Teaching Prostitution Seriously

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INTRODUCTION

This article examines what students learn about prostitution in criminal law courses by reviewing the treatment of prostitution in three criminal law casebooks currently in use in law schools and the teacher’s manuals that accompany them.1 Criminal law casebooks have undergone change as a result of feminist efforts to reform the criminal justice system. Although feminist legal theory has influenced the treatment of rape and domestic violence in the casebooks, the stereotypical treatment of prostitution remains virtually unchanged. The purpose of this article is to build on earlier feminist efforts and encourage criminal law teachers and casebook authors to recognize the gendered implications of the treatment of prostitution, to take the law of prostitution seriously, and to consider how prostitution implicates a broad range of criminal justice issues.

During the last thirty years, feminist legal scholarship and activism have succeeded in making the criminal justice system more responsive to the issue of violence against women.2 In the area of domestic violence, states have

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enacted statutes that mandate arrest in cases of domestic assault, require assistance to victims, and mandate training of police and court personnel. In the area of sexual assault, states have modified the definitions of consent and force and have enacted rape shield laws. Throughout this period of change and reform of the criminal law, the statutory framework criminalizing prostitution has been largely ignored.

At the same time that feminist scholars and activists were analyzing and critiquing the criminal justice system with an emphasis on reforming those areas of criminal law that involve violence against women, feminist legal scholarship developed a critique of legal education. The
treatment of violence against women in legal education, in particular, has become increasingly scrutinized. One focus of this feminist critique has been the criminal law and how it is taught in law school. There have been a number of articles analyzing casebooks and textbooks from a feminist perspective. In addition, the American Bar Association, through its Commission on Domestic Violence, has launched a project to encourage the integration of issues of domestic violence into the law school curriculum and has held a series of conferences throughout the country to discuss ways of implementing curricular change in this area. Although been much activity and activism have been directed at the manner in which domestic violence and rape are taught in criminal law courses, the treatment of prostitution has drawn little attention. Just as legal reform efforts have ignored prostitution, legal education reform has also ignored this area of the law.

When one raises the issue of the legal treatment of prostitution, the discussion typically is limited to a debate about whether prostitution is an expression of sexual autonomy and a form of work or a form of violence against women. In the context of a criminal law course, however,


7. See, e.g., Margaret A. Baldwin, Strategies of Connection: Prostitution and Feminist Politics, 1 Mich. J. Gender & L. 65, 68 n.7 (1993) (citing the National Coalition Against Sexual Assault’s national resolution: “Be it further resolved that NCASA adopt the position that prostitution is violence against women, that women and children are not empowered emotionally or financially through prostitution.”); Elizabeth Bernstein, What’s Wrong with Prostitution? What’s Right with Sex Work? Comparing Markets in Female Sexual Labor, 10 Hastings Women’s L.J. 91 (1999) (analyzing the radical feminists’ proposition that prostitution is sexual violence against women and the pro-sex feminist position that prostitution may offer women possibilities for self-assertion, subversion, and resistance, and finding both positions are right some of the time, yet neither are right all of the time); Holly B. Fedner, Three Stories of Prostitution in the West: Prostitutes’ Groups, Law and Feminist “Truth,” 4 Colum. J. Gender & L. 26, 37-38 (1994) (describing “liberal feminist” efforts to gain recognition for prostitution as work deserving of equal working rights); International Committee for
a discussion of prostitution has far broader implications. Regardless of whether criminal law teachers embrace the work or violence side of the debate, they should recognize that prostitution is a paradigm for women’s status and plays an important role in criminal law beyond the discrete crime of prostitution. The prostitution paradigm permeates criminal law cases that on their face are not “prostitution” cases. If we examine those crimes that have a particular gender-based impact, for example domestic assault and rape, or we look at certain doctrines such as provocation, we can see that as the woman’s behavior is scrutinized, her behavior is described in terms of her sexual fidelity or innocence or the lack of those virtues. In domestic assault and rape cases, often the violence is accompanied by epithets against the woman casting her as a prostitute. Moreover, the legal system, in these cases, asks a series of questions to determine whether a woman is, or appears to be, a prostitute. Those questions include “Why didn’t she leave?”; “Why did she go with that man to his apartment, to his car, to his room?”; “Why was she wearing what she was wearing?”; “Why was she in that place, at that hour, behaving in that way?” The more closely her appearance and conduct resemble a woman in prostitution, the less she is deserving of protection through the criminal law and the

Prostitutes’ Rights World Charter and World Whores’ Congress Statements, in Sex Work: Writings by Women in the Sex Industry 305, 310 (Frederique Delacoste & Priscilla Alexander eds., 2d ed. 1989) (affirming “the right of all women to determine their own sexual behavior, including commercial exchange, without stigmatization or punishment”) (emphasis omitted); Sheila Jeffreys, The Idea of Prostitution (1997) (looking at both sides of the prostitution debate, analyzing the side that claims prostitution is a legitimate form of chosen employment and advocating that a man’s use of prostitution is a form of cruelty constituting a women’s human rights violation.); Catharine A. MacKinnon, Toward a Feminist Theory of the State 113 (1989) (labeling prostitution as an abuse against women); Veronica Monet, Sedition, in Whores and Other Feminists 217, 221 (Jill Nagel ed., 1997) (“Sex in general and sex for money really is something that a fully feminist woman can choose to engage in. And that choice can liberate, empower, and raise her self-esteem.”); Rosemarie Tong, Prostitution, in Sex, Morality, and the Law 107, 118 (Lori Gruen & George E. Panichas eds., 1997) (describing various analyses of prostitution, including “existentialist feminists” who view a prostitute as “an exceptional woman who dares to challenge the sexual mores of her society”).
For example, a case widely included in criminal law casebooks is the case of People v. Berry. This case is a principal case in one of the casebooks I reviewed and a note case or in the notes in the other two casebooks. The case usually is placed in the homicide section of the casebook and used to illustrate the issues of provocation, cooling off periods, and their effect on intentional homicide. The court's opinion in the case dwells on the victim's behavior and what the court characterizes as the victim's sexually taunting and sexually exciting behavior toward the defendant. Rather than scrutinizing the actions of the defendant, the court focuses on the victim's relationship with another man and her sexually provocative conduct toward the defendant. This emphasis allowed the court to base the degree of the husband's culpability on the so-called immoral conduct of the victim. The stereotypical characterization of the victim as immoral and sexually provocative is only a minimally disguised description of a woman who behaves like a woman in prostitution. The potential consequences imposed on the defendant are less severe (the court found that the defendant was entitled to a jury instruction on voluntary manslaughter) because the victim was less worthy of the law's protection. The court leaves the impression that her immoral sexual conduct is to blame and therefore that she deserved the consequences of her own behavior. Berry illustrates how prostitution and its use as a paradigm for women's condition have broad implications in criminal law. The omission of a serious discussion of the law of prostitution means more than just the omission of prostitution cases. In fact, the specter of

8. 556 P.2d 777 (Cal. 1976).
9. Id. at 779.
10. See Evelina Giobbe, Confronting the Liberal Lies About Prostitution, in The Sexual Liberals and the Attack on Feminism 67, 76 (Dorchen Leidholdt & Janice G. Raymond eds., 1990) (noting that “prostitution isn't like anything else. Rather, everything else is like prostitution because it is the model for women's condition.”).
the stereotypical, unchaste woman and her resemblance to the woman in prostitution influences a whole range of criminal law issues and especially the criminal justice system's treatment of violence directed at women.

Part I describes the findings of a report published ten years ago that examined sex bias in teaching criminal law courses. The report examined a wide range of criminal law topics by studying the content of seven criminal law casebooks. Part I focuses on the report's findings with regard to the coverage of prostitution. Part II examines three current criminal law casebooks. First, general themes and similarities applicable to all the reviewed casebooks are analyzed. Part II then continues the examination by scrutinizing each of the three current casebooks individually with regard to each one's treatment of prostitution. Based on the analysis in Parts I and II, the Conclusion suggests that current criminal law casebooks continue to treat prostitution in substantially the same minimal manner as casebooks did ten years ago. The traditional stereotypes of women in prostitution remain unchallenged while the demand side of prostitution receives little or no scrutiny. The Conclusion urges criminal law teachers and casebook authors to include more material about the nature of prostitution and raise challenges to the pervasive stereotypes before another decade passes.

I. PROSTITUTION IN CRIMINAL LAW CASEBOOKS—THAT WAS THEN

Ten years ago, a report was published on sex bias in the teaching of criminal law.11 By reviewing seven criminal law casebooks, surveying law professors who taught in the field, and compiling a bibliography of supplementary materials, the report sought to examine sex bias in the teaching of criminal law.12 Among the topics considered in

12. Id. at 320.
that report was prostitution.

The report found that the elements to establish a charge of prostitution were mentioned in only three casebooks.\textsuperscript{13} The total number of pages in which the elements were mentioned was .85 with an average of .28 pages.\textsuperscript{14} The report goes on to note that this lack of information on the basic elements of the crime leaves the students unprepared to fully understand and analyze other issues related to prostitution, including criminalization, vagueness, and sanctions against johns.\textsuperscript{15} The question of criminalization of prostitution received the most extensive coverage, with a total of 13.3 pages in four casebooks.\textsuperscript{16} However, the report notes that this total is distorted because one book contained 12.8 pages. The average coverage in the other three books was only .17 pages.\textsuperscript{17} The casebook with the most extensive coverage of the criminalization issue included excerpts from the 1957 Committee on Homosexual Offences and Prostitution Report, known as the Wolfenden Report which advocated decriminalizing homosexuality and prostitution in England. It also included excerpts from Lord Devlin’s response to it and Hart’s reply to Devlin.\textsuperscript{18} In one of the other casebooks, prostitution is mentioned in the context of the costs and benefits of criminalization; the other casebook “mentions prostitution as a ‘vice crime’ along with homosexuality, drugs, and gambling.”\textsuperscript{19} The final casebook categorizes prostitution as a victimless crime and makes reference to it in the context of whether after Powell v. Texas,\textsuperscript{20} a case which raised the issue of the

\begin{footnotesize}
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  \item Id.
  \item Id.
  \item See id. at 434. In this article, I will be using the term “john” to refer to a purchaser of sex. This term was created by women in prostitution who wanted to express the idea that the men who buy sex are indistinguishable from one another. See also Jeffreys, supra note 7, at 3; 2 Random House Historical Dictionary of American Slang 301 (J.E. Lighter ed., 1997).
  \item Erickson, Final Report, supra note 6, at 437.
  \item Id. at 438.
  \item See id.
  \item Id. at 439.
  \item 392 U.S. 514 (1986) (affirming appellant’s conviction for public
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constitutionality of a statute making it a crime to be intoxicated in public, it is constitutional to punish someone for having the status of a prostitute.21

The report explains the importance of the vagueness doctrine in criminal law jurisprudence. The vagueness challenge to statutes is a basic component in understanding constitutional limits placed on criminal statutes. The vagueness rule makes certain that persons have adequate notice of what conduct is prohibited by the criminal law and that state actors do not have unlimited discretion as to what is prohibited conduct. Statutes that have been used to target prostitution such as vagrancy statutes or loitering statutes often contain language that is subject to challenge. Words such as “lewd” and “immoral” raise the question of whether there is adequate notice of the conduct that is being prohibited. From a broader perspective, the report notes that these kinds of statutes have the effect of

restricting women’s liberty,... [and] may encourage the police to pick up women... just because they are dressed in a certain way or are in a certain part of town. In this way, such statues serve to ensure “proper” behavior for women, thereby maintaining gender roles while seeking to punish prostitution.22

Given the importance of the vagueness doctrine, it is not surprising that the report finds that six of the seven casebooks reviewed included a section on vagueness.23 However, the report also found that only one of the casebooks considered vagueness as it might apply to prostitution and prostitution-related laws “for a total of one-half page of coverage.”24 In that casebook, the authors do include the case of Commonwealth v. Dodge,25 in which a

21. Erickson, Final Report, supra note 6, at 439.
22. Id. at 443.
23. Id. at 444.
24. See id.
statute that outlawed sexual activity as a business was upheld against a vagueness challenge. The casebook, however, does not discuss the vagueness issue raised in the case. A second casebook includes a note in which the authors ask whether a provision that makes it a crime for a known prostitute to “repeatedly stop... any pedestrian or motor vehicle by hailing, whistling, waving of arms or any other bodily gesture,” is constitutional. Another casebook includes excerpts from the case of Shaw v. Director of Public Prosecutions, which dealt with prosecution for conspiracy to corrupt public morals. In this case the appellant was prosecuted for publishing a directory of prostitutes’ names, addresses, and phone numbers with descriptions of the behavior in which they were willing to engage. The report indicates that the Shaw case was placed in a section on “Legality” in the chapter on “Defining Criminal Conduct.” The report concludes that:

[Although vagueness challenges to prostitution laws are touched on in a few casebooks, no book contains any extended discussion of the topic, and no mention is made of how these laws may invest the police with undue discretion to arrest women merely on the basis of the clothing they choose to wear or the part of town where they choose to be.]

The final aspect of prostitution considered by the report is the imposition of criminal sanctions on johns. The report points out that the Wolfenden Report, excerpted in one of the casebooks, while recommending decriminalization of prostitution, called for continuing the legal prohibition of loitering and solicitation which were characterized as public nuisances. While calling for the continued legal prohibition of loitering and solicitation,

26. Erickson, Final Report, supra note 6, at 444.
27. Id. See also City of Detroit v. Bowden, 149 N.W.2d 771 (Mich. Ct. App. 1967) (finding the city ordinance void for vagueness and violative of due process).
29. Erickson, Final Report, supra note 6, at 445.
30. Id.
31. Id. at 448.
however, the Wolfenden Report does not advise legally prohibiting “kerb crawling.”32 Curb [kerb] crawling “involves motorists (usually male) who drive slowly, overtaking pedestrians (usually female), and stopping with the intention of inviting them into their cars for the purpose of engaging in sexual activity.”33 It is clear from the discrepancy in its recommendations that there was a reluctance on the part of the drafters of the Wolfenden Report to punish males for soliciting prostitution or engaging in prostitution but no similar reluctance when it came to females.

The report found that only three casebooks covered the topic of criminal sanctions against johns “for a combined total of .95 pages or an average of .32 pages.”34 One of the casebooks contains the case of Commonwealth v. Dodge,35 which challenged the Pennsylvania statute as violative of equal protection because it set disparate penalties for female prostitutes and male patrons and promoters, although the statute by its terms was gender neutral.36 The same casebook also included a case regarding a male soliciting a male which is used “specifically to illustrate the crime of solicitation.”37

Another of the three casebooks only addressed the topic in a note regarding the Mann Act, which makes it a federal offense to transport a woman or girl across state lines for the purpose of prostitution, debauchery or any other immoral purpose.38 The authors of this casebook do, however, in a note in the Equal Protection chapter, raise the question of whether prostitution statutes discriminate against women. The authors also include the “Committee Comments to the Model Penal Code section 5-2 which ask whether the ‘john’ should be guilty of prostitution.”39

32. Id.
33. Id. at 448.
34. Id. at 449.
36. Erickson, Final Report, supra note 6, at 449-50.
37. Id.
38. Id.
39. Id. at 450-51.
The third casebook includes a brief note in the section on solicitation regarding a California case in which the court held that the disorderly conduct statute could be applied to customers of prostitutes. The report notes that the authors of this casebook raise the issue of whether this is a desirable outcome and a fair result if “the defendant would not have been an accomplice to the act of prostitution had it occurred.” The authors continue to focus on this issue of liability of accomplices by including a note from the Model Penal Code which asks whether a man who has intercourse with a prostitute should be viewed as an accomplice in the act of prostitution. The text includes a comment on how the ambivalence in public attitudes towards situations like prostitution, prohibition on liquor, and abortion make it difficult to apply and enforce the normal principles of accessorial accountability, and concludes that the legislature, rather than prosecutors, should determine this issue with respect to each particular substantive crime.

The report effectively uses the topic of prostitution to demonstrate the bias against women in criminal law casebooks. Frequently, the topic was barely covered at all, notwithstanding the lack of consensus in criminal law jurisprudence on whether the sale of sex for money should be criminalized. When the issue was raised, it was done so in a manner that largely ignored the criminal liability of Johns and focused primarily on the criminal liability of the women from whom they were buying sex. More typically prostitution was used as a tool to raise other legal issues, such as legality or conspiracy. The topic was treated so tangentially, that a majority of the reviewed casebooks did not mention the required elements of the crime of prostitution.

As we will see, many of these same criticisms apply to

40. Id. at 451.
41. Id.
42. Id. at 451.
current casebooks. Their greater attention to rape and domestic violence has not led to a reconsideration of the law of prostitution. I expand on the analysis found in the report by showing how a failure to take prostitution seriously leads to inadequate analysis of “prostitution” as well as “not prostitution” cases.

II. PROSTITUTION IN CRIMINAL LAW CASEBOOKS—THIS IS NOW

I reviewed three criminal law casebooks and their accompanying teacher’s manuals currently in use in law schools. Before addressing the particulars of each of the three casebooks, however, I want to note some similarities across all of the texts in their treatment of prostitution. As will become obvious, the last ten years have not led to substantial changes in the treatment of prostitution in criminal law casebooks. Although change has occurred in the material included in casebooks that explore the issues surrounding sexual assault and domestic violence, prostitution continues to be presented in a gendered, stereotypical manner through the use of traditional materials.

For the most part, if prostitution is dealt with at all, it is used as a means to illustrate some other issue or principle in criminal law, such as conspiracy or legality. The substantive issue of prostitution itself is not a topic that is explored. State statutes that set out the elements of the crime of prostitution are not included in the casebooks and therefore are left unexamined. The statutes, if included, could present a valuable opportunity for students to engage in statutory interpretation and construction and raise a host of jurisprudential issues. For example, in Minnesota, the statute is written in terms of prostitute and patron. What does it mean that the statute uses the term “patron?” Does this language tell us something about how

43. Kadish & Schulhofer, supra note 1; Kaplan et al., supra note 1, Saltzburg et al., supra note 1.
this behavior is viewed by the criminal law? What does it
tell us about societal attitudes toward prostitution? Why
did the legislature use the term “patron?” Does the term
patron suggest that the law views prostitution as primarily
an economic exchange in the marketplace? If so, what are
the implications of treating prostitution as an economic
exchange? Should prostitution be viewed as an economic
exchange in the marketplace? If it is so viewed, is the
criminal law an appropriate means of intervention? Are
there other economic exchanges that are made criminal?
How does the law decide which exchanges to criminalize?

When prostitution is discussed in the casebooks, it is
primarily treated as a moral issue or vice crime within the
context of questions about what should or should not be
criminalized or punished. The role of the john, even in
casebook discussions of what should be punished is rarely
addressed. In fact, the john and what he is buying is for
the most part ignored.45 Also ignored is the disparity in
enforcement. Statistics show women in prostitution are
arrested and prosecuted at far higher rates than the men
who “patronize” them.46 The casebooks also omit any

45. A study of men who purchase sex found that the men “repeatedly stress
the attraction of a woman whom one could ask to do anything.” Neil McKeganey
& Marina Barnard, Sex Work on the Streets: Prostitutes and Their Clients 53
(1996). The study found further that for most of the men “the prostitute seemed to
be no more than the sex she sold.” Id.
46. There is a disparate arrest rate of woman in prostitution, compared to
arrests of johns. See Belinda Cooper, Prostitution: A Feminist Analysis. 11
Women’s Rts. L. Rep. 99, 108 (1989) (pointing out that women are prosecuted
more and get longer sentences than their male clients); Kate DeCou, Women in
social policy of incarcerating women in prostitution, and finding such policies to
be rooted in value-based, gender bias against women); Melissa Farley & Vanessa
Kelly, Prostitution: A Critical Review of the Medical and Social Sciences
Literature, 11 Women & Crim. Just. 29, 49 (2000). ("[I]n 1993 there were 1,210
arrests of women on prostitution-related charges [in Seattle]. Of those arrested,
62% were charged and 42% convicted. During the same time period, 228 men
were arrested for patronizing a prostitute. Of those men, 98% were charged and
only 8% were convicted."); see also Julie Lefler, Shining the Spotlight on Johns:
Moving Toward Equal Treatment of Male Customers and Female Prostitutes, 10
Hastings Women’s L.J. 11 (1999) (pointing out that the justice system treats
prostitutes and johns differently. "While the female prostitute is vilified, her
analysis of the difference in penalties between women and men arrested and prosecuted. Casebook authors could easily analyze the disparity of punishment by referring to the treatment of prostitution in the Model Penal Code (M.P.C. or Code). All of the casebooks include the M.P.C. as an appendix. In presenting other topics in the criminal law curriculum, all of the casebooks make extensive use of the M.P.C. All of the texts quote from its various provisions and comments. They also highlight the various issues raised by the Code. In fact, one of the casebooks devotes almost three pages from an excerpt on the history of the formation and organization of the Code followed by notes and questions concerning the influence of the Code and its attempt to codify principles of criminal liability that are neutral and that reflect a societal consensus.

With regard to prostitution, however, the provisions of the Code are neither mentioned nor analyzed. This failure to explore the M.P.C.’s provisions dealing with prostitution cannot be attributed to the Code’s silence on the issue. In fact, the placement of the prostitution provision and its language and elements could raise numerous issues for discussion in a criminal law course. In the Code, prostitution is placed in Article 251, entitled Public Indecency. Section 251.2, entitled Prostitution and Related Offenses, sets out the required elements of prostitution and

 clients are seen as men who simply make mistakes, if they are seen at all.”); id. at 19 (citing Federal Bureau of Investigation, Dep’t of Just., Crime In The United States 1994, Uniform Crime Reports 283 (1994)) (“Statistical evidence provides convincing proof that discriminatory treatment does indeed happen at the law enforcement level. According to the FBI’s Uniform Crime Reports, in 1993 only 35.7% of prostitution arrests nationwide were males while 64.3% of arrests were females.”); Courtney Guyton Persons, Note, Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes’ Patrons, 49 Vand. L. Rev. 1525, 1531 (1996) (finding that most states traditionally incarcerate or fine women in prostitution and the johns merely get citations).

48. See Saltzburg et al., supra note 1, at 51-53.
49. See Kaplan et al., supra note 1, at 1161-64.
includes the following subsections: promoting prostitution, grading of offenses, presumption from living off prostitutes, patronizing prostitutes, and evidence. The crime of prostitution is defined as follows:

(1) Prostitution. A person is guilty of prostitution, a petty misdemeanor, if he or she:

(a) is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or

(b) loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.

“Sexual activity” includes homosexual and other deviate sexual relations. A “house of prostitution” is any place where prostitution or promotion of prostitution is regularly carried on by one person under the control, management or supervision or another. An “inmate” is a person who engages in prostitution in or through the agency of a house of prostitution. “Public place” means any place to which the public or any substantial group thereof has access.

(2) Promoting Prostitution. A person who knowingly promotes prostitution of another commits a misdemeanor or felony as provided in Subsection (3). The following acts, shall, without limitation of the foregoing, constitute promoting prostitution:

(a) owning, controlling, managing, supervising or otherwise keeping, alone or in association with others, a house of prostitution or a prostitution business; or

(b) procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; or
(c) encouraging, inducing, or otherwise purposely causing another to become or remain a prostitute; or

(d) soliciting a person to patronize a prostitute; or

(e) procuring a prostitute for a patron; or

(f) transporting a person into or within this state with purpose to promote that person’s engaging in prostitution, or procuring or paying for transportation with that purpose; or

(g) leasing or otherwise permitting a place controlled by the actor, alone or in association with others, to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or

(h) soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this Subsection.

(3) Grading of Offenses Under Subsection (2). An offense under Subsection (2) constitutes a felony of the third degree if

(a) the offense falls within paragraph (a), (b) or (c) of Subsection (2); or

(b) the actor compels another to engage in or promote prostitution; or
(c) the actor promotes prostitution of a child under 16, whether or not he is aware of the child’s age; or

(d) the actor promotes prostitution of his wife, child, ward or any person for whose care, protection or support he is responsible. Otherwise the offense is a misdemeanor

(4) Presumption from Living off Prostitutes. A person, other than the prostitute or the prostitute’s minor child or other legal dependent incapable of self-support, who is supported in whole or substantial part by the proceeds of prostitution is presumed to be knowingly promoting prostitution in violation of Subsection (2).

(5) Patronizing Prostitutes. A person commits a violation if he hires a prostitute to engage in sexual activity with him, or if he enters or remains in a house of prostitution for the purpose of engaging in sexual activity.

(6) Evidence. On the issue whether a place is a house of prostitution the following shall be admissible evidence: its general repute; the repute of the persons who reside in or frequent the place; the frequency, timing and duration of visits by nonresidents. Testimony of a person against his spouse shall be admissible to prove offenses under this Section.\(^{50}\)

To be guilty of prostitution, a crime that will affect primarily women, is to be guilty of a petty misdemeanor under the Code. A petty misdemeanor is defined as punishable by imprisonment for a maximum of less than one year.\(^{51}\) To be guilty of patronizing a prostitute, a crime that will affect primarily men, is to be guilty of a violation. A violation is defined as punishable by fine or fine and

\(^{51}\) Id. at § 1.04(4).
forfeiture or other civil penalty.\textsuperscript{52} The Code specifically provides that a violation does not constitute a crime and that “conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense.”\textsuperscript{53}

This obvious disparity in penalty provides the basis for an important classroom discussion. Teachers could draw out issues of gender bias and stereotypes in the criminal law and assist students to appreciate how bias and stereotyping may affect the design and the operation of the criminal law. One could imagine a class discussion generated by the following questions: Why do you think the drafters of the M.P.C. thought it appropriate to have a more severe penalty for the woman in prostitution than for the man purchasing sex from her? What are the gender and race implications of this disparity?\textsuperscript{54} Do you think if

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    \item \textsuperscript{52} Id. at § 1.04(5).
    \item \textsuperscript{53} Id.
    \item \textsuperscript{54} See Vednita Carter & Evelina Giobbe, Duet: Prostitution, Racism and Feminist Discourse, 10 Hastings Women’s L.J. 37, 40 (1999):


    Poor, Black communities have become de facto combat zones where street prostitution is highly visible and readily available. The implicit message to white men is that it is all right to solicit Black women and girls for sex, that we are all prostitutes. On almost any night, you can see them slowly cruising our neighborhoods, rolling down their windows, calling out to women and girls. The message to Black women is equally clear: this is how it is, this is who we are, this is what we’re for.


    It is not coincidental that most of the women arrested and prosecuted for prostitution are black women and other women of color. Although the form of prostitution known as “street walking” constitutes only ten to twenty percent of the prostitution market, street walkers who are predominately women of color represent eighty-five percent of the women incarcerated for prostitution;


    Arrest statistics clearly indicate discrimination in prostitution arrests based on gender, since only a small percentage of those arrested are male

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“patrons” were not overwhelmingly male and prostitutes were not overwhelmingly female, the drafters of the M.P.C. would have promulgated this punishment scheme? Is the disparity found in the M.P.C.’s provisions on prostitution equivalent to the treatment of drug-related crimes in which, for example, drug dealers are often subject to harsher penalties than drug users and those who sell drugs are subject to harsher penalties than those who possess them? What does this comparison say about how the criminal justice system views prostitution? What does it say about society’s view of prostitution?

Of course, it must be recognized that having such discussions with students would not be as rich an experience as it might be because many are likely to have the stereotypical views about prostitution and women in prostitution that are pervasive in our society. The casebooks, as currently designed, leave intact the enduring stereotypes perpetuated by popular culture. From the “whore with the heart of gold,” to the more contemporary image of “Pretty Woman,” the woman in prostitution is seen as either the autonomous entrepreneur in the marketplace who assumes the risks of her “business” or the immoral woman who is a source of disease and corruption.

despite the fact that males comprise the large majority of participants in prostitution. Police also discriminate against street prostitutes although they represent the smallest sector of prostitutes. Based on Task Force testimony, African American, transgender and immigrant women are specifically targeted in cases of harassment and other abuse.

Adelle Weiner, Understanding the Social Needs of Streetwalking Prostitutes, 41 Soc. Work 97, 99 (1996) (estimating that in 1990, women prostitutes consisted of 52.5% African American, 26.8% Hispanic and 20.7% white).

55. See Irma La Douce (Mirisch Company et al. 1963).

56. Pretty Woman (Silver Screen Partners IV and Touchstone Pictures 1990).

57. See, e.g., Micloe Bingham, Nevada Sex Trade: A Gamble for the Workers, 10 Yale J. L. & Feminism 69, 78 (1998) (The main goal of COYOTE (Call Off Your Old Tired Ethics) was to change society’s image of prostitutes as “fallen,’ ‘other,’ or ‘bad’ women; social deviants; and victims.”); id. at 94-95 (“The regulations requiring mandatory HIV tests for all licensed prostitutes serve to perpetuate the image of the prostitute as a transmitter of HIV and are an ineffective method of reducing the spread of the disease. Historically, prostitutes have been scapegoated for the spread of venereal disease.”); Tracy M. Clements, Prostitution and the American Health Care System: Denying Access to a Group of Women in
In either construction, she is unworthy of the protection of the law. At the same time, the purchaser of the woman in prostitution is viewed as a figure to be pitied or perhaps ridiculed.\(^8\) He is not seen as blameworthy except as the

Need?, 11 Berkeley Women's L.J. 49, 83 (1996) (“Given the enduring image of the prostitute as a transmitter of disease, it is not surprising that demands to enforce criminal sanctions against prostitutes have become more frequent and insistent since the beginning of the AIDS epidemic.”) (internal citations omitted); Elizabeth M. Iglesias, Rape, Race and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality, 49 Vand. L. Rev. 869, 929-43 (1996) (discussing impact of virgin-whore dichotomy on the Latina/o community and using the sacred prostitution image as example of cultural resistance to the dichotomous sexuality); Donna R. Lee, Mail Fantasy: Global Sexual Exploitation in the Mail-order Bride Industry and Proposed Legal Solutions, 5 Asian L.J. 139, 157 (1998):

Perhaps because of the social stigma associated with prostitution, legislatures and judiciaries have often sought to provide narrow definitions of prostitution, so as to penalize only those women who project the traditional image of prostitutes as unsavory or dangerous individuals. Such definitions are often merely a descriptive interpretation of the stereotypical act deemed to constitute prostitution, with no treatment of its socioeconomic underpinnings.

58. One example of a john becoming subject to public scrutiny was the 1996 resignation of Richard Morris, President Clinton's political consultant, after the press reported he had repeatedly purchased sex from a woman. See Sara Fritz, Key Clinton Strategist Quits Amid Controversy, L.A. Times, Aug. 30, 1996, at A1. Morris became an embarrassment to Clinton, according to media accounts because he was known to have "inspired President Clinton to adopt a ... family-values message." Id. The next day found "Morris and his wife... greet[ing] the press with their arms around each other as they stood in their yard with their dog..." Id. His wife told the press at that time that "we would like some privacy. It's a time we want to be together with our family ... and our dog." Morris Refuses Comment on Sex Scandal Politics: Former Clinton Advisor Appears with His Wife and Dog to Briefly Address Reporters. Campaign Says It Is Reviewing His Expenses, L.A. Times, Aug. 31, 1996, at A16. Neither the media nor politicians held Morris accountable for purchasing a woman to use for sex. Placing his behavior in the category of "licentious," the focus was on his betrayal of his wife, the hypocrisy of his having promoted family values, and his bad judgement. See, e.g., Editorial, Rise and Fall: Clinton's Closest Advisor Knew Value of Nothing, Houston Chron., Aug. 31, 1996, at 46. Another example of the media treatment of a celebrity john arrest is the 1995 arrest of movie star Hugh Grant. Grant was arrested for lewd conduct in a public place after paying a woman in Los Angeles for sex in his car. The media suggested that the "hooker episode could actually improve his image, giving him a bit of a dark side [and] quelling rumors he might be gay." Jean Seligmann, et al., A Drive-By Scandal, Newsweek, July 10, 1995, at 54. Far from being condemed for his treatment of the woman in prostitution, another article speculated on whether his girlfriend should be concerned about contracting a sexually transmitted disease suggesting
behavior might affect his wife or partner. His behavior is not assessed in terms of how it might affect the woman he has purchased for sex.

The failure to question these stereotypes is, in part, the result of the failure of the casebooks to include material that presents specific information about the impact of prostitution on persons engaged in prostitution. The understanding of prostitution and the context within which it occurs must be informed by the knowledge that most persons engaged in prostitution have a history of physical and sexual abuse suffered as children. It also is critical in any discussion of prostitution to be aware of the fact that it is well documented that persons in prostitution are frequent targets of physical and sexual assaults.

The impact of these abuses both in childhood and while in prostitution has been researched in a study in which 130 persons in prostitution in San Francisco were interviewed. The authors found that 82% of the respondents in the study reported having been assaulted since entering prostitution and 68% reported having been raped since entering prostitution. The study also found that 48% of the respondents had been raped more than five times.

That “while girlfriend Elizabeth Hurley has plenty to worry about when it comes to Grant, a sexually transmitted disease isn’t one of them.” George Rush & Joanna Molloy, To Err Is Hugh-Man, To Tell All Would Be Divine For Fleet Street, Daily News, June 29, 1995, at 27. See also Barbara Wickens, An Actor’s Indiscretion, Maclean’s, July 10, 1995, at 40 (indicating that while Hugh Grant flew back to England to try to patch things up with his girlfriend, the entertainment industry speculated about the effect the arrest would have on his career and his girlfriend’s new modeling contract).

59. See supra note 58 and accompanying text.


62. Farley & Barkan, supra note 61, at 37.

63. Id. at 40-41.
Additionally, according to the study, women and transgender persons who engaged in prostitution were more likely than men who engaged in prostitution to experience physical assaults and were more likely to be raped.

This study also found that 57% had a history of childhood sexual abuse. This is a rate that is lower than the rate found in other research. The authors of the study advance two reasons for this finding. First, they suggest that it is likely that for respondents “in the midst of ongoing trauma” recalling childhood abuse may have been too painful. Second, the authors also point out that many of the respondents seemed unsure about what abuse is. In a telling example, the authors disclose that “[a] number of respondents reported having been recruited into prostitution at the age of 12 or 13, but also denied having been molested as children.”

Eighty-four percent of the respondents reported current or past homelessness, while drug abuse was reported by 75%. When focusing specifically on the diagnosis of posttraumatic stress disorder (PTSD), the study found that 68% of the respondents met the criteria for a diagnosis of PTSD. To measure the severity of the PTSD, the authors compared the respondents to other population groups. The respondents in the study had a mean PCL score (an index of PTSD severity) of 54.9 compared with a mean of 50.6 for 123 PTSD treatment-seeking Vietnam veterans and a mean of 34.8 for 1006 Persian Gulf war veterans. In another comparison, the authors report that the mean PCL score for 27 women seeking healthcare through a health maintenance organization who reported a history of physical and sexual

64. See id. at 41.
65. See id.
66. See id. at 40, 44.
67. See id. at 44.
68. Id.
69. See id.
70. See id.
71. See id. at 42.
abuse in childhood was 36.8 and 24.4 for 26 controls.\textsuperscript{72}

These statistics from just one study illustrate some measure of the severity of the abuse suffered by persons in prostitution. The facts about the nature of prostitution represented by the research findings outlined above indicate that violence and PTSD are prevalent among persons engaged in prostitution.\textsuperscript{73} While the widespread violence has been well documented, criminal law casebooks, even those that include prostitution, fail to address the physical abuse and harms of prostitution.\textsuperscript{74} In the Kadish

\textsuperscript{72} See id.

\textsuperscript{73} In a recent study of 475 person currently and recently engaged in prostitution in five countries (South Africa, Thailand, Turkey, United States, Zambia), the authors found that violence was widespread. See Melissa Farley et al., Prostitution in Five Countries: Violence and Post-Traumatic Stress Disorder, 8 Fem. & Psychol. 405 (1998). The authors determined that across countries, 73\% reported physical assaults in prostitution, 62\% reported having been raped since entering prostitution, and 67\% met the criteria for a diagnosis of PTSD. Id. The data also indicated no differences in overall PTSD severity in five countries and no difference in the incidence of PTSD in four of the five countries. Id. Based on the findings of the study, the authors suggest that the harm of prostitution is not a culture-bound phenomenon. Id.

\textsuperscript{74} The law is not the only discipline which has failed to include discussion of the physical and sexual violence which precedes prostitution and which is endemic to it. Two scholars who examined medical, life sciences and psychology journals reveal that the primary focus in the literature was on HIV or other sexually transmitted diseases. See Melissa Farley & Vanessa Kelly, Prostitution: A Critical Review of the Medical and Social Science Literature, 11 Women & Crim. Just. 29 (2000). The authors of this article found that stereotypes about persons in prostitution persisted. Id. For example, the authors note that while the

public health attention to risk of HIV infection includes the prostituted woman herself; on closer inspection, it becomes apparent that the overarching concern is for the health of the customer: to decrease his exposure to disease. In spite of extensive documentation that HIV is overwhelmingly transmitted via male-to-female vaginal and anal intercourse, not vice versa, one of the misogynist myths about prostitution is that she is a vector of disease, that she is ultimately the source of contamination of the “good wife” through the husband’s weak moment. Id. at 34. The analysis also revealed that “there was an underlying assumption in much of the research that prostitution is inevitable.” Id. The authors’ review of the literature confirms that “research and clinical reports have documented the prevalence of childhood sexual abuse and chronic traumatization among prostituted women. . . . [and that a] number of authors have documented and analyzed the sexual and physical violence which is the normative experience for woman in prostitution.” Id at 41-42. The authors go one to observe that poverty,
and Schulhofer casebook I reviewed, when harms are mentioned, even if in passing, the primary harm is that of the transmission of sexually transmitted diseases along with exploitation of the young and the affront of public solicitation.\textsuperscript{75}

The Saltzburg et al. casebook categorizes the harms under the heading of “Justifying Prostitution as a Crime.” It includes the possible effects on neighborhood property values, possible effects on children who live in the neighborhood, and offense to community values. It also lists the harm to the prostitute herself. It does not, however, describe what that harm might be, except to suggest that laws against prostitution on this basis are paternalistic and to analogize them to criminalizing suicide attempts, failure to wear a motorcycle helmet, dueling, and consensual incest among adults.\textsuperscript{76}

The Kaplan et al. casebook does not address the harms of prostitution in any way.\textsuperscript{77} Given the extensive research literature readily available documenting the violence experienced by those engaged in prostitution, the absence of this data is striking. It is even more striking when this lack of material is compared with the inclusion of information in one casebook detailing the frequency and harms of rape,\textsuperscript{78} the inclusion of information in another casebook that describes the prevalence and impact of domestic violence,\textsuperscript{79} and the inclusion in a third casebook of more than a page of facts about rape in the United States.\textsuperscript{80}

Two conclusions can be drawn from this general critique of the three casebooks. First, is that the consequence of the casebooks’ omissions, silences, or

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\textsuperscript{75} Kadish & Schulhofer, supra note 1, at 165.
\textsuperscript{76} Saltzburg et al., supra note 1, at 18-19.
\textsuperscript{77} Kaplan et al., supra note 1.
\textsuperscript{78} Kadish & Schulhofer, supra note 1, at 315-19.
\textsuperscript{79} Saltzburg et al., supra note 1, at 748-49.
\textsuperscript{80} Kaplan et al., supra note 1, at 1078-79.
minimal treatments is that the pervasive stereotypes and myths about prostitution are left intact. Second, is that the authors could marshal conventional materials, such as the M.P.C. and readily available sociological and psychological data, to address issues of prostitution. Not only would this allow for a more meaningful discussion of the law of prostitution, but it would establish a foundation for considering how the prostitution paradigm is operating in other areas of criminal law. In the sections that follow, in which each casebook is examined separately, I will further illustrate how and why a consideration of prostitution could enhance our understanding of the criminal justice system.

A. Casebook One

The first book, Criminal Law and Its Processes: Cases and Materials by Sanford H. Kadish and Stephen J. Schulhofer, had three listings for prostitution in its index: conspiracy, criminalization of, and transportation for prostitution.\footnote{Kadish & Schulhofer, supra note 1, at 1230.} Prostitution is first treated in this casebook under the chapter entitled “The Justification of Punishment” and under the sub-heading “What to Punish.” It is placed in the part of the chapter that the authors tell the reader is designed to introduce the problem of the reach of the criminal law through the “use of the criminal law to deal with sexual misconduct.”\footnote{Id. at 154.} By its placement, the introduction to the subheading, and the other materials found in this section, prostitution is presented as raising a moral issue. A substantial part of the material presented under this subheading is actually focused not on prostitution but on homosexuality. There is an excerpt from the Wolfenden Report, but it deals primarily with homosexuality.\footnote{Id. at 159-60.} When prostitution is mentioned, it is mentioned in an excerpt from an article, The Crisis of Overcriminalization by Kadish, which calls attention to the “adverse consequences to effective law enforcement of
attempting to achieve conformity with private moral standards through the use of the criminal law. After pointing out the problems with criminalizing consensual adult homosexuality as an attempt to legislate private morality, the author of the excerpted article goes on to mention prostitution as an analogous issue. Because this is one of the casebook’s most extensive discussions of prostitution, I want to quote extensively from the excerpted article:

Although there are social harms beyond private morality in commercialized sex—spread of venereal disease, exploitation of the young, and the affront of public solicitation, for example—the blunt use of the criminal prohibition has proven ineffective and costly. Prostitution has perdured in all civilizations; indeed, few institutions have proven as hardy. The inevitable conditions of social life unfailingly produce the supply to meet the ever-present demand. As the Wolfenden Report observed: “There are limits to the degree of discouragement which the criminal law can properly exercise towards a woman who has deliberately decided to live her life in this way, or a man who has deliberately chosen to use her services.” The more so, one may add, in a country where it has been estimated that over two-thirds of white males alone will have experience with prostitutes during their lives. The costs, on the other hand . . . are similar to those entailed in enforcing the homosexual laws—diversion of police resources; encouragement of use of illegal means of police control (which, in the case of prostitution, take the form of knowingly unlawful harassment arrests to remove suspected prostitutes from the streets; and various entrapment devices, usually the only means of obtaining convictions); degradation of the image of law enforcement; discriminatory enforcement against the poor, and official corruption.

While Kadish’s article does acknowledge that there are

84. Id. at 164.
85. Id. at 165-66.
social harms beyond private morality, the author’s primary assertion is that the laws of prostitution are motivated by the conviction that prostitution is immoral. Even if there are other associated harms, those harms can be effectively controlled short of criminalization. What is unacknowledged and invisible is the violence experienced by women engaged in prostitution. Kadish also fails to question what he apparently accepts as the naturalness and inevitability of prostitution. He does not interrogate the “conditions of social life” which produce the “supply to meet the ever-present demand.” Rather there is an acceptance of the inevitability of women available for prostitution. It is interesting that, in a criminal law casebook that as a matter of pedagogy raises questions on many aspects of the various materials presented, this assertion of naturalness and inevitability is left unquestioned.

The Wolfenden Report and Kadish’s article are preceded by the principal case of Bowers v. Hardwick, in which the United States Supreme Court upheld the constitutionality of Georgia’s sodomy statute. The materials placed together leave little doubt that the authors believe that the questions raised about the criminalization of homosexuality are closely related to the questions raised about the criminalization of prostitution. The casebook’s viewpoint is that consensual homosexual activity is a moral issue and it questions whether the criminal justice system should intervene to regulate private consensual sexual acts. It raises similar issues regarding prostitution without any analysis of whether consent to sex for money is equivalent to consent for mutual “sexual pleasure or emotional intimacy.”

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86. Id. at 166.
87. Id.
89. Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 784 (1988) (suggesting that mutuality in the choice to engage in sexual conduct promotes equality and moral sex is sex in which both parties have pleasure or intimacy as their purpose).
juxtaposition submerges the relevance of the data showing the physical and emotional harms to women in prostitution. By highlighting the similarities between prostitution and homosexuality and ignoring the differences, the materials contribute to a misunderstanding of both prostitution and homosexuality.

The remainder of the casebook uses prostitution as a means to illustrate some other principle of criminal law. It is not presented as a topic on its own for analysis, but rather as an instrument to reach another doctrine. So, for example, the next mention of prostitution occurs in an excerpt of the case of Shaw v. Director of Public Prosecutions.90 The case is placed in the chapter entitled “Defining Criminal Conduct: The Elements of Just Punishment” under the subheading “Legality.”91 The appellant in the case was convicted of conspiracy to corrupt public morals, living on the earnings of prostitution, and publishing an obscene publication. The appellant published a booklet that contained the names, addresses, and telephone numbers of women in prostitution with photographs of nude female figures and, in some cases, details describing the woman’s willingness to engage in various practices. The court found that it retained “a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State....”92 It is clear from the decision that the court views the issue as one of immorality.

The notes that follow the case focus on the issue of the creation of common law crimes without fair warning and the abandonment by Shaw of the principle of legality.93 There is no mention made of the nature of the crime and the harm involved. The authors do not juxtapose the issues of violence inherent in the defendant’s conduct with the notions of immorality raised by the court.

91. Kadish & Schulhofer, supra note 1, at 294.
93. Kadish & Schulhofer, supra note 1, at 297-98.
The issue of prostitution is noted in a number of other sections of the casebook. It comes up again in the rape chapter in terms of an evidentiary issue involving the admissibility of evidence of the complainant’s reputation for unchastity and past unchaste acts. The issue of admissibility of the complainant’s past sexual conduct has been an issue that has been the subject of feminist reform efforts. Through these reform efforts, statutes, called rape shield laws, have been widely enacted to limit the admissibility of such evidence. The authors of the casebook provide the principal case of Pope v. Superior Court, in which the court forbids the introduction of such evidence but goes on to recognize exceptions, including when the defendant alleges the complainant consented to an act of prostitution. In those situations, the court holds, the defendant should be permitted to present evidence of her reputation as a prostitute and her prior acts of prostitution. In the notes, the authors comment on whether the court has gone too far or far enough in its evidentiary determination. What the notes do not comment on is the connection between the introduction of prior unchaste acts or unchaste character and prostitution. One question that could have been asked is who is the inherently unchaste woman? If the answer is the woman in prostitution, do rape shield statutes reinforce the division between the nonprostituted woman who is protected by the statute and worthy of the court’s protection and the immoral woman in prostitution? Will defense strategies include attempting to introduce evidence so that the complainant will be constructed to resemble as closely as possible the inherently unchaste woman or prostitute?

95. See Estrich, supra note 2, at 1133-61.
98. For a critique of feminist law reform strategy as it affects women in prostitution, see Margaret A. Baldwin, Split at the Root: Prostitution and
A similar issue is raised later in the notes by the case of Wood v. Alaska. In this sexual assault case the defendant wanted to introduce evidence that the complainant had told him she had posed for Penthouse magazine, acted in pornographic movies, and had been paid to have sex while others took pictures. The court excluded the evidence, not on the basis of the complainant’s privacy since the pictures were in a national magazine, but rather because the evidence was so prejudicial that it was likely to confuse and prejudice the jury. The court was concerned that

[b]ecause many people consider prostitution and pornography to be particularly offensive, there is a significant possibility that jurors would be influenced by their impression of . . . [the complainant] as an immoral woman, . . . [and] that [t]hey could conclude, contrary to the rape law, that a woman with her sexual past cannot be raped, or that she somehow deserved to be raped . . . .

Although the notes include this decision and suggest comparing it to another noted case that examines the issue of public behavior, there is no further comment on the Wood decision. The Wood case, juxtaposed with Pope, presented the authors with an excellent opportunity to discuss how stereotypical beliefs about prostitution can result in women losing the protection of the criminal justice system. By not elaborating on the myths about prostitution and women in prostitution, the authors left the students without the tools to examine their own understanding of prostitution.

The next area of criminal law in this casebook in which the issue of prostitution arises is in the chapter on group criminality. There are several cases both featured and in notes, which focus on the issues of the liability for the acts

99. 957 F.2d 1544 (9th Cir. 1992).
100. Kadish & Schulhofer, supra note 1, at 379.
of others and the required elements of a conspiracy charge. The facts of these cases involve prostitution. The language of some of the decisions excerpted by the authors imparts the view that prostitution is a trivial or minor offense. The authors' notes and commentary that follow these cases do not address the substantive issue of prostitution, nor do they comment on the factual context of the cases to suggest that the court's treatment of the conspiracy charge may be affected by the court's attitude toward the underlying crime of prostitution at issue in the cases. Instead, the authors focus on the particulars of conspiracy doctrine including mens rea, the consequences of a conspiracy charge, the evidentiary issues, the parameters of liability, and the liability of secondary parties. The fact that these cases involve prostitution is made irrelevant by the authors' treatment. The cases are used simply to illustrate the doctrine of conspiracy law without any examination of the underlying charges and how the context of prostitution may have influenced the courts' decisions.

In the Teacher's Manual to the text, the authors suggest skipping the section on “What to Punish” if


102. See Krulewitch, 336 U.S. 440 (1949) (involving the transportation of a woman for the purpose of prostitution); Lauria, 59 Cal. Rptr. 628 (involving a conspiracy to commit prostitution for furnishing telephone answering services in aid of prostitution); Luciano, 14 N.E.2d 433 (involving a conviction for compulsory prostitution including placing women in houses of prostitution and receiving money for so doing); Shaw, [1962] A.C. 220 (H.L. 1961) (involving a conspiracy to corrupt public morals on the basis of defendant's publication of a directory listing name, address and services of women in prostitution).

103. See, e.g., Krulewich, 336 U.S. at 449 (Jackson, J., concurring) (noting that the modern crime of conspiracy is trivialized when the conspiracy consists of the “concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade. . . .”); United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985) (commenting on an aiding and abetting murder case, Judge Posner called “prostitution, . . . a minor crime, . . . .”); Lauria, 59 Cal. Rptr. at 635 (absolving defendant from a charge of conspiracy to commit prostitution, but noting that it does not imply that authorities are without other remedies to combat “the world's oldest profession.”).  

104. See Kadish & Schulhofer, supra note 1, at 644-781.
criminal law is being taught as a one semester course. Thus, even the section that includes some discussion of prostitution, minimal though it might be, is considered expendable by the authors.105 The remainder of this section of the Teacher’s Manual focuses on the Bowers v. Hardwick106 case. Prostitution is not mentioned at all.107 In subsequent notes in the Teacher’s Manual that address sections of the text that include cases in which the underlying act is prostitution, the notes in the Teacher’s Manual address other precepts of criminal law and do not mention prostitution. For example, in the discussion of Shaw108 under the section on Legality in the Teacher’s Manual, no mention is made of prostitution except to note that the case is interesting because of the fact situation, without further elaboration.109 The section that discusses the conspiracy cases raises evidentiary and legal questions pertaining to conspiracy charges. The underlying crime of prostitution is generally not mentioned.110 The discussion of mens rea in the context of one of the other cases focuses on the question of the difference between actual purpose or a stake in the venture to establish intent on the one hand and knowledge alone on the other. The text does ask whether the defendant had a stake in the success of the women engaged in prostitution, but that is the extent of mentioning the issue of prostitution.111

Finally, in the section entitled “Changing Patterns of Excuse,” the Teacher’s Manual discusses the issue of when punishment should be imposed even in the absence of blame. The authors suggest a hypothetical involving prostitution to raise questions about the implications of the Robinson v. California decision.112 In Robinson, the United States Supreme Court held that a California law that

105. Kadish & Schulhofer, Teacher’s Manual, supra note 1, at 32.
109. Kadish & Schulhofer, Teacher’s Manual, supra note 1, at 73
110. Id. at 180-82.
111. See id. at 189-90.
imprisons a person addicted to narcotics, even though he
has not necessarily used narcotics in the state or been
guilty of misbehavior, inflicts cruel and unusual
punishment in violation of the Fourteenth Amendment.113

The Teacher’s Manual suggests the following hypothetical:
“P is prosecuted under a state statute that makes it a crime
to ‘be a prostitute.’” The Manual then raises a series of
questions that assist in distinguishing the prostitution
hypothetical from Robinson. The Manual highlights three
aspects of the Robinson decision: involuntariness, disease,
and status. The authors then ask about each aspect as
applied to the prostitution hypothetical with regard to
whether such a statute would be found unconstitutional.
The point of the hypothetical is not to examine in any
detail the question of prostitution, but rather its purpose is
only to examine the ambiguities of the Robinson decision.114

The Kadish and Schulhofer casebook and its Teacher’s
Manual treat prostitution in a conventional manner. It
covers the topic minimally without any interrogation of the
stereotypes of prostitution and women in prostitution.
When the topic is covered, it is for the purpose of
illustrating some other doctrine of criminal law.

B. Casebook Two

The second casebook, Criminal Law: Cases and
Materials by Stephen A. Saltzburg, John L. Diamond, Kit
Kinports, and Thomas H. Morawetz, had two listings for
prostitution in the index: “controversial crime, as” and
“Model Penal Code.”115 In Chapter One, entitled “The
Nature and Structure of Criminal Law,” under the
subheading “Controversial Crimes,” prostitution is set out
as a separate crime, along with unprotected sex as assault,
prenatal delivery of drugs, and insider trading. In
introducing the “Controversial Crimes” section, the authors
suggest that some crimes are controversial either because

113. Id. at 666-67.
114. See Kadish & Schulhofer, Teacher’s Manual, supra note 1, at 252-53.
115. Saltzburg, supra note 1, at 999.
“It is not clear what kind of harm they involve or because they implicate some value other than harm, e.g., offense, social harmony, etc.” The authors then go on to frame the section by posing the following questions:

Does the conduct . . . involve genuine harm to others, or does it merely offend the views of some persons about how other should conduct their lives? . . . Does the conduct . . . involve genuine harm to others or harm to self? Should the criminal law prevent harm to self? . . . Does the prohibition of certain kinds of conduct demonstrate bias on the basis of gender, class, or race? . . . Does [an] economic . . . analysis clarify the goals of the criminal law . . . ?

Within this discussion, the authors, unlike the other casebooks reviewed, include a case that directly addresses the issue of prostitution. The case concerns two young women who are charged with prostitution. It is the first arrest for both. Both are attending business school. They have moved for dismissal in the interests of justice. The backdrop for this case is that shortly before their arrests, the prostitution statute was amended to equalize the penalties for both the woman engaged in prostitution and the john. Prior to the amendment, the woman in prostitution was guilty of a Class B misdemeanor while the john was guilty of a violation. The amendment also made the john guilty of a Class B misdemeanor. The result of this equalization in penalty was that the district attorney refused to continue the previous policy of offering an adjournment on contemplation of dismissal for first offender women engaged in prostitution. The district attorney insisted on a plea to the charge with no offer of an adjournment for first-time johns and therefore made a similar insistence as to the woman.

The opinion of the court raises a number of interesting issues that could be the basis of a discussion about policies

116. Id. at 11.
117. Id.
and practices regarding prostitution and the criminal justice system’s response to it. The court recognizes that the so-called equal enforcement policy in fact impacts more harshly on the woman. As the court notes:

[t]his result is occasioned by the fact that a prostitute who is no longer offered a second chance via an adjournment in contemplation of dismissal has infinitely more to lose by being sent out on the streets to earn her fine by selling her body again than the patron who is usually more affluent, often a substantial businessman away from home who can pay his fine and forget the experience.  

At the same time the court asserts that prostitution is “a victimless crime in which two equal contracting parties negotiate for the performance of an act proscribed by law, usually performed in private by consenting adults.” The court goes on to compare the criminalization of prostitution to prohibition, in the sense of society’s widespread indifference to its illegality. However, while asserting the impossibility of legislating morality, the court also recognizes that the “real victim of prostitution is the prostitute herself and the real criminal is, her pimp,... [and that] [o]ur system of law enforcement has as yet found no effective way of bringing these pimps to justice.” In granting the motions to dismiss in the interests of justice, the court concludes that “the public interest is not served by intransigence on an issue whose irrelevance to the real problem of violent crime is recognized almost universally....”

It is clear that there are a host of questions raised by this case. The court’s opinion is rich in contradictions and assertions that certainly could be used as a basis for a class discussion analyzing prostitution. For example, the case in question brings into stark relief differential enforcement of

119. Saltzburg, supra note 1, at 17.
120. Id.
121. Id. at 18.
122. Id.
the prostitution laws. It does this first in its discussion of 
the previous statute and the harsh results of the new 
"equal" enforcement policy. It also does it when it raises 
the very basic question of who gets arrested. It is ironic 
that, prior to the statutory amendment, women were 
treated more harshly by the terms of the statute itself. 
After the statutory amendment, women were treated more 
harshly by the policy implemented to carry out the 
statutory amendment. Why is it that, regardless of the 
legal circumstances, we are left with the same result of 
harsher treatment of the woman in prostitution? The 
court's assertion that prostitution is a victimless crime and 
the result of a free market negotiation between two equal 
parties is certainly open to interrogation. Is it victimless? 
If not, who is the victim? Are the "negotiations" conducted 
between two equal parties? Who has the greater power in 
this exchange? Should the criminal law take the power 
differential, if there is one, into account? Is the purchase 
of sex just one more business transaction? Is this market 
model the correct model to analyze the exchange that is 
taking place in prostitution?

Another issue that is raised by this opinion is the role 
of the john. The opinion is quite direct in targeting the 
pimp for condemnation. What is less clear, however, is the 
court's view of the blameworthiness of the john. In fact, the 
john and his behavior are made invisible except at the 
outset where the amended statute is discussed. What are 
we to make of this? Why does the john seem to be 
constructed, through absence, as almost blameless? Why 
has, as the court's opinion asserts, the law been unable to 
bring pimps to justice?123 Has the law been able and willing 
to bring johns to justice?

123. The term "pimp" refers to one who procures sexual services for others. It 
is of unknown origin but may be connected with the Middle French word for small 
eel, pimprenou or pimprenneau, which was also used to refer to a knave, rascal, 
valet, and scoundrel; alternatively, it may be related to the Middle French term 
pimper, meaning to dress up elegantly or adorn. See Barnhart Dictionary of 
Etymology 795 (Robert K. Barnhart ed., 1988); An Etymological Dictionary of the 
In the notes following the case the authors ask the question: Why make prostitution a crime? In response to the question they posit three possible justifications: prostitution harms groups in the community, i.e. land values and children; prostitution offends community values; prostitution harms the woman in prostitution herself. With regard to the last justification the authors raise the issue of whether it is appropriate for the criminal law to be used paternalistically. The notes go on to ask if criminalization is discriminatory in that it penalizes the choice some women make or if the existence of prostitution itself reflects a society that demeans women. Finally, the authors ask if an economic analysis of prostitution is useful.

The inclusion of a case directly dealing with prostitution and the authors’ notes following the excerpt are the most extensive treatment of prostitution as a topic in and of itself in any of the casebooks. While the authors raise some of the issues that are generated by the opinion, they tend to raise the traditional questions surrounding prostitution that were in the criminal law casebooks ten years ago. Although the language has changed, the authors basically are asking if it is appropriate for the criminal law to deal with questions of values or immorality, and if a paternalistic use of the criminal law is proper. While the authors do raise the question of whether criminalization is discriminatory and whether prostitution reflects a legal system and a society that demean women, they provide no material that would enable students to have a sufficient foundation of knowledge to be able to engage in critical thinking about these issues. While this casebook does contain material dealing with prostitution that the others do not, what is striking is the material that is not included. The casebook, as is true of the other two reviewed, does not include material that addresses the nature and effects of prostitution. Nor, with the exception of the case cited, does it contain material concerning johns

124. See Saltzburg, supra note 1, at 18-19.
or the demand side of prostitution. In contrast, the casebook does include statistics and material on both the extent and effect of rape\textsuperscript{125} and the extent and effect of domestic violence.\textsuperscript{126}

Later in this same chapter, the authors summarize the issues raised by the section on controversial cases and note that the core of the criminal law involves serious harm. The casebook then proceeds with a section on the functional and procedural bases of criminal law in which the issue of the distinction between civil and criminal remedies is raised and how the concept of blameworthiness marks the imposition of criminal penalties. They suggest that the civil law might respond to the problem of prostitution by “public control and administration of the service.”\textsuperscript{127} The authors never suggest a connection between the issue of the appropriateness of criminalizing prostitution and the blameworthiness of purchasing sex for money (john) or profiting from a person engaged in prostitution (pimp) and the resulting harm. If more sociological and psychological material about prostitution had been included in the casebook, perhaps this possible connection would have become apparent.

The next case dealing with prostitution in Chapter One is contained under the subheading of “Specificity and Discretion in Criminal Law” and within the section entitled “From Common Law to Statute.” The authors include the case of Shaw v. Director of Public Prosecutions.\textsuperscript{128} This same case is included in the Kadish and Schulhofer casebook. The notes following the case raise the same kinds of issues that were raised in the Kadish and Schulhofer casebook: the inappropriateness of judge-made law, the lack of notice, and retroactive application.\textsuperscript{129} As in the previous casebook, there is no mention in the notes of the underlying facts of the case nor their possible

\textsuperscript{125} See id. at 390-99.
\textsuperscript{126} See id. at 748-56.
\textsuperscript{127} See id. at 26.
\textsuperscript{128} [1962] A.C. 220 (H.L. 1961) [Eng.].
\textsuperscript{129} See Saltzburg, supra note 1, at 50-51.
In Chapter Two, entitled “Perspectives on Criminal Law,” in the subheading on contemporary critical jurisprudence, the authors have an excerpt from Patricia Smith’s book, Feminist Jurisprudence. In this excerpt, Smith raises a number of questions that could serve as the basis for a fruitful class discussion of prostitution. What counts as harm? How does society make the judgment to recognize a harm? Even if a harm is recognized, should the law intervene? If the act in question is viewed as natural and societal norms do not recognize a claim of harm, how do social attitudes change so that the harm is counted? These questions could be the center of an important discussion about prostitution and the gendered nature of criminal law. The authors, in the notes that follow the Smith excerpt, miss the opportunity to connect these far-reaching feminist grounded questions specifically to prostitution and the question of its criminalization.

The remaining cases in the casebook that involve prostitution are used as a means to illustrate other doctrines of criminal law, rather than as a vehicle to discuss prostitution itself. For example, the case of People v. Lauria, which is also in the Kadish and Schulhofer casebook, is excerpted as a principal case in the chapter on conspiracy. Lauria involved an indictment for conspiracy to commit prostitution against the owner of a telephone answering service who knew some of his customers were engaged in prostitution. The notes that follow, as in the Kadish and Schulhofer casebook, focus on the required elements to prove conspiracy and the question of whether it is necessary to prove purpose to promote the

130. Id. at 83-86.
132. See Bedder v. Director of Public Prosecutions, [1954] 1 W.L.R. 1119 [Eng. Weekly Law Rep.] (dealing with the murder of a woman in prostitution by a “patron” who was impotent and discussing whether the jury should be instructed to take into account how a reasonable man suffering from the defendant’s liability would have reacted).
133. 251 Cal. App.2d 471 (1967) (case is also excerpted as a principal case in the other two criminal casebooks).
underlying crime or whether knowledge of the crime is sufficient.134 There is scant mention of prostitution in the notes. As is true in the Kadish and Schulhofer casebook, the underlying facts of prostitution are made invisible by the authors' lack of examination of the underlying charges and of how the context of prostitution may have influenced the court's decision.

In the Teacher's Manual, the authors discuss the entire subdivision on "Controversial Crimes" in one short paragraph without any particular emphasis on the issue of prostitution.135 The Manual mentions prostitution in a discussion of the Lauria case in the section on conspiracy.136 As in the main text, the Teacher's Manual discusses the case in the context of the mens rea required for conspiracy. The Manual focuses on the intent to engage in a criminal scheme and under what circumstances intent can be inferred from knowledge.137 There is no discussion of the substantive issue of prostitution.

The Saltzburg et al. casebook is unusual because it includes a principal case raising the issue of prostitution. Nevertheless, it otherwise treats prostitution in a conventional manner. Notwithstanding its efforts to bring to bear contemporary critical theory to criminal law, it does not build on that theory to interrogate the stereotypes of prostitution and women in prostitution. In fact, it does not deviate substantially from the traditional approach of using prostitution for the purpose of illustrating some other doctrine of criminal law.

C. Casebook Three

The third casebook, Criminal Law: Cases and Materials by John Kaplan, Robert Weisberg, and Guyora Binder has no prostitution entries in the index.138

134. See Saltzburg, supra note 1, at 698-703.
136. See id. at 93.
137. See id. at 93-94.
138. See Kaplan et al., supra note 1.
Prostitution is first mentioned in an excerpt of Dan M. Kahan's article, Social Influence, Social Meaning, and Deterrence, that argues that public disorder is a "self-enforcing cue about the community's attitude toward crime [because it] convey[s] that people in the community either don't value or don't expect order." The excerpt is in Chapter One, which is entitled "The Purposes and Limits of Punishment." Prostitution is listed in the excerpt as one of many examples of a "public order" offense. No analysis or discussion of prostitution is otherwise included in this chapter.

The only principal case in the text that involves prostitution is People v. Lauria. It is included in the chapter on conspiracy and within the section on the mens rea of conspiracy. This is similar to the treatment of the case in the other two casebooks. In the notes that follow, the only issues raised are those exploring what mens rea is needed to become a member of a conspiracy and the meaning of the court's interpretation of intent. Later in the conspiracy chapter, the authors include a note on Gebardi v. United States. Gebardi involved a prosecution for both conspiracy to violate the Mann Act and violating the Mann Act. In discussing the issue of whether it is appropriate that a person would not be guilty of conspiracy if his co-conspirator is a protected party under the statute or not guilty of the underlying substantive offense, the authors ask whether a woman engaged in prostitution could be found guilty of conspiring with a client to commit prostitution. In the note, this is the only sentence by the authors that mentions prostitution. One wonders who the authors consider the protected party or who they assume is

139. Id. at 41-43. The assertion that persons are more likely to engage in criminal behavior when public disorder signals that the community is unwilling or unable to enforce order and community norms is included in an excerpt of an article by Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 Va. L. Rev. 349 (1997).
141. Kaplan, supra note 1, at 922.
142. 287 U.S. 112 (1932).
143. Id.
not guilty of the underlying offense. There is no further comment or analysis by the authors in response to the question they raise.

Finally, in the chapter on rape in the section on evidentiary reforms, the authors discuss the defense tactic of cross-examining complainants about their previous sexual conduct. The authors quote from a New York case from 1838 in which a clergyman, in appealing his rape conviction, argued that he should have been permitted to question the complainant about her previous sexual conduct.144 The court’s opinion, as quoted in part from the casebook, asks:

[A]re we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? That the triers should be advised to make no distinction between the virgin and a tenant of the stew? Between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embrace of the other sex? . . . No court can override the law of human nature, which declares that one who has already started on the road of prostitution, would be less reluctant to pursue her way, than another who remains at her home of innocence. . . .145

The text then goes on to quote a more recent case from 1953 that expresses a similar view.146 The court asserts that the complainant’s “story of having been raped would be more readily believed by a person who was ignorant of any former unchaste conduct on her part than it would be by a person cognizant of the unchaste conduct defendants offered to prove against her seems too clear for argument.”147 In commenting on these cases, the authors note that interrogating a complainant about her sexual history does increase the chance of acquittal. The authors then ask whether a complainant’s sexual history should

145. Id. at 192-93.
146. Padkineau v. United States, 202 F.2d 681 (8th Cir. 1953).
147. Id. at 685.
increase the chance of acquittal, whether it is an indication of consent to the act in question, or whether it is an indication of dishonesty. Finally, the authors ask if questioning about the complainant’s sexual history simply decreases the jury’s sympathy for the victim. While these are relevant questions, what the authors of the casebook fail to reveal or analyze is the connection between a complainant’s sexual history and prostitution. It is this connection that allows the defense to construct the victim so that she resembles the woman in prostitution and consequently is viewed as unworthy of the law’s protection and thus deserving of her fate. The stereotype of the woman in prostitution as polluted, immoral, and disreputable gives the defense a powerful weapon in casting the complainant within that stereotype so that her honesty and worthiness are called into question.

The Teacher’s Manual attached to this casebook is similar to the previous two described. It does not discuss prostitution in the context of the Kahan excerpt nor in the context of evidentiary issues regarding the complainant’s past sexual conduct in a rape case. The authors do devote almost two pages of the Manual to the Lauria case. The Manual raises issues of intent by describing the doctrines encompassed by the Lauria decision and by pointing out that the case raises the policy question of when to impose a duty. What the Manual does not do is include any points of discussion with regard to the underlying behavior at issue in the case. While the authors raise the question of when to impose liability for conspiracy using the criterion of the seriousness of the crime, they do not then question whether the court’s view of the nature of the underlying crime at issue—prostitution—had an effect on the court’s interpretation of conspiracy doctrine.

The Kaplan et al. casebook, like the Kadish and Schulhofer casebook, treats prostitution in a conventional manner. It covers the topic more minimally than the other

148. Kaplan, supra note 1, at 1155.
149. See generally Kaplan, Teacher’s Manual, supra note 1.
150. See id. at 242-43.
two casebooks, creating no opportunity for an examination of the law of prostitution. When the topic is covered, it is for the purpose of illustrating some other doctrine of criminal law.

CONCLUSION

Ten years ago, a report analyzing sex bias in the teaching of criminal law found that the casebook treatment of prostitution was minimal and the coverage that was included left many stereotypes unchallenged. Today, criminal law casebooks continue to treat prostitution in substantially the same spare manner. The traditional stereotypes are prevalent and the focus continues to be the woman in prostitution with little or no scrutiny of the john. There is little analysis or questioning of those stereotypes and little information provided about the gendered nature of the disparate punishment imposed for engaging in prostitution. The casebooks also fail to make important connections between societal attitudes that permeate the criminal law about the “unworthy, immoral woman in prostitution” and the law’s recognition of a deserving claim of harm. As with the casebooks reviewed ten years ago, the current casebooks do not include studies or material that would help inform students about the nature of prostitution, even though such material is readily available and analogous material is included with regard to rape and domestic violence.

The casebook treatment of prostitution has not changed substantially in ten years. Feminist reform efforts have succeeded in making changes in the criminal law’s treatment of rape and domestic violence. Some of those changes have made their way into current criminal law casebooks. Even though there has been great debate within the feminist community about prostitution, there have been no similar efforts with regard to reform of the criminal law’s treatment of prostitution and no substantial changes in the treatment by criminal law casebooks. Perhaps before another decade passes, authors of criminal
law casebooks will recognize the need to include material on the nature of prostitution. Perhaps before another decade passes, law students will be given the tools to challenge the pervasive stereotypes that dominate the law's treatment of prostitution and the assumptions about its naturalness and inevitability that mask the blameworthiness of those who purchase sex for money and the resulting harm.