

The Inadequacies of Tinkering: Unmeetable Promises and Failed Incrementalism in U.S. “Prostitution Diversion Programs”

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Response to Kate Mogulescu, “Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk.”

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INTRODUCTION

Kate Mogulescu’s article, “Your Cervix is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk” (“Your Cervix is Showing”), analyzes New York’s loitering for the purpose of engaging in prostitution offense laws (“LPP laws”) to demonstrate “the interplay between gender and petty offense enforcement.”¹ Her article’s title captures a phenomenon that is both absurd and dangerous: It derives from an actual criminal complaint in which a police officer reported that the defendant’s “cervix” was “exposed” as she

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¹ Kate Mogulescu, *Your Cervix Is Showing: Loitering for Prostitution Policing as Gendered Stop & Frisk*, 74 U. MIA. L. REV. CAVEAT 68, 71 (2020), https://lawreview.law.miami.edu/wp-content/uploads/2020/05/Your-Cervix-is-Showing_Page-Proof_FINAL.pdf.

walked the street.² The absurdity is, of course, the physical impossibility of a cervix “showing;” no matter what an individual wears, the danger stems from the fact that a cop successfully used this absurd notion as a basis for arrest.³

Courts seem to lose all pretense of rigor when they “see” sexual conduct in public.⁴ In this mode of delusion, Mogulescu argues, courts support a wide range of discriminatory policing and charging abuses, facilitating broad arrests on the bases of appearance, arrest history, and sexual conduct.⁵ Mogulescu warns that “tinkering” with LPP laws through incremental procedural reforms is wholly inadequate in reducing harm; so long as these laws stay on the books, they remain a convenient tool for what she calls “gendered stop-and-frisk.”⁶

“Your Cervix is Showing” illustrates how problematic policing is not just tolerated but encouraged through formal adjudication of sex-related petty offenses: the courts enable bad behavior through their own jurisprudence.⁷ Nevertheless, the lessons we learn from Mogulescu’s analysis apply outside the courtroom as well; absurdity and systematic unfairness are equally constitutive of “diversion,” and court-driven efforts to direct individuals *away* from courts and detention and into mandated social services.

Over the past five years, we at the Yale Global Health Justice Partnership (“GHJP”) have studied local level “prostitution diversion programs” (“PDPs”), a wide-ranging set of interventions that position themselves as compassionate, rehabilitative alternatives to criminal adjudication. We have mapped and analyzed the practices of PDPs nationally⁸ and have also watchdogged a failed diversion

² *Id.* at 68–69.

³ *Id.* at 106.

⁴ *Id.* at 89.

⁵ *See id.* at 85–99.

⁶ *Id.* at 71, 73.

⁷ *See id.* at 85–99.

⁸ *See* YALE GLOB. JUST. P’SHIP & SEX WORKERS PROJECT URB. JUST. CTR., DIVERSION FROM JUSTICE: A RIGHTS-BASED ANALYSIS OF LOCAL “PROSTITUTION DIVERSION PROGRAMS” AND THEIR IMPACTS ON PEOPLE IN THE SEX SECTOR OF THE UNITED STATES 21–43, 44–60 (2018) [hereinafter YALE GHJP & SWP, DIVERSION FROM JUST.]; *see generally* YALE GLOB. HEALTH JUST. P’SHIP & SEX WORKERS PROJECT OF THE URB. JUST. CTR., UN-MEETABLE PROMISES: RHETORIC AND REALITY IN NEW YORK CITY’S HUMAN TRAFFICKING

pilot impacting street-based sex workers in New Haven, Connecticut.⁹ Our investigations have demonstrated that the promises that PDPs make to “participants” are fundamentally “un-meetable.”¹⁰

Just like LPP laws in NYC, PDPs are predicated on an inappropriate extension of court and police discretion and result in significant harm.¹¹ We agree with Mogulescu that thinking about “sex in public” makes everyone with legal power (law enforcement, courts, and lawmakers) rather imprudent.¹² We extend her argument to shed light on the ways in which absurd and biased thinking around “sex in public” confers unquestioned power upon the criminal legal system to distribute access to social services to people who sell sex.¹³ Additionally, while PDPs often cast these people as “victims,” diversion programs nevertheless rely on continued criminalization where convenient and expedient in imposing “order” on public space.¹⁴

The links between LPP laws and PDPs lead us to a similar conclusion about diversion that Mogulescu reaches about “gendered stop-and-frisk.”¹⁵ Just as tinkering has not sufficed to fix intrinsic problems with LPP laws, tinkering with diversion programs will not suffice in extricating individuals from the surveillance and control of police and courts.¹⁶

Here, we begin by exploring ways in which *post-booking* diversion programs (those programs that intervene after arrest) subject individuals to coercion and systematic abuse. Next, we interrogate the supposed merits of *pre-booking* diversion programs, which intervene before arrests and, therefore, purport to interrupt cycles of criminalization of “sex in public.” These analyses allow us to expose diversion programs as potential sites of harm rather than support.

INTERVENTION COURTS (2018) [hereinafter YALE GHJP & SWP, UN-MEETABLE PROMISES].

⁹ Yale Glob. Health Just. P’ship & Sex Workers & Allies Network, *About this Watch Site*, NEW HAVEN L. ENF’T ASSISTED DIVERSION WATCH SITE, <https://leadwatchsite.wixsite.com/newhaven> (last visited Aug. 23, 2020).

¹⁰ See YALE GHJP & SWP, UN-MEETABLE PROMISES, *supra* note 8, at 8.

¹¹ *Id.* at 24–25.

¹² See Mogulescu, *supra* note 1, at 85–99.

¹³ See YALE GHJP & SWP, UN-MEETABLE PROMISES, *supra* note 8, at 8–10.

¹⁴ *Id.*

¹⁵ See Mogulescu, *supra* note 1, at 71.

¹⁶ See *id.* at 73.

We conclude that only full decriminalization can have the meaningful, sustained, and positive impacts that PDPs promise but fail to realize.

I. POST-BOOKING DIVERSION

To those seeking to reduce petty offense policing, “diversion programs” might sound compelling. Localities commit, in theory, to creating systems that divert people from arrest, conviction, and detention and into “treatment.”¹⁷ But GHJP’s research, in collaboration with sex worker advocates in NYC and New Haven, tells a different story—one of fleeting good intentions and long-term misfires.¹⁸ PDPs promise responsive, trauma-informed services, but fail to address structural needs and further entrench social welfare within the penal system.¹⁹

After interviewing defendant/participants²⁰ and service providers involved in post-booking PDPs across the country, we found that most programs did not truly “divert;” even the most well-intentioned of programs tied access to social services to the criminal legal system.²¹ Interviewees described that they were under constant threat of punishment, given onerous and inconsistent program parameters.²² As one individual noted, “I got the full experience of court and saw that I am being monitored, I am being watched, and if my behavior is not deemed healthy by the court system, then I would be ordered to make changes . . . whatever changes they deemed appropriate to my life.”²³

¹⁷ YALE GHJP & SWP, DIVERSION FROM JUST., *supra* note 8, at 14.

¹⁸ *Id.* at 15.

¹⁹ See Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1401–02 (2016).

²⁰ We call individuals in post-booking PDPs “defendant/participants,” recognizing that people in diversion continue to be treated as criminal offenders and that the term “participant” alone might inaccurately imply that diversion is always or typically undergone voluntarily. YALE GHJP & SWP, DIVERSION FROM JUST., *supra* note 8, at 6.

²¹ See *id.*, at 14, 22.

²² *Id.* at 54

²³ *Id.*

Defendant/participants' anxieties were often exacerbated by experiences of disrespect and abuse at the hands of police and court staff. One individual, speaking about the court staff in her jurisdiction who handled her roughly and made her handcuffs too tight, said, "[T]hey're rude . . . the correctional court officers who work there treat you like you're beneath them."²⁴

Most post-booking PDPs assumed that defendant/participants had been trafficked, coerced, or otherwise forced into selling sex. Yet despite characterizing defendant/participants as "victims," courts continued to threaten criminal consequences for non-compliance with treatment plans.²⁵ In almost every post-booking program we reviewed, services were administered under threat of detainment, (re)incarceration, or an inability to receive a dismissal of charges.²⁶ And, as individuals navigated post-booking PDPs, they continued to be stigmatized and systematically mistreated.²⁷ As one individual explained, "the judge tells us . . . that is too tight or maybe you could dress in something looser next time . . . it makes you feel cheap, it makes you feel bad."²⁸ Defendant/participants and social service providers to which we spoke noted that courts lacked cultural competencies and gender sensitivity—for instance, by failing to provide interpreters for cases involving non-English-speaking clients or misgendering defendant/participants.²⁹

Stigma and mistreatment based on appearance and identity are not accidental elements of post-booking diversion. These experiences betray diversion's basic premise: that the courts can always fall back on viewing the selling of sex—especially by women, transgender or gender non-conforming individuals, people of color, and immigrants—as morally suspect and make the seller a criminal where expedient.³⁰

²⁴ *Id.* at 56.

²⁵ AUDACIA RAY, EMMA CATERINE, & RED UMBRELLA PROJECT, CRIMINAL, VICTIM, OR WORKER?: THE EFFECTS OF NEW YORK'S HUMAN TRAFFICKING COURTS ON ADULTS CHARGED WITH PROSTITUTION-RELATED OFFENSES 5 (2014).

²⁶ *See* YALE GHJP & SWP, DIVERSION FROM JUST., *supra* note 8, at 63.

²⁷ *Id.* at 56.

²⁸ *Id.*

²⁹ *Id.* at 50–51.

³⁰ *Id.* at 53.

II. PRE-BOOKING DIVERSION

Distinct from their post-booking counterparts, a new wave of pre-booking programs have emerged over the last decade; their goal is to interrupt cycles of criminalization by offering diversion before arrests.³¹ The pre-booking model was piloted through the King County, Seattle, Law Enforcement Assisted Diversion (“LEAD”) program and has since expanded to several cities across the United States.³² In the LEAD model, police officers are given discretionary authority to divert individuals who commit low-level offenses to case management and social services rather than opting for traditional criminal proceedings.³³

The police-led, “community-based” LEAD model was, for an extended period of time, deemed a success.³⁴ We remain concerned, however, that many pre-booking programs are incapable of fixing diversion’s intrinsic flaws.³⁵ In New Haven, Connecticut, where GHJP works closely with the Sex Workers and Allies Network,³⁶ the rollout of a LEAD Pilot Program has revealed the pitfalls of pre-booking diversion. At best, the New Haven program simply has not

³¹ *Law Enforcement Assisted Diversion (LEAD): Diversion and Reentry Services*, KING CNTY., <https://www.kingcounty.gov/depts/community-human-services/mental-health-substance-abuse/diversion-reentry-services/lead.aspx> (last updated June 15, 2020).

³² Jamie Wood, *An Innovative Drug Policy That Works*, OPEN SOC’Y FOUND.: VOICES (Apr. 20, 2020), <https://www.opensocietyfoundations.org/voices/innovative-drug-policy-works>.

³³ *Id.*

³⁴ *What is LEAD?*, LEAD NAT’L SUPPORT BUREAU, <https://www.lead-bureau.org/about-lead> (last visited Oct. 1, 2020).

³⁵ *Id.* In response to nationwide calls to rethink the role of police in public health, order, safety, and equity, the LEAD National Support Bureau announced in 2020 that the flagship LEAD program in Seattle was renamed to “Law Enforcement Assisted Diversion/Let Everyone Advance with Dignity.” See *LEAD Program Transformation and Website Changes*, PUB. DEF. ASS’N (Aug. 14, 2020), <http://www.defender.org/news/lead-program-transformation-and-website-changes>. According to its website, the Bureau has also developed an alternative option for LEAD operations that “decenters law enforcement as gatekeepers to LEAD services.” *Id.* While there are promising elements to these recent announcements, further information and evaluation are needed to assess whether these are transformative reforms or more of the same incrementalist tinkering.

³⁶ SEX WORKERS & ALLIES NETWORK, <http://swanct.org/> (last visited Aug. 23, 2020).

done what it intended to do; at worst, it has enhanced the discretion afforded to police in public space.³⁷

A commissioned evaluation³⁸ of New Haven's LEAD Pilot program found that few stops resulted in diversion because New Haven Police Department ("NHPD") officers were insufficiently trained, officers did not believe in the basic premises of addressing petty criminality with services as opposed to punishment, and coordination between officers and service providers was inadequate.³⁹ The report also observed that the LEAD program was not well-adapted to the context of the city in that neither the adequacy of services nor the balance of power between individuals and police had ever been examined with input from those most directly affected.⁴⁰

Beyond these implementation issues lay the more fundamental issue that even the pre-booking approach could not address: Diversion models are premised on the criminal legal system becoming the gatekeeper and manager of social services.⁴¹ By the LEAD National Support Bureau's own explanation, the pre-booking model is *specifically intended* to let "police officers exercise discretionary authority at point of contact . . ."⁴² In other words, officers are tasked with assessing the potential benefits of *service* over arrest. Ironically, the inappropriateness of this kind of broad-based authority was not lost on NHPD officers themselves: one interviewed officer remarked that the program was "asking police officers to be social workers and outreach counselors, that's not what [they] are."⁴³

Like the players in post-booking programs, police in pre-booking programs are ill-suited to facilitate access to social services for many reasons, not least of which remains an entrenched stigma

³⁷ See YALE GLOB. HEALTH PARTNERSHIP & SEX WORKERS & ALLIES NETWORK, MISTREATMENT & MISSED OPPORTUNITIES: HOW STREET-BASED SEX WORKERS ARE OVERPOLICED AND UNDERSERVED IN NEW HAVEN, CT 19 (2020).

³⁸ PAUL JOUDREY, ET AL., FORMATIVE EVALUATION OF THE CITY OF NEW HAVEN LAW ENFORCEMENT ASSISTED DIVERSION (LEAD) PILOT PROGRAM (2020).

³⁹ *Id.* at 7–9.

⁴⁰ *Id.* at 15.

⁴¹ *Id.* at 1.

⁴² *What is LEAD?*, LEAD NAT'L SUPPORT BUREAU, <https://www.lead-bureau.org/about-lead> (last visited Aug. 23, 2020).

⁴³ JOUDREY, ET AL., *supra* note 38, at 9.

against individuals who engage in criminalized or taboo activities.⁴⁴ One officer interviewed in the LEAD Pilot evaluation thought there was little law enforcement could do to divert people from arrest because “there is a reason why the majority of people are in the situations they are in because of life choices, personal responsibility, the goals they do or don’t have in life.”⁴⁵ These same officers were the arbiters of the fates of those they detained on the street.⁴⁶

Reform advocates optimistic about PDPs may insist that adequate training and assistance could remediate officers’ biases regarding the selling of sex and other low-level offenses. Yet this is the same faith in incrementalism—and rational juridical thinking about sex and sexual conduct—that Mogulescu identifies as rather hopeless in the case of procedural LPP reform.⁴⁷ LEAD pilots in cities like New Haven clarify how even “improvements” on PDP design continue to expose street-based individuals to harmful police encounters and even *widen* law enforcement’s authority to police public space with what Mogulescu calls “unfettered discretion.”⁴⁸

CONCLUSION

In “Your Cervix Is Showing,” Mogulescu suggests that diversion programs provide cover for questionable arrests by preventing cases from being adjudicated with rigorous oversight.⁴⁹ While PDPs may shield law enforcement from scrutiny, they hardly shield individuals from harm. As we have demonstrated, post-booking diversion programs not only fail to prevent arrest, they also perpetuate stigma, discrimination, surveillance, and coercion by courts and police. Although pre-booking diversion programs theoretically intervene upstream from arrest, they afford law enforcement even broader discretion, while failing to correct the most fundamental flaws of post-booking diversion.

⁴⁴ See *id.* at 1, 7–8, 15 (noting that stigma associated with substance use disorders act as a barrier to access social services). Similarly, individuals who sell sex are subject to the same or similar stigma and endure many of the same consequences as those who suffer from substance abuse. *Cf. id.*

⁴⁵ *Id.* at 9.

⁴⁶ *Id.*

⁴⁷ Mogulescu, *supra* note 1, at 73.

⁴⁸ *Id.* at 85.

⁴⁹ *Id.* at 98.

“Tinkering” with bad policies and programs will not work. Like Mogulescu, we aim for something more transformative. Decriminalizing the buying and selling of sex is the only way to achieve meaningful diversion.

When we revisit the intersecting considerations of gender and race, we get an even stronger imperative to decriminalize, rather than tinker at the margins. Andrea Ritchie’s remarks at the 2019 University of Miami Petty Offenses Symposium made clear that law enforcement’s focus on clearing “disorderly” Black and brown bodies from “worthy” public spaces has a long, insidious history.⁵⁰ With respect to prostitution charges, the “whore stigma”⁵¹ has also affected white women selling sex on the streets, as we observed in New Haven. Applying Khiara Bridges’s work on the intertwined nature of “white privilege” and “white unprivilege” to New Haven sex workers, we see that the punishment of white unprivilege (and unrespectability) through their arrest and disrespect functions precisely to preserve “hegemonic whiteness” and white privilege.⁵² If commercial or public forms of sexual conduct constitute what Gayle Rubin has famously called “bad sex,”⁵³ then we cannot expect law enforcement and the courts to relinquish gendered and racialized sources of power by making incremental, procedural adjustments to diversion programs. Indeed, as Issa Kohler-Hausmann trenchantly observes, “to expect an overall retrenchment of penal power” from programs like PDPs “is to misunderstand the intentions and understandings of actors administering and innovating them” because, on

⁵⁰ Petty Offenses Symposium: A Conversation on Gender and Petty Offenses (University of Miami School of Law 2019) (on file with University of Miami School of Law), <https://echo360.org/media/06bd36a5-7b14-4449-98b7-86148abc08da/public>.

⁵¹ Gail Pheterson, *The Whore Stigma: Female Dishonor and Male Unworthiness*, 37 SOC. TEXT 39, 42 (1993).

⁵² Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HAR. L. REV. 770, 782–783 (2020).

⁵³ Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 281 (Carole S. Vance ed., 1992).

principle, such programs are “not intended to free the subjects” of socio-legal control.⁵⁴

To be sure, decriminalization will not fix all the abuses and harms faced by people in the sex trade, but it will remove some persistent barriers associated with the oppressive cycle of surveillance, arrest, and incarceration. PDPs have neither the goal nor the capacity to meet the needs of people involved in the sex sector; real change can only be enacted through decriminalization and reinvestment of resources in community-led efforts that serve persons in the sex trade according to their needs and rights.

⁵⁴ ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 252, 255 (2018).