN>]. Studies have found that “sex workers with criminalization-related experiences” face a significantly higher risk of experiencing sexual and physical violence.

Moreover, individuals in the sex industry are unable to rely on law enforcement for protection and enforcement of their rights, as reporting experiences of victimization puts them at risk of incarceration or criminal fines.⁴⁶ With nowhere for sex workers and trafficking victims to turn for help and little chance that they will be believed, perpetrators of violence and abuse are able to act within a “culture of impunity.”⁴⁷

Criminalization has been found to have serious health-related consequences, such as an increased risk of sexually transmitted disease and HIV infection.⁴⁸ Other harms caused by criminalization include “assault and harassment by police officers, . . . extortion and blackmail, arbitrary arrest and detention, inhumane conditions of detention, unlawful profiling, . . . confiscation of property, child custody disallowance, forced rehabilitation, [and] expulsion and deportation.”⁴⁹

Sex workers and victims with criminal records also face barriers to obtaining employment, housing, educational funding, and welfare benefits, and may have their record used against them in custody cases and other family court proceedings.⁵⁰ Trafficking victims are often charged with crimes resulting from their victimization, even though the TVPA directs against this practice.⁵¹ The barriers and challenges imposed by criminal records may lead trafficking victims “to engage in illegal activity in order to survive—including returning to commercial sex work—after escaping their traffickers.”⁵²

II. PROBLEM-SOLVING COURTS

A. Emergence of the Problem-Solving Court Model

Towards the end of the twentieth century, a legal movement began to emerge that rejected traditional models of criminal justice and embraced a “comprehensive, integrated, humanistic, interdisciplinary,

Vanwesenbeeck, *supra* note 44, at 1633. “Criminalization-related experiences” may include “the experience of prison or arrest, having sex with police officers to avoid arrest, having condoms or needles and syringes confiscated by the police, or having been subject to police raids.” *Id.*

46. Vanwesenbeeck, *supra* note 44, at 1633.

47. *Id.*; *see also* Siegfriedt, *supra* note 20, at 41–42.

48. Vanwesenbeeck, *supra* note 44, at 1633. Studies have found that sex workers with criminalization-related experiences have a two to four times greater risk of sexually transmitted infection and HIV transmission. *Id.*

49. *Id.*

50. PHILLIPS ET AL., *supra* note 45, at 21, 23–24.

51. *Id.* at 15 (citing 22 U.S.C. § 7101(b)(19) (2012)).

52. *Id.* at 16.

restorative, and often therapeutic approach to law and lawyering.”⁵³ One of the key elements of this movement was the development of “problem-solving courts.”⁵⁴

Unlike traditional courts that are limited to deciding the narrow issue presented by the parties before them, problem-solving courts “attempt to understand and address the underlying problem that is responsible for the immediate dispute, and to help the individuals before the court to effectively deal with the problem in ways that will prevent recurring court involvement.”⁵⁵ These specialized courts address “recycling” problems, which are often social or psychological in nature and cause individuals to continually cycle in and out of the criminal justice system for engaging in the same actions or behaviors.⁵⁶

The emergence of problem-solving courts in the United States is typically traced back to the first drug court, which was established in Miami, Florida in 1989.⁵⁷ The Miami-Dade County Drug Court was a response to the massive increase in drug-related arrests caused by the shift in national drug policy known as the War on Drugs.⁵⁸ Miami’s criminal justice system struggled to accommodate the ninety-three percent increase in drug possession arrests in Miami-Dade County from 1985 to 1989.⁵⁹ The court sought to address the underlying cause of drug-related crimes by substituting jail sentences with court-ordered drug treatment.⁶⁰ This model was eventually adopted in jurisdictions all over the United States, with more than three thousand drug courts in operation as of June 2015.⁶¹

53. Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPP. DISP. RESOL. L.J. 1, 1 (2006). Professor Daicoff refers to this shift as the “Comprehensive Law Movement.” *Id.* at 3.

54. *Id.* at 1–2.

55. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts,* 30 FORDHAM URB. L.J. 1055, 1055 (2003).

56. *See id.* at 1055, 1060.

57. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 14, 16 (2009), <https://www.nacdl.org/drugcourts/> [<https://perma.cc/2BYH-FL99>]; Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform,* 31 WASH. U. J.L. & POL’Y 57, 59 (2009).

58. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 16, 20.

59. *Id.* at 16.

60. *Id.*

61. *Drug Courts,* NAT’L INST. JUST., <https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx> [<https://perma.cc/B53L-383D>] (last modified Aug. 23, 2018).

In 1997, the National Association of Drug Court Professionals and the U.S. Department of Justice's Office of Justice Programs articulated the ten "key components" of drug courts:

Integration of substance abuse treatment with justice system case processing.

Use of a nonadversarial approach, in which prosecution and defense promote public safety while protecting the right of the accused to due process.

Early identification and prompt placement of eligible participants.

Access to a continuum of treatment, rehabilitation, and related services.

Frequent testing for alcohol and illicit drugs.

A coordinated strategy among the judge, prosecution, defense, and treatment providers to govern offender compliance.

Ongoing judicial interaction with each participant.

Monitoring and evaluation to measure achievement of program goals and gauge effectiveness.

Continuing interdisciplinary education to promote effective planning, implementation, and operation.

Partnerships with public agencies and community-based organizations to generate local support and enhance drug court effectiveness.⁶²

There are three main models of drug courts from a procedural standpoint: "(1) pre-plea/pre-adjudication, (2) post-plea/pre-adjudication, and (3) post-adjudication."⁶³ In the first model, the defendant is given the chance to complete the treatment program before entering a plea.⁶⁴ If the defendant successfully completes the program,

62. U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, DRUG COURTS: THE SECOND DECADE 3 (2006) (bullet points omitted) (summarizing U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997)).

63. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 17. The first two models are also sometimes referred to as deferred prosecution or diversion models. See Mary Kate Leahy, *Are Drug Courts the Answer For Addicts Who Commit Crimes?*, LAW STREET (May 10, 2016), <https://lawstreetmedia.com/issues/law-and-politics/drug-courts-answer-addicts-commit-crimes/> [<https://perma.cc/472J-Q88K>].

64. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 17. As a requirement of admission to the program, the "defendant will typically be required to waive certain procedural rights (such as the right to a speedy trial), but will retain her right to challenge the charge against her should she fail to complete the program and be returned to a traditional court." Alex Kreit, *The Decriminalization Option: Should States Consider Moving*

the charges are dismissed. If they fail to complete the program requirements, they go through the traditional court process.⁶⁵ In the post-plea/pre-adjudication model, the defendant must enter a guilty plea as a condition of admittance to the program, but the plea is held in abeyance.⁶⁶ If the defendant completes the program, the charge is dismissed, but if they fail, the guilty plea is entered and the judge imposes a sentence.⁶⁷ In the last model—post-adjudication—the defendant enters a guilty plea and is sentenced at the outset, but the sentence is “suspended pending the successful completion of the . . . program.”⁶⁸

The drug court model has been translated to other populations and offenses, resulting in the creation of mental health courts, veterans courts, domestic violence courts, family courts, and prostitution and human trafficking courts, among others. These different problem-solving courts, as they have become known, do not share identical policies and practices.⁶⁹ Methods are adjusted to best address the underlying issue.⁷⁰ However, problem-solving courts do share many key elements. These commonalities include “a collaborative approach to

from A Criminal to A Civil Drug Court Model?, 2010 U. CHI. LEGAL F. 299, 307 (2010).

65. NAT’L ASS’N OF CRIMINAL DEF. LAWS., *supra* note 57, at 17.
66. *Id.*
67. *Id.*
68. Kreit, *supra* note 64, at 308; NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 17.
69. Rachel Porter et al., *What Makes a Court Problem Solving?: Universal Performance Indicators for Problem-Solving Justice*, CTR. FOR CT. INNOVATION, 2010, at 1-2, https://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf [<https://perma.cc/FRB3-4TYH>] In fact, there is variation between courts in each category, resulting from a number of factors including state laws, jurisdictional rules, or judicial preference. *Id.*
70. Domestic violence courts, for example, take quite a different approach from drug, mental health, and human trafficking courts. Porter et al. explain:

Domestic violence courts provide extensive services to the victims of crime, as opposed to the focus of drug and mental health courts almost exclusively on the defendant/litigant. Furthermore, domestic violence court stakeholders do not all presume that community-based programs and services can successfully reduce the defendant’s underlying criminal propensities. In domestic violence courts, defendant accountability and deterrence from re-offending often emerge as more integral goals than defendant rehabilitation per se.

Id. at 2.

decision-making; individualized justice for each litigant; a focus on defendant accountability; community engagement; enhanced information through staff trainings and better data collection on each case; and an interest in producing better substantive outcomes, such as lower recidivism, improved safety for victims, or stronger communities.”⁷¹

*B. Human Trafficking and Prostitution Courts*⁷²

Advocates describe human trafficking and prostitution courts as a collaborative effort between court actors and community-based service providers to “connect[] victims to aid appropriate for their individual situations, including job training, education, housing, medical assistance, immigration services, and mental health and substance abuse treatment.”⁷³ These court programs are often viewed in the

71. *Id.*

72. Court-based responses to human trafficking and prostitution can take a number of different forms. These programs may be located within a community court or may take the form of a specialized docket, similar to drug and mental health courts. Katie Crank, *Community Courts, Specialized Dockets, and Other Approaches to Address Sex Trafficking, in A GUIDE TO HUMAN TRAFFICKING FOR STATE COURTS* 37, 38, 41 (2014), http://www.htcourts.org/wp-content/uploads/Ch-2_140723_NACM_Guide_OnLineVersion_04.pdf [<https://perma.cc/X6UQ-HVEW>]. Another approach is to assign all prostitution-related crimes to one prosecutor. *Id.* at 44–45. Furthermore, court-based responses “may arise pre-arrest, pre-arrest, pre- or post-adjudication or sentencing.” Ann Sarnak et al., *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* 5 (Glob. Health Justice P’ship, Yale Law Sch. & Yale Sch. of Pub. Health, with Sex Workers Project of the Urban Justice Ctr., Working Paper, Sept. 2018) [hereinafter *Diversion from Justice*], https://law.yale.edu/system/files/area/center/ghjp/documents/diversion_from_justice_pdp_report_ghjp_2018rev.pdf [<https://perma.cc/VAN6-8KPQ>]. This Comment uses the term Human Trafficking and Prostitution Courts (HTPCs) to refer primarily to specialized dockets for trafficking victims, CSE victims, and sex workers, regardless of whether participants enter the program pre-plea, post-plea but pre-adjudication, or post-adjudication. Much of the analyses in this Comment could be applied to prostitution diversion programs that occur pre-arrest and do not necessarily involve contact with the court—these are not, however, this Comment’s primary focus. Finally, this Comment analyzes HTPCs for people at or over the age of majority, not juvenile diversion programs.

73. Anchan, *supra* note 36, at 136. Not all HTPCs use “human trafficking” terminology or emphasize the participants’ status as victims. *See infra* notes 81–89 and accompanying text. Among HTPCs that do use this trafficking victimization framework, however, numerous programs include participants who do not fall under legal definitions of human trafficking. HTPCs have been criticized for this conflation of sex trafficking and sex work, resulting from an underlying ideology that views “all sex work as

context of other victim-centered legal approaches to human trafficking.⁷⁴

HTPCs are often identified as a recent offshoot of the problem-solving court model. Critics point out, however, that courts have been used to regulate and mold women selling sex into “responsible citizens” since the establishment of the New York City Women’s Court during the first decade of the twentieth century.⁷⁵ The modern human trafficking and prostitution courts locate themselves within the problem-solving court model by seeking to address the circumstances underlying commercial sex. Although some programs recognize that there are many reasons people become involved in the sex trade, most of the programs focus on treating trauma caused by victimization, other mental health issues, and substance use problems.⁷⁶

HTPCs vary in terms of the target population that they serve. Some programs only serve individuals with a demonstrated history of trafficking victimization.⁷⁷ Others target all individuals involved in the commercial sex trade, regardless of where they fall on a continuum of agency and victimization.⁷⁸ A number of HTPCs hinge eligibility on any commercial sex involvement, but treat victims of trafficking differently.⁷⁹

exploitative and/or violent, regardless of circumstance.” *Diversion from Justice*, *supra* note 72, at 6.

74. See, e.g., Kavita Desai, *Legal Strategies in the Fight to End Human Trafficking*, 3 HOUS. L. REV. 33, 53–55 (2013); Anchan, *supra* note 36, at 135–37; Crank, *supra* note 72, at 45.

75. Corey S. Shdaimah, *Prostitution/Human Trafficking Courts: Policy Frontline as Fault Line*, 96 TEX. L. REV. ONLINE 14, 14–15 (2017) (discussing Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 TEX. L. REV. 915 (2017)). See generally Gruber et al., *supra* note 11. See generally GLOB. HEALTH JUSTICE P’SHIP, YALE LAW SCH. & YALE SCH. OF PUBLIC HEALTH, WITH SEX WORKERS PROJECT OF THE URBAN JUSTICE CTR., UN-MEETABLE PROMISES: RHETORIC AND REALITY IN NEW YORK CITY’S HUMAN TRAFFICKING INTERVENTION COURTS (2018) [hereinafter UN-MEETABLE PROMISES], https://law.yale.edu/system/files/area/center/ghjp/documents/un-meetable_promises_htic_report_ghjp_2018rev.pdf [<https://perma.cc/3WYT-GGMQ>].

76. See *Diversion from Justice*, *supra* note 72, at 41–42.

77. *Id.* at 42.

78. The Human Trafficking Intervention Courts in New York City, for example, do not inquire into victimization status. *New York State’s Human Trafficking Intervention Courts*, CTR. CT. INNOVATION (2013), <https://cjinvolwedwomen.org/wp-content/uploads/2016/12/HTIC-1pager.pdf> [<https://perma.cc/257Y-9D5T>].

79. See *Diversion from Justice*, *supra* note 72, at 42.

The narratives and frameworks that HTPCs apply to participants, as well as HTPCs' perception of their own role or purpose, vary from program to program. These narratives and perceptions ultimately impact how HTPCs choose the target population, define program goals, and measure success.⁸⁰

One narrative employed by some programs assumes that engagement in the sex trade is never truly a choice and sex workers would opt out if given the option.⁸¹ Courts that abide by this framework tend to focus on helping “participants . . . exit[] the sex industry.”⁸² and typically do not hinge eligibility on an assessment of human trafficking victimization. Some programs, such as the Human Trafficking Intervention Courts in New York City, do not inquire into victimization status and include participants across the agency-victimization continuum.⁸³ When trafficking victimization *is* assessed, some programs remove participants who are determined to be victims of human trafficking, while others keep “trafficking victims in the program but refer them to special services.”⁸⁴

Another common narrative adopted by HTPCs emphasizes participants' status as victims. This narrative attempts to reduce blame and moves away from characterizing the participants as criminal defendants, often framing the program as a way to rescue them.⁸⁵ Some HTPCs “specifically seek out defendant/participants that are victims of human trafficking, excluding defendant/participants if they are not identified as having a history of trafficking.”⁸⁶ Others view any commercial sex involvement as a form of victimization and thus do not stake eligibility on the existence of force, fraud, or coercion.⁸⁷

A much less common approach “recogniz[es] the full range of reasons individuals enter sex work, including by choice,” and focuses on

80. *Id.* at 41.

81. *Id.* at 41; *FAQs about Prostitution*, PROJECT PHOENIX, <http://www.projectphoenixwebsite.com/faq.html> [<https://perma.cc/TJT6-SLRT>] (last visited Oct. 25, 2018).

82. *Diversion from Justice*, *supra* note 72, at 41.

83. *New York State's Human Trafficking Intervention Courts*, CTR. CT. INNOVATION (2013), <https://cjinvolvedwomen.org/wp-content/uploads/2016/12/HTIC-1pager.pdf> [<https://perma.cc/257Y-9D5T>]; *see also* GERASSI & NICHOLS, *supra* note 24, at 6–7 (2018) (describing the “agency-victimization continuum”).

84. *Diversion from Justice*, *supra* note 72, at 42.

85. *Id.* at 41.

86. *Id.* at 42.

87. The CATCH Court in Columbus, Ohio, described as “a program for victims of human trafficking, prostitution, and sexual exploitation,” exemplifies this approach. CATCH CT., *supra* note 1.

harm reduction.⁸⁸ A few programs outwardly use a human trafficking narrative as a result of funding requirements, while program staff recognize a greater degree of agency and may refrain from labeling all participants as victims.⁸⁹

III. COMMON CRITIQUES OF PROBLEM-SOLVING COURTS APPLIED TO HTPCS

Although problem-solving courts are often viewed as “progressive alternatives to traditional criminal justice approaches,” they also have been the subject of extensive debate and criticism.⁹⁰ While most of these critiques are applicable to HTPCs as well, several of the common concerns raised about problem-solving courts merit additional consideration specific to the HTPC context.

A. Eligibility: Over- and Under-Inclusion

1. Problem-Solving Courts

Critiques of problem-solving justice often highlight issues of inclusion and eligibility. While this type of analysis more frequently focuses on individuals who are excluded from these programs, some critics have also argued that problem-solving courts and diversionary programs incentivize the participation of individuals for whom the services are not necessarily appropriate.

Drug courts provide a prime example of the over-inclusivity of problem-solving justice. Critics of the drug court model have argued that not all of the individuals deemed eligible for participation in a drug court need the court’s services.⁹¹ There is a broad spectrum of drug use, and some drug users will never develop a serious substance use disorder. However, “in any system that criminalizes the possession, cultivation, and distribution of small quantities of controlled substances, a substantial percentage of those who are arrested and prosecuted will inevitably be nonaddicts and nonabusers.”⁹² Individuals who are arrested for a drug-related charge but are not in need of comprehensive treatment services may still be motivated to participate in a drug court program to avoid a criminal conviction.⁹³ While the benefits may be

88. *Diversion from Justice*, *supra* note 72, at 41.

89. *Id.*

90. *See, e.g.*, Stephanie Wahab & Meg Panichelli, *Ethical and Human Rights Issues in Coercive Interventions with Sex Workers*, 28 J. WOMEN & SOC. WORK 344, 345 (2013).

91. *See, e.g.*, Kreit, *supra* note 64, at 312–13.

92. *Id.* at 312.

93. *Id.* at 313.

obvious to these individuals at the outset, the burdens may come to outweigh them. The requirements of a drug court program may actually interfere with various aspects of participants' lives, including employment, education, and personal obligations.⁹⁴

Many drug courts attempt to address this potential for over-inclusion by requiring defendants to “demonstrate that they suffer from an abuse problem in order to gain entry.”⁹⁵ However, these efforts are countered by the practice of “skimming” or “cherry picking,” which refers to the admission of people who are most likely to comply with program requirements rather than people with the greatest need.⁹⁶ After all, funding for drug courts is inevitably impacted by their ability to decrease recidivism, and there is evidence that “drug courts actively seek out ‘low-risk’ non-addicted clients . . . in order to boost their success rate.”⁹⁷

Drug courts and other problem-solving courts are also often criticized for utilizing eligibility criteria that exclude individuals who most need the services they offer. Many problem-solving courts exclude individuals who have been charged with a violent offense.⁹⁸ The intensive supervision and treatment provided by drug courts and other problem-solving courts would be highly beneficial for “high-risk offenders for whom everything else has failed” and are “facing the longest sentences.”⁹⁹ However, these people are typically disqualified from participation.¹⁰⁰

Even when individuals with a great need for services are eligible for a specialized treatment court, they may opt out. In fact, this choice may be quite prudent. Problem-solving courts may have positive and negative incentives at their disposal to encourage compliance, but at the end of the day, “[a]ddiction is a complex disease of the brain and

94. *Id.* at 320.

95. *Id.* at 312–13.

96. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 12; NASTASSIA WALSH, ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES 21 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted_to_courts_final.pdf [<https://perma.cc/8B5Z-DZFR>].

97. Kreit, *supra* note 64, at 314; *see also* NAT'L ASS'N. OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 47; WALSH, *supra* note 96, at 21.

98. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 22–23; Kreit, *supra* note 64, at 321. Problem-solving courts that receive funding from the federal Drug Court Discretionary Grant Program are required to exclude violent offenders, with the exception of veterans treatment courts. LISA N. SACCO, CONG. RESEARCH SERV., R44467, FEDERAL SUPPORT FOR DRUG COURTS: IN BRIEF 7, 10 (2018).

99. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 12.

100. *Id.* at 11–12.

body”¹⁰¹ and “relapse is a normal part of recovery.”¹⁰² People who suffer from severe forms of addiction are more likely to fail to meet treatment requirements.¹⁰³ Research has demonstrated that “defendants who participate in a drug court program but fail to complete it often receive longer sentences (sometimes quite longer) than similarly situated defendants who are conventionally adjudicated.”¹⁰⁴

Another important example of under-inclusivity in problem-solving courts is the underrepresentation of minorities. The admission criteria used by drug and other problem-solving courts “often disproportionately exclude persons of color,” thus enhancing already existing racial disparities within the criminal justice system.¹⁰⁵ Additionally, drug court participation can put immigrants at risk of deportation, and fear of this severe consequence deters participation.¹⁰⁶ Undocumented immigrants may also be unable to successfully complete problem-solving court programs that require participants to secure employment.¹⁰⁷

2. HTPCs

Eligibility criteria for HTPCs throughout the United States are highly varied. Like other problem-solving courts and diversion programs, HTPCs often exclude “violent offenders,” either categorically or on a discretionary, case-by-case basis.¹⁰⁸ Most programs only admit people with charges for misdemeanor offenses, as opposed to felonies, and some only “serve first-time offenders and other individuals with shorter criminal histories.”¹⁰⁹ The same critiques discussed above apply here.

The gender make up of HTPC participants suggests an issue with under-inclusion, whether resulting from explicit eligibility requirements

101. *Addiction as a Disease*, CTR. ON ADDICTION, <https://www.centeronaddiction.org/what-addiction/addiction-disease> [<https://perma.cc/9NH5-TX4S>] (last visited Dec. 18, 2018).

102. NAT’L INST. ON DRUG ABUSE, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 23 (2018), <https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/soa.pdf> [<https://perma.cc/59NH-U4F3>].

103. Kreit, *supra* note 64, at 322.

104. *Id.*

105. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 44.

106. *Id.* at 43–44 (explaining that “[d]rug convictions often result in mandatory deportation even if the plea is later vacated or withdrawn,” and the meaning of “convictions” under federal law could be interpreted to include drug court participation).

107. *Id.* at 44.

108. *Diversion from Justice*, *supra* note 72, at 31–32.

109. *Id.* at 31.

or the less conscious influence of social norms. A recent survey of thirty-five HTPCs and diversionary programs¹¹⁰ found that over a fifth were exclusively available to cisgender women.¹¹¹ However, even the programs that were ostensibly gender-inclusive had very few transgender or gender non-conforming (GNC) participants and even fewer cisgender men.¹¹² While the majority of sex trafficking victims and sex workers are women, all genders are represented in the commercial sex industry.

The lack of gender diversity in some HTPCs may be the result of policing practices. In many areas, police “target women who sell sex more frequently than men or transgender individuals involved in the same activities.”¹¹³ In some areas, however, police frequently target transgender women in public spaces, automatically assuming that they are selling sex.¹¹⁴ Police also commonly charge men who they suspect of selling sex with different offenses, “such as criminal nuisance, loitering, assault, theft and the use and sale of drugs.”¹¹⁵ Police officers, other legal actors, and service providers who identify and connect eligible individuals with HTPCs may pass over eligible cisgender men and transgender individuals because they do not fit within common perceptions of the “ideal victim.”¹¹⁶

Finally, men and transgender persons may be less likely to agree to participate in HTPCs either due to fears of increased stigma or transphobia or as a result of internalized gender norms that equate male victimhood with weakness.¹¹⁷ Not only is the lack of gender diversity in

110. This evaluation looked at court-based programs with entry occurring at various stages after arrest, as well as a number of pre-booking and pre-arrest diversionary programs. *Id.* at 6, 9, 73–76.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* This practice is common in certain New York City boroughs. *Id.*

115. GLOB. NETWORK OF SEX WORK PROJECTS, BRIEFING PAPER NO. 8, THE NEEDS AND RIGHTS OF MALE SEX WORKERS 4 (2014), <http://www.nswp.org/sites/nswp.org/files/Male%20SWs.pdf> [<https://perma.cc/N9UQ-4HZB>]; see also *Diversion from Justice*, *supra* note 72, at 32 (“Some programs also reported that men and transgender or gender non-conforming defendant/participants . . . are charged under other offenses ([such as] lewd conduct).”).

116. See GLOB. NETWORK OF SEX WORK PROJECTS, *supra* note 115, at 2–3; *Diversion from Justice*, *supra* note 72, at 31; GERASSI & NICHOLS, *supra* note 24, at 15, 192–94 (discussing the “ideal victim theory” in relation to sex trafficking victims).

117. See *Diversion from Justice*, *supra* note 72, at 32 (“Some programs also reported that men and transgender or gender non-conforming defendant/participants are less likely to accept the terms of the

HTPCs likely caused by gender-related stigma, it also serves to perpetuate this stigma. Current practices reinforce the invisibility of men and transgender individuals in the sex trade and send the message that they cannot be victims.

The admissions criteria for a majority of HTPCs are typically tied to current prostitution (or related) charges or a demonstrated history of commercial sex involvement.¹¹⁸ This has several important implications. First, reliance on prostitution-related charges as a means of identifying participants also has an “over-inclusive” effect, which parallels the earlier discussion of over-inclusion in drug courts. In many of these programs, a prostitution-related charge renders an individual eligible to participate, regardless of factors such as agency, trauma history, mental health, and substance use issues. Individuals engaged in autonomous sex work who are not interested in exiting the sex trade may opt in as a means to avoid jail but may ultimately experience negative consequences as a result of intensive judicial supervision and probation requirements.

Second, reliance on prostitution-related charges likely causes HTPCs to fail to identify many trafficking victims and individuals engaged in the sex trade who pass through the criminal justice system. Commercial sex acts may be charged under a variety of criminal statutes, including some that encompass a wide range of unrelated activities, such as loitering and disorderly conduct.¹¹⁹ Trafficking victims may also be “compelled to commit a range of other crimes,” putting them “at risk of arrest for vagrancy, trespass[ing], disorderly

[prostitution diversion programs] . . .”). *See generally* GLOB. NETWORK OF SEX WORK PROJECTS, *supra* note 115, at 3 (discussing stigmatization of male sex workers); GLOB. NETWORK OF SEX WORK PROJECTS, BRIEFING PAPER NO. 9, THE NEEDS AND RIGHTS OF TRANS SEX WORKERS 2 (2014) [hereinafter NEEDS AND RIGHTS OF TRANS SEX WORKERS], <http://www.nswp.org/sites/nswp.org/files/Trans%20SWs.pdf> [<https://perma.cc/4PR3-8CYM>] (discussing transphobia and “widespread social stigmatization” of transgender sex workers).

118. *See Diversion from Justice*, *supra* note 72, at 32. *See generally* DARIA MUELLER, CHICAGO COALITION FOR THE HOMELESS, TREATMENT COURTS AND COURT-AFFILIATED DIVERSION PROJECTS FOR PROSTITUTION IN THE UNITED STATES (2012), <http://chicagohomeless.issuelab.org/resources/14135/14135.pdf> [<https://perma.cc/6B8G-4HZ7>] (listing eligibility criteria for treatment courts for prostitution offenses and court-affiliated prostitution diversion programs).

119. *See, e.g.*, Elizabeth Campbell, *Michigan’s First Human Trafficking Court*, 60 ST. LOUIS U. L.J. 97, 105–06 (2015) (“Commercial sex can be charged under a variety of names—prostitution, accosting and soliciting, pandering, disorderly conduct, public indecency.”).

conduct, crimes against nature, larceny, and drug and immigration offenses.”¹²⁰

Challenges related to victim disclosure also impact the identification and inclusion of eligible HTPC participants. Trafficking victims may not come forward because they do not realize they are victims or are unaware that their experiences make them eligible for special services and programs like HTPCs. Even when asked directly, many victims will withhold information about their experiences of victimization due to a number of factors, including fear, distrust, stigma, and trauma.¹²¹ As a result, individuals may be wrongfully excluded from HTPCs that only serve individuals with a history of trafficking victimization, or included in programs that are not intended for victims.¹²²

Finally, even HTPCs that operate under a human-trafficking framework largely exclude victims of labor trafficking.¹²³ HTPCs that do not explicitly limit participation to victims of sex trafficking and CSE may still fail to engage labor trafficking victims in their programs. This may be due, in part, to the difficulties associated with identifying victims of labor trafficking in the criminal justice system.¹²⁴ Eligible HTPC participants are often “identified by case type or arrest charge,” and prostitution-related charges indicate potential sex trafficking victims.¹²⁵ Labor trafficking victims are more difficult to identify because they typically are not arrested on charges that are explicitly indicative of trafficking victimization.¹²⁶

Human trafficking courts’ disparate focus on sex trafficking as opposed to labor trafficking also reflects broader trends. Although human trafficking has become a prominent global and national concern over the past few decades, sex trafficking commands the majority of

120. PHILLIPS ET AL., *supra* note 45, at 15.

121. *Id.* at 10, 17.

122. *Diversion from Justice*, *supra* note 72, at 42.

123. The Washtenaw County Human Trafficking Court, for example, is “aimed at sex trafficking,” and does not serve victims of labor trafficking. Campbell, *supra* note 119, at 110.

124. See *Human Trafficking Task Force e-Guide*, § 6.4, *Human Trafficking Courts*, *supra* note 7 (suggesting ways that HTPD judges and court personnel can overcome challenges to identifying labor trafficking victims).

125. *Id.*

126. *Id.* (identifying labor trafficking victims “may be more difficult [than sex trafficking victims] because there is no single arrest charge that raises red flags, but relevant arrests could involve truancy, assault, panhandling, shoplifting, lack of legal status and drug-related charges”).

attention and resources, while labor trafficking is often ignored.¹²⁷ This dynamic may be influenced by problematic normative narratives surrounding victimization, which paint “[g]ood’ women forced into sex work [as] far more deserving of governmental assistance and rescue than ‘bad’ undocumented low-wage immigrant workers whose labor is expected to be exploited.”¹²⁸

The exclusion of labor trafficking victims does not seem to comport with the espoused mission of HTPCs—particularly those that emphasize the trauma caused by trafficking victimization. Most victims of labor and sex trafficking are subjected to “some combination of isolation of the victim, emotional or physical abuse, and threats to ensnare the victim into acquiescing to the trafficker’s demands.”¹²⁹ The line between labor and sex trafficking is often quite blurred, and cases that fall under the TVPA’s definition of labor trafficking often involve sexual abuse and exploitation.¹³⁰ Victims of labor trafficking and sex trafficking commonly present with similar forms of psychological trauma, attributed in large part to a number of shared experiences across all forms of trafficking.¹³¹ Accordingly, therapeutic justifications for HTPCs are eroded by the exclusion of labor trafficking victims.

The fact that many of these programs primarily target women involved in the sex trade regardless of their agency or psychological health, while simultaneously excluding labor trafficking victims experiencing psychological trauma, suggests that these programs may be premised on moral repugnancy and “sex panic,” as opposed to therapeutic justifications.¹³² This division of “sex and labor trafficking along moral lines” ultimately has a negative therapeutic effect, by “underplay[ing] the actual harms of labor trafficking, ‘marginaliz[ing] persons trafficked in non-sex related industries,’ and eras[ing] the gendered nature of labor trafficking.”¹³³

127. Leila Miller, *Why Labor Trafficking Is So Hard to Track*, FRONTLINE (Apr. 24, 2018), <https://www.pbs.org/wgbh/frontline/article/why-labor-trafficking-is-so-hard-to-track/> [<https://perma.cc/3GHB-LACZ>].

128. Melynda H. Barnhart, *Sex and Slavery: An Analysis of Three Models of State Human Trafficking Legislation*, 16 WM. & MARY J. WOMEN & L. 83, 90 (2009).

129. *Id.* at 89–90.

130. *Id.* at 91.

131. *Id.* at 92–93 (“[B]oth are subjected to performing demeaning and often degrading tasks against their will by similarly coercive abusers . . .”).

132. *Id.* at 95.

133. *Id.* at 94 (quoting Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 319 (2007)).

B. Coercion

1. Problem-Solving Courts

One of the more controversial aspects of problem-solving courts is the role of coercion. Proponents of problem-solving courts—and even some judges who oversee these programs—view the court’s coercive power as an invaluable motivation tool for getting individuals to accept, commit to, and successfully complete treatment.¹³⁴ Drug court judges have referred to this as “benevolent coercion” and have framed the threat and use of sanctions to compel compliance as “providing help” rather than “imposing punishment.”¹³⁵ These attitudes, combined with the courts’ control over typically private decisions, have given rise to serious concerns over paternalism.¹³⁶

Responses to concerns over coercion differ. Some proponents of problem-solving courts acknowledge the coercive context. Others emphasize that the defendant’s decision-making places them in this predicament and argue that a choice between two disfavored options is still a choice.¹³⁷

There is widespread recognition that coercion can interfere with therapeutic goals.¹³⁸ If a defendant feels that they were coerced into participating in the problem-solving court program, their “attitude, motivation, and chances for success in the treatment program may be undermined.”¹³⁹ These negative outcomes may be avoided, however, if judges adjust their interactions with defendants to “increase the likelihood that they will experience their choice to enter into treatment as voluntary and will internalize the treatment goal and act in ways that help to achieve it.”¹⁴⁰

Regardless of how defendants perceive their decision to participate in a problem-solving court or treatment program, the coercive context of this decision is made particularly problematic when defendants are required to waive certain rights and protections as a condition of

134. Winick, *supra* note 55, at 1073–74; Kristine A. Huskey, *Justice for Veterans: Does Theory Matter?*, 59 ARIZ. L. REV. 697, 715 (2017).

135. Winick, *supra* note 55, at 1073; Huskey, *supra* note 134, at 715 (citing James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1556 (2003)).

136. *See, e.g.*, Huskey, *supra* note 134, at 715–16.

137. Winick, *supra* note 55, at 1074.

138. Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 Touro L. REV. 479, 483 (2002).

139. *Id.*

140. *Id.*

admission.¹⁴¹ If the judge determines that a defendant failed to complete the required treatment program—a subjective assessment—the collaborative nature of the problem-solving court once again becomes adversarial and the defendant faces jail time or other punitive sanctions.¹⁴² Unfortunately, defendants already waived many of their due process protections in order to participate in the drug-court program.¹⁴³

2. HTPCs

HTPCs raise additional concerns about the use of coercion. First, studies have found that most HTPC participants decide to take part in these programs as a way to avoid a jail sentence.¹⁴⁴ Former participants in HTPCs “suggested that anything was preferable to jail”¹⁴⁵—a far cry from the therapeutic ideal of perceiving the decision to participate in the program voluntarily. Many human trafficking victims experience psychological trauma and the jail environment abounds with triggers.¹⁴⁶ For this population, the threat of jail—which comes with risk of further victimization¹⁴⁷—is highly coercive.

Second, one of the core elements of trauma-informed practice and care is the “promotion of self-determination.”¹⁴⁸ Traumatic experiences often involve a loss of control, so “it is important to provide opportunities for victims to reestablish real and meaningful control over as many aspects of their life as possible.”¹⁴⁹ Accordingly, the use of coercion in HTPCs has the potential to cause anti-therapeutic effects.

141. Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1498–99 (2004).

142. *Id.* at 1483–84.

143. *Id.* at 1483.

144. Corey Shdaimah & Marie Bailey-Kloch, “*Can You Help With That Instead of Putting Me in Jail?*”: Participant Insights on Baltimore City’s Specialized Prostitution Diversion Program, 35 JUST. SYS. J. 257, 262 (2014).

145. *Diversion from Justice*, *supra* note 72, at 46.

146. Alicia Summers, *Victim Series 9—Trauma-Informed Courts*, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES (June 9, 2015), <http://www.ncjfcj.org/victim-series-09> [<https://perma.cc/WHA3-J48T>].

147. Nancy Wolff et al., *Patterns of Victimization Among Male and Female Inmates: Evidence of an Enduring Legacy*, 24 VIOLENCE AND VICTIMS 469, 479 (2009).

148. Summers, *supra* note 146.

149. *Id.*

C. Increased Criminal Justice System Involvement

1. Problem-Solving Courts

Critics of drug courts have pointed to their potential “net-widening” effect.¹⁵⁰ In other words, the existence of these courts causes more individuals to come into contact with the criminal justice system through increased arrest rates and police interactions.¹⁵¹ For example, the creation of drug courts has been associated with a greater number of arrests made and criminal charges filed in some cities.¹⁵² The types of crimes that make a person eligible for a drug court are typically subject to discretionary enforcement, and the existence of drug courts and other diversionary programs seem to inspire police officers and prosecutors to pursue minor crimes that they previously “would not have bothered with,” such as “\$10 and \$20 hand-to-hand drug cases.”¹⁵³ Explanations for this net-widening effect range from law enforcement officers’ good will to the “increased capacity for processing cases.”¹⁵⁴

This net-widening effect has long-term negative implications for individuals and populations. Even when people are connected with services through diversion programs and problem-solving courts, the collateral consequences of involvement in the criminal justice system “can be devastating to an offender’s employment and financial future.”¹⁵⁵ Additionally, failure to comply with the supervisory requirements can lead to harsher punishments and longer sentences

150. See, e.g., Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059, 1094–98 (2015); NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 42; Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1501–04 (2000) (referring to the “net-widening” effect as the “popcorn” effect).

151. See Natapoff, *supra* note 150, at 1094–98.

152. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 42.

153. *Id.* (quoting Hoffman, *supra* note 150, at 1503).

154. *Id.*; see also Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 483 (2009) (defining the “net-widening” effect as “an expansion in the number of offenders arrested and charged after the implementation of [drug court treatment] because well-meaning police and prosecutors now believe there to be something worthwhile that can happen to offenders once they are in the system (i.e., treatment instead of prison)”); Natapoff, *supra* note 150, at 1097 (explaining how “decriminalization eliminates traditional procedural hurdles that constrain law enforcement actors—the need for formal arrest, judicial hearings, and the adversarial process more generally,” which “permits police and prosecutors to convict those who might otherwise never have been arrested or charged under the old regime”).

155. Natapoff, *supra* note 150, at 1089.

than a defendant would have been given otherwise.¹⁵⁶ On a more systemic level, “net-widening . . . can further intensify racial disparities, creating new safety valves for white, wealthy, well-educated, and other favored offender classes to exit the enlarged criminal process while poor, minority, addicted, and otherwise disadvantaged offenders remain behind, unable to extricate themselves.”¹⁵⁷

2. HTPCs

The establishment of HTPCs and pre-arrest prostitution diversion programs throughout the country has raised similar concerns of “net widening.”¹⁵⁸ Like many drug-related crimes, prostitution and related offenses are discretionary crimes.¹⁵⁹ When these programs are established, officers in that jurisdiction may begin arresting and “diverting individuals they would have otherwise left alone on the grounds of connecting them with social services.”¹⁶⁰ Some diversion programs have even acknowledged that policing and arrests will increase as a means of filling “open slots.”¹⁶¹

While all of the general concerns and critiques regarding net widening are applicable here as well, there are additional considerations specific to HTPCs. People who are engaged in the sex industry—particularly street-based sex work—are commonly subjected to harassment, threats, and violence by police officers.¹⁶² Additionally,

156. *Id.* at 1095–96.

157. *Id.* at 1095.

158. *Diversion from Justice*, *supra* note 72, at 33–34.

159. *Id.* at 48.

160. UN-MEETABLE PROMISES, *supra* note 75, at 22–23.

161. *Diversion from Justice*, *supra* note 72, at 33.

162. *See, e.g.*, JUHU THUKRAL & MELISSA DITMORE, REVOLVING DOOR: AN ANALYSIS OF STREET-BASED PROSTITUTION IN NEW YORK CITY 6–7, 34–38 (2003), <http://sexworkersproject.org/downloads/RevolvingDoor.pdf> [<https://perma.cc/RT5V-C9DX>]; Fabian Luis Fernandez, *Hands Up: A Systematized Review of Policing Sex Workers in the U.S.*, SCH. PUB. HEALTH—PUB. HEALTH THESES, Jan. 2016, at 20–21, 25–30; U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 149 (2016), <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/DGZ3-YKAE>] (finding that Baltimore Police officers “target[ed] members of a vulnerable population—people involved in the sex trade—to coerce sexual favors from them in exchange for avoiding arrest, or for cash or narcotics” and that “the Department failed to adequately investigate allegations of such conduct, allowing it to recur”); BEST PRACTICES POLICY PROJECT, DESIREE ALL., & SEX WORKERS OUTREACH PROJECT—NYC, HUMAN RIGHTS VIOLATIONS OF SEX WORKERS, PEOPLE IN THE SEX TRADES, AND PEOPLE PROFILED AS SUCH 3–4, 7 (2014), [831](http://www.bestpracticespolicy.org/wp-</p></div><div data-bbox=)

when people who are engaged in commercial sex try to report experiences of victimization to police, they are often ignored, shamed, and re-victimized, which entrenches distrust of law enforcement even further.¹⁶³ Increasing the amount of contact that sex workers have with the police may increase the occurrence of these traumatic experiences. Additionally, the arrest process can be humiliating and traumatizing for people engaged in the sex trade and can create “an immediate distrust [that continues] throughout the remainder of the criminal justice process, regardless of the quality of the services or the care that went into creating safe, trauma-informed courtrooms.”¹⁶⁴

Problem-solving courts may seek to decrease incarceration, but participants often still spend time in jail. For example, participants may be forced to wait in jail until a bed opens at an appropriate treatment facility.¹⁶⁵ Short jail stints may also be used as a penalty for noncompliance with program requirements.¹⁶⁶ Courts have even “use[d] incarceration as a way of mandating safety, particularly in instances where there is concern about the defendant’s ability to make good choices for herself.”¹⁶⁷ Correctional settings often “activate and exacerbate past trauma.”¹⁶⁸ Many victims of human trafficking and exploitation “experience multitudes of various trauma.”¹⁶⁹ Spending even a short period of time in jail exposes victims to a high risk of re-traumatization. In order to heal from trauma, it is critical that victims feel safe.¹⁷⁰ Incarceration works directly against that goal, as jails are

content/uploads/2013/01/2014UPRReportBPPPDASWOPNYC1.pdf
[<https://perma.cc/VZ3T-MXM6>].

163. Siegfriedt, *supra* note 20, at 41–42.

164. White et al., *supra* note 12, at xi.

165. See Neena Satija, *Texas Couldn’t Help This Sex-Trafficked Teen, So Authorities Sent Her to Jail*, TEX. TRIB. (Feb. 15, 2017), <https://www.texastribune.org/2017/02/15/texas-sex-trafficked-teens-often-end-jail/> [<https://perma.cc/8VFN-2R83>].

166. See THUKRAL & DITMORE, *supra* note 162, at 6.

167. Gruber et al., *supra* note 11, at 1375.

168. Wolff et al., *supra* note 147, at 479.

169. GERASSI & NICHOLS, *supra* note 24, at 110; see also Barnhart, *supra* note 128, at 92–93 (“Victims of labor trafficking often present forms of psychological trauma similar to those of sex trafficking victims, largely because both are subjected to performing demeaning and often degrading tasks against their will by similarly coercive abusers.”).

170. See Summers, *supra* note 146; SAMHSA’S TRAUMA AND JUSTICE STRATEGIC INITIATIVE, SAMHSA’S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 10–11 (2014), <https://store.samhsa.gov/system/files/sma14-4884.pdf> [<https://perma.cc/LRZ5-Z9E9>].

rife with environmental stressors that can trigger memories of victimization and set off a trauma response.¹⁷¹

IV. ARE HUMAN TRAFFICKING AND PROSTITUTION COURTS AN EFFECTIVE SOLUTION?

Many HTPCs either explicitly or implicitly strive to “help defendants exit the sex trade,” and “eradicate[] th[e] scourge of sex trafficking.”¹⁷² Currently, however, there is very limited empirical evidence regarding HTPCs’ impact on individual participants and on prostitution and human trafficking rates.¹⁷³ What evidence does exist is ambiguous.¹⁷⁴ When it comes to recidivism rates and length of time spent in the program, HTPCs have highlighted their difficulty measuring success with this population of participants, citing the common occurrence of participants “return[ing] to their pimp or former abuser,” sometimes multiple times.¹⁷⁵ Some HTPC judges decline to punish the victims with incarceration, recognizing that subsequent prostitution charges after entering the program may indicate that the participant returned to or is still under the control of a pimp or abuser. Although this trauma-informed response is admirable, there is still a real need to determine whether HTPCs are actually meeting the diverse needs of the participants and providing them a way out of the sex trade if they want to exit.

A. Factors Underlying Commercial Sex Involvement

Problem-solving courts seek to decrease recidivism by addressing fundamental issues underlying criminal behavior. HTPCs adopt this same general premise. Accordingly, it is important to understand the various reasons that people become involved in commercial sex.

Trafficking victims may be induced into engaging in commercial sex acts through the use of overt violence and force, threats, deceit, or emotional manipulation.¹⁷⁶ Traffickers often target individuals with

171. Wolff et al., *supra* note 147, at 479.

172. See, e.g., White et al., *supra* note 12, at 36 (discussing perceptions of the mission driving New York City’s Human Trafficking Intervention Courts); *Diversion from Justice*, *supra* note 72, at 41.

173. Stephanie Wahab & Meg Panichelli, *Ethical and Human Rights Issues in Coercive Interventions With Sex Workers*, 28 J. WOMEN & SOC. WORK 344, 345 (2013); *Diversion from Justice*, *supra* note 72, at 18–19.

174. *Diversion from Justice*, *supra* note 72, at 18.

175. Megan Hadley, *Courts Fail Black Sex Trafficking Victims, Say Advocates*, CRIME REP. (Jan. 19, 2018), <https://thecrimereport.org/2018/01/19/courts-fail-sex-trafficking-victims-webinar-told/> [https://perma.cc/94YA-C96M].

176. See PHILLIPS ET AL., *supra* note 45, at 7–8.

certain vulnerabilities, such as: a lack of monetary or survival-related resources including food, shelter, and transportation; a weak or absent support system; prior experiences of sexual abuse or domestic violence; substance use issues; and mental illness.¹⁷⁷ Traffickers employ many methods of maintaining control over their victims. These methods include violence, threats, withholding identification or immigration documents, and “facilitating a dependency on drugs and alcohol.”¹⁷⁸ Often, “psychological ties or economic needs . . . prevent someone from leaving a trafficking situation, rather than physical restraint.”¹⁷⁹

Outside of overt force, fraud, and coercion, there are numerous complex and overlapping reasons for commercial sex involvement. Studies have shown that economic factors are the most commonly cited reason for engagement in the sex trade.¹⁸⁰ The intersection of poverty and other factors may make selling sex necessary for survival. Individuals in the sex trade often cite “difficulty finding well-paying jobs and affordable housing” as a reason for their involvement.¹⁸¹ Employment and housing discrimination plays a significant role, particularly for transgender individuals.¹⁸²

Physical and mental health problems are additional factors that may influence commercial sex involvement. Maintaining steady, mainstream employment can be incredibly difficult “while struggling with illness or pain,” and sex work provides greater flexibility.¹⁸³ For other individuals, mental and physical health problems arise as a *result* of their involvement in the commercial sex industry, rather than as a precursor.¹⁸⁴ Once developed, these problems may make it difficult for individuals to exit the sex trade.

Drug use is very common among individuals engaged in commercial sex, although some individuals cite “addiction [as] the reason [they] started trading (e.g., the need for money to support a habit).” Others started using after becoming involved in commercial sex as a means of “self-medica[ti]ng or because clients wanted to do drugs together.”¹⁸⁵

Often, commercial sex involvement is connected to involvement in other systems, such as “foster care, child welfare, the courts, social

177. *See id.* at 8–9; GERASSI & NICHOLS, *supra* note 24, at 4–5.

178. PHILLIPS ET AL., *supra* note 45, at 8–9.

179. GERASSI & NICHOLS, *supra* note 24, at 4.

180. White et al., *supra* note 12, at vi.

181. *Id.* at 14.

182. NEEDS AND RIGHTS OF TRANS SEX WORKERS, *supra* note 117, at 2.

183. White et al., *supra* note 12, at v–vi.

184. *Id.* at vi.

185. *Id.*

services, and government assistance.”¹⁸⁶ Entrance into commercial sex may result from a “desire to avoid foster care, seeking to escape abusive families, needing money to pay a court-imposed fine, facing barriers to legal employment because of criminal records, or not being able to survive on government subsidies.”¹⁸⁷

Other more positive reasons for engaging in sex work are often ignored because they do not comport with the widely adopted victimization framework. However, some sex workers “choose to do sex work because it offers better pay and more flexible working conditions,’ or even because it allows them to ‘explore and express their sexuality.’”¹⁸⁸ There are also sex workers who view their “involvement in the sex trade as part of a larger commitment to the work of healing, rather than an experience they were coerced into.”¹⁸⁹ All of these individual experiences are legitimate, just as are individuals’ experiences with exploitation and trafficking.

B. Limitations and Reasons for Concern

Although a number of HTPCs claim to provide a wide range of support services, HTPCs have been criticized for treating commercial sex involvement as a behavioral problem or addiction and placing primary emphasis on treating underlying trauma and substance use problems.¹⁹⁰ Commercial sex involvement is influenced by a multitude of factors, and is commonly viewed as an economic choice—albeit often a constrained one. While mental health care and substance use treatment are certainly welcome and necessary services for many HTPC participants, they are not sufficient to provide many participants with a true exit option. Programs must address structural barriers to wellbeing, which often underlie commercial sex involvement, including “lack of housing, gender identity discrimination, immigration concerns,”

186. *Id.* at vi, 15.

187. *Id.* at vi.

188. Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 50–51 (2016) (quoting *Understanding Sex Work in an Open Society*, OPEN SOC’Y FOUND., <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society> [<http://perma.cc/7WYXCU3U>] (last updated June 2017)).

189. White et al., *supra* note 12, at vi.

190. UN-MEETABLE PROMISES, *supra* note 75, at 14. Insufficient medical or social science research exists to support the treatment of commercial sex involvement as a behavior problem or addiction. *Diversion from Justice*, *supra* note 72, at 52. This type of approach “tend[s] to focus on behavioral modification . . . [and] may not address defendant/participants’ actual needs or desires.” *Id.*

and economic insecurity.¹⁹¹ Unfortunately, HTPCs are not currently designed to address these issues in any substantial way.¹⁹²

HTPCs' effectiveness is directly linked to the available resources in the surrounding area and funding to ensure participants have access to the resources they need.¹⁹³ Service providers and HTPC participants have expressed concerns regarding some HTPCs' "ability to reliably and efficaciously provide services that are of sufficient quality and quantity to meet defendants' varied needs (which often include resource needs linked to structural inequities such as access to housing, health services and support for families)."¹⁹⁴ HTPCs must also provide culturally competent services to participants, which has proven challenging for some programs. For example, some courts do not have translators available for participants who do not speak English and struggle to find service providers with appropriate language-interpretation services.¹⁹⁵ Programs that include transgender men and women and cisgender men have found that appropriate housing is not always available for them.¹⁹⁶ The importance of ensuring that appropriate and accessible resources and services are readily available to participants raises serious doubts regarding the feasibility of expanding these programs to more areas.

Finally, HTPCs fail to adequately address the negative impacts of criminal justice involvement, which can act as barriers to exiting the commercial sex trade. Some HTPCs expunge or seal the record of participants' charges or convictions upon successful completion of the program.¹⁹⁷ However, not all programs offer this service, as it may be dependent on state laws. When record sealing is not available or if a participant fails to complete the program, the participant is left with a criminal record that acts as a major barrier to employment, housing, and education.¹⁹⁸ Even if participants already have a criminal record, prostitution-related charges impose a particularly burdensome stigma.¹⁹⁹ Further, court dockets are typically accessible to the public, and many courts now make these records available online. The accessibility of this information prior to the completion of an HTPC

191. *Diversion from Justice*, *supra* note 72, at 51.

192. *Id.* at 51–52.

193. *See id.* at 27–28, 50.

194. *Id.* at 12.

195. *See id.* at 50.

196. *Id.*

197. *See id.* at 39; MUELLER, *supra* 118, at 31, 39, 48–49 (HTPCs providing expungement or record sealing to eligible participants).

198. *Diversion from Justice*, *supra* note 72, at 39.

199. *See* MUELLER, *supra* note 118, at 6; PHILLIPS ET AL., *supra* note 45, at 23.

program may undermine participants' ability to fulfill program requirements, such as securing employment or stable housing.

Furthermore, HTPCs often have incredibly intensive requirements that are disruptive to daily and familial routines and regular employment.²⁰⁰ Again, these types of structural barriers often cause individuals to become involved in commercial sex.²⁰¹ HTPCs should be breaking down barriers, not building them.

V. ARE HUMAN TRAFFICKING AND PROSTITUTION COURTS AN EFFECTIVE WORKAROUND TO A BROKEN SYSTEM?

Even if HTPCs are not an effective intervention to trafficking victimization and sexual exploitation, do they at least reduce the harms caused by traditional criminal justice processes and the blanket criminalization of the commercial sex industry?

HTPCs have been justified as a more humane response to a broken system that “penalizes and incarcerates” people engaged in the sex trade but fails to provide the assistance and resources that they need to exit.²⁰² Those involved in the creation and operation of HTPCs have framed these programs as stopgap measures that lessen the harms caused by punishing victims for acts that may not have been entirely voluntary.²⁰³ A number of HTPC judges view the courts as “workarounds for processes they could not control when they would prefer that the laws themselves changed.”²⁰⁴

Although many of HTPCs attempt to present a trauma-informed alternative to a traumatizing and re-victimizing criminal justice system, these efforts often do not extend beyond HTPC staff. Even short jail stays—which appear to be common with many of these programs—may be harmful to individuals with trauma histories.²⁰⁵ Additionally, there is evidence that some HTPCs have increased interactions between

200. *Diversion from Justice*, *supra* note 72, at 35–36; *see also* Michelle Chen, *Why Do Sex-Work Diversion Programs Fail?*, THE NATION (Sept. 25, 2015) <https://www.thenation.com/article/why-do-sex-work-diversion-programs-fail/> [<https://perma.cc/N4KE-2XXU>] (describing the experience of one former HTPC participant, who struggled to care for her son and eventually dropped out of school due to the time consuming program requirements).

201. *See id.* at 34–35, 52.

202. *See* Leon & Shdaimah, *supra* note 10, at 267.

203. *See* White et al., *supra* note 12, at 44–45. One HTPC judge posited that the courts are an attempt to informally “decriminalize” forced commercial sex acts without changing the law. *Id.*

204. *Id.*

205. *See supra* notes 165–171 and accompanying text.

individuals involved in the sex trade and police officers, thus increasing their risk of experiencing harassment, discrimination, and violence.²⁰⁶

HTPCs' ability to offset the negative aspects of the criminal justice process with therapeutic benefits has been called into question. Participants' distrust of law enforcement often transfers to the counselors and social service providers who they are connected with through the program, diminishing the effectiveness of counseling and service provision.²⁰⁷ Initial negative interactions with police and jail staff during arrest and booking may particularly undermine participants' willingness to engage meaningfully with the HTPC treatment team.²⁰⁸ Furthermore, HTPC-connected treatment providers are often expected to report information about participants' progress and compliance with program requirements to the court, placing them in dual roles of "counselor, confidant, and advocate as well as monitor, possible adversary, and whistleblower."²⁰⁹ In addition to the more immediate impact of inhibiting open and honest communication between participants and service providers, this structure may have the long-term impact of "increas[ing] barriers to accessing resources and support as defendants lose trust in the systems that purportedly exist to help them."²¹⁰ Finally, the inherently coercive nature of HTPC involvement seems particularly problematic for the population they serve, as "voice" and "choice" are critical to the healing process for trauma survivors.²¹¹

Regardless of whether participants' experiences with HTPCs are characterized by more respect and compassion than typically provided by traditional criminal justice processes, these programs do not address the myriad of harms that result from the regulatory framework governing commercial sex in the United States. Trafficking victims, CSE victims, and sex workers still must worry about receiving criminal sanctions for coming forward to report an experience of victimization to law enforcement. HTCPs also are not equipped to address the negative health consequences of criminalization, including lack of access to health insurance and discrimination by health care providers.²¹²

206. *See supra* notes 158–161 and accompanying text.

207. *See. e.g.*, White et al., *supra* note 12, at 40–41 (discussing this challenge in the context of New York's human trafficking courts).

208. *See id.*

209. UN-MEETABLE PROMISES, *supra* note 75, at 60.

210. UN-MEETABLE PROMISES, *supra* note 75, at 60. *See also Diversion from Justice*, *supra* note 72, at 51.

211. Summers, *supra* note 146.

212. *See PHILLIPS ET AL.*, *supra* note 45, at 22; *see also supra* note 48 and accompanying text.

While some HTPCs attempt to eliminate the barriers created by criminal records by providing opportunities for record sealing, these solutions often fall short.²¹³

Ultimately the question of whether HTPCs provide a preferable alternative to traditional criminal justice processes is quite subjective and contextually dependent. Despite the numerous criticisms already discussed, HTPCs have been found to provide “important resources for many of the people who participate in them, particularly when compared to current U.S. alternatives.”²¹⁴ However, individuals who need and desire the type of treatment that their local HTPC provides may have a different **perspective** than individuals who feel coerced into culturally incompetent programming that disrupts their daily lives while their structural needs go unmet.

Even if HTPCs are preferable to traditional criminal processes, between the small number of programs in existence and their eligibility requirements, access to these programs is incredibly limited. The dramatic expansion of these programs to more jurisdictions is unlikely, as HTPCs rely on the availability of funding and local service providers. Even in jurisdictions that have an HTPC, eligible participants often go unidentified. The fact that so many individuals are unable to access these programs, combined with HTPCs’ inability to reduce many of the systemic harms caused by criminalization, suggests that focus needs to shift to changing the broken system rather than incremental harm reduction for a limited number of individuals.

CONCLUSION

Viewing HTPCs as a direct intervention—a tenable solution to the social problem itself—is highly problematic. This runs the risk of endorsing a regulatory framework that imbues these courts with authority over people who do not necessarily belong in the criminal justice system. Furthermore, accepting these courts as a “first line of attack” may lead to advocacy against policy changes that aim to address the social problem *outside* of the criminal justice system. Advocates cite judges’ ability to coerce individuals into treatment as justification for maintaining the criminal justice system’s grasp, but these advocates fail to identify the individual hardships and systemic barriers caused by criminal justice involvement, even in models of problem-solving justice. Once this type of judicial coercion is accepted

213. *See, e.g.*, UN-MEETABLE PROMISES, *supra* note 75, at 14 (critiquing the record-sealing process employed by New York City’s Human Trafficking Intervention Courts).

214. Shdaimah, *supra* note 75, at 22.

as a useful part of the treatment process, advocates may wish to increase penalties to provide these courts with greater control.²¹⁵

This pattern has played out with drug court advocates who oppose comprehensive sentencing reforms, arguing that decreasing criminal penalties for nonviolent drug charges would render drug courts powerless.²¹⁶ These arguments represent a shift in the understanding of drug courts' purpose. After all, drug courts were first developed as a pragmatic solution to the overcrowding of jails and overload of the court system that was caused by a drug policy that has been widely recognized as a failure.²¹⁷ Now, drug courts are being used to advocate against reforming the very policies that made their existence necessary.

Viewing HTPCs as workarounds or stopgap measures is less problematic because it inherently recognizes systemic flaws. However, presenting HTPCs as the better of two options shifts focus away from the urgent need for systemic change. HTPCs may provide therapeutic benefits and decrease some of the anti-therapeutic effects associated with the traditional, punitive criminal justice system, but they do not eliminate the harmful aspects of criminal justice involvement entirely. HTPCs simply do not possess the capacity to significantly ameliorate the vast and substantial harms caused by criminalization.

This Comment joins with other works calling for a change to the regulatory framework governing commercial sex in the United States.²¹⁸ Rather than focusing on reducing the harms of criminalization through HTPCs, the focus of questioning should turn instead to which of the other three regulatory systems—decriminalization, legalization, or abolition—would lead to the most just and humanistic outcomes.

215. See Leon & Shdaimah, *supra* note 10, at 262 (describing “a group of judges . . . debat[ing] the role of the courts and of punishment in terms of motivating women to participate in treatment or access services. One bemoaned the lack of adequate punishment incentives because loitering is usually settled with a fine, and prostitution itself only merits a 6-month sentence, described as ‘too short a time to actually help them.’”).

216. See, e.g., Maureen O'Connor, Opinion, *Ohio's Fight Against Drug Abuse is Saving Lives—If Issue 1 Passes, More Ohioans Will Die*, CLEVELAND.COM (Oct. 21, 2018), https://www.cleveland.com/opinion/index.ssf/2018/10/no_on_issue_1_ohio_is_well_eng.html [<https://perma.cc/5H3E-GSDQ>]; Jim Provance, *Former Drug Court Judge Changes Mind, Opposes Issue 1*, TOLEDO BLADE (Sept. 12, 2018, 5:01 PM), <https://www.toledoblade.com/news/Politics/2018/09/12/Former-drug-court-judge-changes-mind-opposes-Issue-1-Ohio/stories/20180912148?abnpagversion=evoked> [<https://perma.cc/A37N-MFRV>]; Nick Castele, *Cuyahoga County Drug Court Judge Opposes Issue 1*, IDEASTREAM (Sept. 25, 2018), <http://www.ideastream.org/news/cuyahoga-county-drug-court-judge-opposes-issue-1> [<https://perma.cc/7KDC-8EDY>].

217. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 57, at 16.

218. See, e.g., *Diversion from Justice*, *supra* note 72, at 60–61; UN-MEETABLE PROMISES, *supra* note 75, at 64–66.

Furthermore, comprehensive services and resources similar to those that HTPCs attempt to offer should be funded in communities, where they can prevent criminal justice involvement rather than intervening afterward.

This is not to say, however, that there is not an appropriate space for HTPCs in the criminal justice system going forward. Victims of labor trafficking, sex trafficking, and CSE are often charged with non-sexual offenses. Decriminalizing prostitution-related offenses would free up HTPCs to screen for and admit victims with more serious charges that are more appropriate for HTPCs' intensive supervision and treatment requirements. While the foregoing critiques of problem-solving courts are still applicable and should be carefully accounted for by HTPCs, these programs may provide a preferable alternative for victims when criminal justice involvement is unavoidable.

Becca Kendis[†]

[†] J.D. Candidate, 2019, Case Western Reserve University School of Law; M.S.S.A. Candidate, 2019, Jack, Joseph and Morton Mandel School of Applied Social Sciences. I would like to thank the Editors of Volume 69 of the Case Western Reserve Law Review for all of their help getting this Comment ready for publication. I would also like to thank Professor Maya Simek for encouraging me to ask hard questions and formulate my own opinions. Last but not least, I would like to thank my parents, Daniel and Cheryl, for their unending love and support, and my fiancé, Adam, for his limitless patience and love and for always championing my work.