1993

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Georgetown Public Law and Legal Theory Research Paper No. 11-69

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93 Colum. L. Rev. 1442 (1993)

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LEGITIMATING THE ILLEGITIMATE: A COMMENT ON *BEYOND RAPE*

Robin L. West *

Professor Dripps's provocative proposal, as I understand it, is that we think of sex as a commodity and rape as the theft of that commodity.¹ Understood as such, the theft of sex accomplished through violence or the threat of violence is a twofold wrong: it violates our "negative" right to refuse to have sex with anyone for any or no reason, and violence or the threat of violence infringes our right to personal, physical security.² Therefore, the violent expropriation of sex should be punished as a major felony, as is violent rape, at least in theory.

Furthermore, according to Dripps, the expropriation of sex through nonviolent means may also be wrong, and even criminally so, depending upon the means used.³ It is much more difficult, however, to distinguish those sexual transactions that result from impermissible, albeit nonviolent, pressures from those that result from pressures that, although perhaps not commendable, are not sufficiently egregious to be made the target of the criminal law. Eschewing reliance on the presence or absence of the woman's consent as a means of distinguishing between criminal expropriations and permissible bargains, Dripps suggests that we focus instead on the "means" used to procure sex, and develop some set of guidelines by which to distinguish those means that are "legitimate" from those that are "illegitimate."⁴ Through consideration of a series of hypothetical cases, Dripps reaches the conclusion that expropriation of sex accomplished in part by disregarding an expressed, verbal protestation should be the paradigm for this lesser offense of nonviolent expropriation; a refusal to heed an expressed desire not to have sex violates rights of autonomy and should be criminal, although not punished as harshly as those expropriations accomplished through violence or threats.⁵

Although this new offense—nonviolent expropriation of sexual services in disregard of a verbal "no"—would expand the criminalization of sex, it would leave untouched two important classes of sexual transactions, the first of which Dripps concedes may be problematic, but the second of which, Dripps argues, although viewed as problematic by a number of feminist writers,⁶ should not be so viewed. First, it

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1. See Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 Colum. L. Rev. 1780, 1786 (1992).

2. See *id.* at 1797–99.

3. See *id.* at 1799–81.

4. See *id.* at 1801–03.

5. See *id.* at 1804.

6. See Andrea Dworkin, *Intercourse* 128 (1987); Adrienne Rich, *On Lies, Secrets,*

leaves uncriminalized a wide range of sexual transactions that result from fraudulent misrepresentation.⁷ Surely these transactions are illegitimate, since they would be criminal if the commodity were anything but sex. However, primarily for pragmatic reasons (namely, that it would involve a "sweeping criminalization of sex," and particularly the recriminalization of adultery⁸), Dripps argues that such sexual transactions should not be regarded as criminal. Second, it leaves untouched a range of sexual transactions that might concededly result in unwanted, undesired, and unpleasurable sex for the woman, but that are a part of what Dripps calls "complex relationships," in which sex is given in exchange not for pleasure, but rather for some bundle of goods presumed desirable by the woman—including, for example, fidelity, economic security, or friendship.⁹ Those relationships, Dripps argues, may well involve nonmutual and unpleasurable sex, but the "means" by which the sex is obtained are "legitimate." Since the woman has in some way acquiesced in the totality of the bargain, an exchange of goods for sex does not constitute an infringement of the woman's rights or a denial of her autonomy, even if the sex itself is far short of ideal.

Like a good bit of contemporary male writing on rape and feminism,¹⁰ Dripps's article seems to be driven by two very different motives. Dripps's first goal is to fashion a law of sexual assault that will respond to the bulk of contemporary feminist criticism of modern rape law—criticism with which Dripps is generally sympathetic.¹¹ But his second goal, which is in considerable tension with the first, is to defend many *consensual* sexual practices against feminist critique, regardless of whether the aim of that critique is the "sweeping criminalization of sex" or the "unmasking" of consensual sex as a bad bargain for women

and Silence 17 (1979); Martha Chamallas, Consent, Equality and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 839–40 (1988); Charlene L. Muehlenhard & Jennifer L. Schrag, Nonviolent Sexual Coercion, in *Acquaintance Rape: The Hidden Crime* 115, 115, 120–21 (Andrea Parrot & Laurie Bechhofer eds., 1991) [hereinafter *Acquaintance Rape*]; Robin L. West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, in *At the Boundaries of Law* 115, 121–22 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991).

7. See Dripps, *supra* note 1, at 1802–03.

8. See *id.*

9. See *id.* at 1789–92; 1801–02.

10. For recent examples, see Richard Posner, Sex and Reason 383–95 (1992) (advocating a number of feminist reforms, such as the criminalization of marital rape, but generally defending much consensual sexual behavior against the feminist claim that conduct is often subordinating); Douglas W. Husak & George C. Thomas III, Date Rape, Social Convention, and Reasonable Mistakes, 11 Law & Phil. 95, 114–26 (1992) (arguing for retention of the reasonable mistake of fact regarding consent defense); Duncan Kennedy, Sexual Abuse, Sexy Dressing and the Eroticization of Domination, 26 New Eng. L. Rev. 1309 (1992) (explaining how all men benefit from rape, as feminists argue, but then urging a "postmodern" defense of a broad range of consensual sexual practices against radical feminist critique).

11. See Dripps, *supra* note 1, at 1780–85.

much of the time.¹² Part of the interest, as well as part of the strength, of Dripps's article is that these goals—reforming rape law and defending sex—are quite explicitly stated in Dripps's piece. The novelty and the power of his argument lie in his claim that the “commodity theory” of sex and its implied “theft” theory of rape serve *both* of these seemingly incompatible objectives; the theft theory of rape reflects the wrongness of rape better than does current criminal law, while the commodity theory of sex defends the legitimacy of non-assaultive sex against certain feminist critiques. Accordingly, the commodity theory, Dripps argues, responds to feminist critiques of rape law and serves as a rejoinder to feminist critiques of consensual sex.¹³

In these comments, I recapitulate my understanding of Dripps's argument, then suggest what seem to be some of the strengths and weaknesses of his suggested reform of rape law. I then comment in more detail on what I take to be the most serious danger of Dripps's proposal: the “commodity theory” of sex legitimates what should be regarded as morally problematic (whether or not criminally culpable) sexual transactions. I conclude by suggesting a way to retain some of the structure of Dripps's proposal without accepting its undesirable normative consequences.

I. DRIPPS'S RECONSTRUCTION

Dripps begins his article by arguing, convincingly, that the law of rape cannot be cleansed of its patriarchal history, and that we should therefore quit trying to reform it and instead replace it with an entirely new set of laws against sexual assault.¹⁴ Those new laws should in turn be developed not by reference to the historical understanding of rape, but rather by reference to contemporary liberal and feminist “first principles” regarding women's equal interests in and rights to sexual autonomy and physical security.¹⁵ Given its origin in past systems of social and legal organization which presumed that a woman's sexuality was the property of some man, and that the injury of nonconsensual intercourse, if any, was to the man with the relevant property interest, rape law simply cannot be reformed to bring it into accord with our modern convictions that women, like men, have a property interest in their own bodies such that a woman's sex is her own, and that the injury of rape is accordingly a violation of her rights. Dripps argues that we should instead rethink the law of sexual assault “from the ground up,” so to speak—that we should start not with historical norms, but with the post-patriarchal modern assumption that women, like men, have a property right to their bodies, and an interest in freedom from vio-

12. See *id.* at 1790–92.

13. See *id.*

14. See *id.* at 1780–85.

15. See *id.* at 1785–90.

lence, and secondly, that the wrongful expropriation of a woman's sex is accordingly an injury to the woman, rather than to the man with an interest in the woman's body.

The most important practical consequence of this reconstruction, Dripps contends, is to rid the law of sexual assault of its present insistence on both force and nonconsent as conditions of culpability.¹⁶ This dual requirement, maintained even in reform jurisdictions through the provision of various defenses, cannot be justified. In theory and in practice, it leaves noncriminal both sexual transactions obtained through extreme forms of violence so long as the victim at some point consented to the sex, as well as sexual practices that although concededly nonconsensual were not accompanied by demonstrable force.¹⁷ The result is unjustified underenforcement of laws against sexual assault. By abandoning traditional definitions of rape and defining sexual assault in a way that borrows heavily from analogy to larceny and robbery, we can criminalize the wrongful appropriation of sex and punish more severely those appropriations accompanied or accomplished by violent means. The victim's "consent" need never enter the picture; the crime is either sex obtained through violence or through the disregard of a stated "no." The only issue is whether the means used by the defendant to obtain sex were wrongful.

Thus, under Dripps's proposed law, a woman's "consent" to sex is not the determinative line between rape and sex, and indeed is virtually irrelevant. This would be a dramatic shift from current law, under which, as Dripps explains, a sexual transaction is legal so long as a woman consents at some point to the sex itself—regardless of how much violence is used or threatened in order to obtain that consent.¹⁸ Many, if not most, rape law commentators from a range of perspectives have addressed the underenforcement of laws against sexual assault by arguing that rape should be defined simply as nonconsensual sex—by dropping, in effect, the force requirement altogether.¹⁹ Dripps's proposed reform statute takes the strikingly different tactic of dropping the issue of consent (even as a defense) and defining the wrong entirely by reference to the defendant's conduct and state of mind: the knowingly wrongful expropriation of sex.

Dripps argues that we should distinguish a greater and lesser crime. The greater offense—the violent expropriation of sex—is fully

16. See *id.* at 1783–85.

17. See *id.* at 1793–94.

18. See *id.* at 1784–85, 1794–95.

19. See, e.g., Susan Estrich, *Real Rape* 96–104 (1987); Lynne Henderson, *Rape and Responsibility*, 11 *Law & Phil.* 125, 149 (1992); Lois Pineau, *Date Rape: A Feminist Analysis*, 8 *Law & Phil.* 217, 221 (1989); Lani Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 *U. Pa. L. Rev.* 1103 (1993); Stephen Schulhofer, *Taking Sexual Autonomy Seriously*, 11 *Law & Phil.* 35, 39 n.12 (1992); Robin D. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 *Harv. Women's L.J.* 143 (1983).

accomplished when the defendant knowingly presents the victim with the choice of either sex or violence.²⁰ The lesser offense—sexual expropriation—is fully accomplished, in essence, by knowingly obtaining sex from the victim in disregard of a verbally expressed “no.”²¹ Dripps argues that by focusing on the legitimacy of the means used to obtain sex, rather than the presence or absence of consent, we unmask the normative inquiry traditionally concealed by the focus on the presence or the absence of a rape victim’s “consent.”²² Consent, Dripps argues, is little more than the label we apply to behavior or influences we deem legitimate causes of subsequent events. All behavior is in some sense determined by prior events, so we can not distinguish free from unfree sex by insisting upon consent as the line dividing the criminal from the permissible. By focusing on the legitimacy of the antecedent causes of sex rather than the presence or absence of “consent,” we align the explicit legal inquiry with the actual, albeit implicit, normative issues.

Dripps’s goal in writing this piece and in putting forward his proposal is not simply to create a more just law of rape. Dripps’s second goal is to defend noncriminal contemporary sexual relationships and transactions against feminist critique. Some modern feminist writing on rape,²³ Dripps argues, either expressly or implicitly seeks a broad criminalization of what now is regarded as consensual (and hence legal) sex.²⁴ He particularly singles out various feminist arguments suggesting different theories for drawing the line between sex and rape, including whether the sex was “mutual”²⁵ and whether the woman would have initiated the sex if she had had the option.²⁶ Some feminists have also theorized that distinguishing legitimate sex from coerced sex, and possibly sex from rape, should depend on whether the woman engaged in sex in exchange for something unjustly distributed along gender lines.²⁷ All of these arguments, Dripps fears, threaten a sweeping criminalization of sex for no good reason.²⁸ Like a number of

20. See Dripps, *supra* note 1, at 1797.

21. See *id.* at 1803. At no point in either offense does consent to the sex itself ever enter the picture. As a consequence, Dripps argues, there would be not only more convictions than under current law, but furthermore the “rape shield laws” presently in place in most jurisdictions would be put on a more secure, as well as more constitutional, foundation; if consent to sex is not the issue, then a history of having consented to sex either generally or with the particular defendant is obviously not relevant and therefore these shield laws no longer constitute a potential violation of a defendant’s Sixth Amendment and Fourteenth Amendment rights. See *id.* at 1794–97.

22. See *id.* at 1787–89.

23. See sources cited *supra* note 6. Dripps is most interested in a critique of contemporary sexuality put forward by Martha Chamallas. See Chamallas, *supra* note 6, at 835–43.

24. See Dripps, *supra* note 1, at 1791–93.

25. See *id.* at 1790.

26. See *id.*

27. See *id.*

28. See *id.* at 1791–92.

men now writing on rape, Dripps finds these feminist critiques of consensual heterosexuality not only unjustified, but no doubt unsettling as well.

Dripps's singular directive—rethink sex as a commodity and rape as theft—responds to those feminist critiques of rape law with which Dripps agrees, but also rebuts those feminist critiques of consensual heterosexuality that he finds unjustified. Eschewing reliance on consent as the line between sex and rape, Dripps argues that since sexual assault is simply the expropriation of sex through illegitimate means, then by inference nonassaultive and noncriminal sexual transactions are those that involve only *legitimate* means of persuasion.²⁹ And, if we are right to view sex as simply another commodity, then feminist critiques of presumably “legitimate” sexual transactions premised on resources unequally distributed between the genders have no more merit than critiques of voluntary contracts premised on complaints of general maldistributions of bargaining power. Just as unequal bargaining power does not render a contract either involuntary or unjust, so too, Dripps argues, unequal distribution of power or resources between the genders does not render a sexual transaction between a man and a woman—whether undertaken as an exchange of pleasure for pleasure, or of pleasure for money, security, support, or friendship—a bad bargain. The sex may still feel good, or alternatively, whatever was received in exchange for it may have been worth the trade. Viewing sex as a commodity clarifies not only the wrongness of rape—the expropriation of sex through illegitimate means of pressure—but also the rightness of sex and the fallacy of some feminist critiques. Like any other commodity we own, Dripps argues, sex is ours for the giving, selling, or keeping, and there is no reason why we should not do with it what we will.³⁰

II. RAPE AS THEFT

There are a number of strengths to Dripps's proposed law of sexual assault. Dripps is surely right to insist that we rethink the law of rape from first principles rather than through incremental reforms of a law inherited from a thoroughly unjust regime. Dripps is also surely right to argue that any law of sexual assault that assumes a woman owns her own sexuality is a vast improvement over conceptions of sex and rape that assume the contrary. On a practical level, he is also right to insist that the dual requirement of nonconsent and force in many jurisdictions' definitions of rape is unjustified and results in serious under-enforcement of laws against violent sexual assault. He is also right to argue that we use the extraordinarily malleable notion of consent to distinguish not so much voluntary from involuntary sex as those causes we view as “legitimate” from those we regard as illegitimate. And he

29. See *id.* at 1792.

30. See *id.*

may be right that his substantive reform, unlike reforms aimed at procedural and evidentiary rules, would reverse the outcome of at least one set of cases that presently come out very wrong: those in which a woman's "consent" to sex shields a defendant from liability, even where the consent is brought on by violence or threats of violence. For all of these reasons, Dripps's commodity theory of sex and theft theory of rape are likely to have tremendous appeal, especially to liberals and liberal feminists who advocate reform that identifies the woman's sexual autonomy and physical sovereignty as the core interests that must be protected.

But there are problems. Perhaps most seriously, Dripps's theft analogy wildly misdescribes the experience of rape. In order to reduce the crime of rape to its familiar constitutive parts, Dripps proposes that we rethink traditional violent rape as the conjunction of violence or a threat of violence and the expropriation or "theft" of sexual services, and rethink nonviolent rape—what Susan Estrich calls "simple rape"³¹—as constituting a lesser offense of expropriation. That reduction does not work. What it rather strikingly omits is the violence, and hence the injury, of the penetration itself. *From the victim's perspective*, unwanted sexual penetration involves unwanted force, and unwanted force is violent—it is physically painful, sometimes resulting in internal tearing and often leaving scars.³² Dripps omits this central feature of the experience. The offense that he calls "expropriation" is *itself* a forceful, physical, and in a word, assaultive penetration of one person's body by another. It is not in any way a "larcenous taking." Rape accompanied by additional acts of violence is no doubt a worse experience than what we misleadingly think of as "nonviolent" rape—rape in which the only demonstrable violence is the violence of penetration. But it is not the case that they are both essentially thefts, with the first aggravated by the use of violence, as robbery is larceny aggravated by violence. Both involve violent assaults upon the body. Both are experienced, and typically described, as more like spiritual murder than either robbery or larceny.

Dripps's own analogy reveals the serious inadequacy of his construct. In trying to convey the "essence" of the expropriation offense, Dripps at one point analogizes it to the theft by a customer of a piece of jewelry off a counter while the merchant's back is turned.³³ Nothing could be further from the experience of rape: rape is in no way like the near-instantaneous nonviolent theft of a piece of jewelry off a merchant's counter. Sex is not jewelry, and a woman's body is not a store. Unlike jewelry, sex cannot be "taken" quickly, cleanly, or pain-

31. See Estrich, *supra* note 19, at 102.

32. For a full discussion of this point, see Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 Tex. J. Women & L. 41, 54–55, 58, 64–65 (1993).

33. See Dripps, *supra* note 1, at 1803–04.

lessly. It can be "taken from," or "imposed on," a truly unwilling partner only with a great deal of force and considerable physical pain—a combination that in any other context we could quite readily recognize as violence.³⁴

Rape is *sui generis*. It is not accurately captured by any analogy, no matter how clever or elaborate. It is a primal experience to which other events might be meaningfully analogized—the "rape" of the land, the "rape" of a people. But rape itself cannot be reduced to other painful experiences. It certainly cannot be reduced to theft.³⁵

III. SEX AS COMMODITY

There are also a number of problems with Dripps's insistence that we view sex as a commodity. The most obvious problem is simply descriptive. At least for vast numbers of women and men, sex is not experienced as a commodity, nor is it for the most part presently treated as a commodity. To reverse the common cliché, if it does not feel like a commodity, does not look like a commodity, and is not treated like a commodity, it probably is not one. Sex is not "like" a service we sell or give away, so there is little gain in analogizing it to services and goods treated in such a way. Of course, there always has been, and for all we know always will be, a market for prostitution, but that hardly makes sex a commodity, for defining something as a commodity depends upon whether it is *typically* treated as such. Neither our current practices, our most common experiences, nor our most generally shared aspirations support this notion.

Dripps knows that sex is not currently treated (or, for the most part, experienced) as a commodity, so his commodity theory of sex must be read as inviting us to rethink our understanding of sex and begin to treat it as one. The question, then, is not whether sex is a commodity—it clearly is not—but whether we should commodify it. The consequences of doing so would certainly be far-reaching—Dripps's proposed reform of rape law only scratches the surface. Were we to commodify sex, we should, for example, and without hesitation, legalize prostitution.³⁶ And we should also without hesitation recognize a wide range of civil actions for breach of promise to cover the

34. The theft example also masks the rapist's motives, which, unlike those of the thief, may include exerting control over the victim solely for the sake of humiliating her. See Bonnie L. Katz, *The Psychological Impact of Stranger versus Nonstranger Rape on Victims' Recovery*, in *Acquaintance Rape*, *supra* note 6, at 251, 252 ("Rape is an act of power and control, intended by the rapist to humiliate the victim.").

35. I do not mean to suggest that aggravated rape should not be punished more severely than nonaggravated rape. It should be and typically is. I mean only to suggest that the difference between the two should not be analogized to the difference between nonviolent, simple theft, or larceny, and violent robbery.

36. There may, of course, be other more compelling reasons to legalize prostitution, regardless of whether we should "commodify" sex. Professor Radin, for example, argues persuasively for legalization on the grounds that to do so would better

multitude of cases that would no doubt arise from the complex relationships Dripps describes, in which sex is given in exchange for promises for other valuable commodities, ranging from protection against other men to affection, friendship, or a guarantee of not being "in a snit" for the next few days. Some of those promises would occasionally be broken, and if sex is to be treated as a valuable commodity and women's full autonomy is to be recognized, then the full range of damage remedies should be available—from restitution through expectation loss through reliance and through specific performance—when those promises are broken and damage results.

Similarly, if, as Dripps argues, we should think of sex as a commodity, we should surely criminalize its fraudulent expropriation, and we should do so even if it would involve an expanded criminalization of sex or the "recriminalization of adultery." Dripps's expressed reluctance to do so is more than a little puzzling.³⁷ That criminalizing fraudulent expropriation of sex would result in the sweeping criminalization of sex only suggests that our current sexual trades are pervasively fraudulent. If sex is indeed a valuable commodity, and if we are right to criminalize the theft of valuable commodities accomplished through fraudulent means, then that "sweeping criminalization of sex" that Dripps fears is simply a long-overdue corrective of a massive historic injustice: the uncompensated and unjust expropriation of value from one gender by another. Dripps should favor correcting it with all deliberate speed.

I think it is fair to say that many of us in and outside of the feminist community have a strong intuitive revulsion toward the proposal that we commodify sex. There are at least two explanations for our current reluctance to commodify sex and to undertake the legal reforms such commodification would require. First, our reluctance may have its origins in our historical refusal to grant and protect women's autonomy and property, including our property in our own bodies. If, as a number of liberal feminists have argued,³⁸ our refusal to commodify women's sexual labor (like our refusal or at least reluctance to permit full commodification of women's reproductive labor) is simply a remnant of patriarchal hostility toward compensating women for women's labor, we should resist any intuitive qualms we might have against viewing sex as a commodity. Indeed, we should insist upon the full panoply

protect the interests and lives of sex workers than the present ban. See Margaret J. Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849, 1922-25 (1987).

37. See Dripps, *supra* note 1, at 1802-03.

38. See, e.g., Lars O. Ericsson, *Charges Against Prostitution: An Attempt at a Philosophical Assessment*, 90 *Ethics* 335, 362-66 (1980); Sibyl Schwarzenbach, *Contractarians and Feminists Debate Prostitution*, 18 *N.Y.U. Rev. L. & Soc. Change* 103, 128-30 (1990); Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 *Wis. L. Rev.* 297, 336-37. But see Carole Pateman, *Defending Prostitution: Charges against Ericsson*, 93 *Ethics* 561 (1983).

of legal protections—from “truth in advertising” to remedies for breach to criminalization of fraud—for this labor that women perform in exchange for services or goods. In other words, if our reluctance to commodify sex and our correlative reluctance to provide the full panoply of legal protections against wrongful expropriation of that commodity through the civil and criminal law stem from the same patriarchy that spawned our antiquated law of rape, then we should be as willing to expand the reach of the law to correct *that* grotesque miscarriage of justice as we are to entertain Dripps’s sweeping and novel conception of rape. If Dripps insists on his “nonromantic” view of sex, he ought to be equally willing to grant nonromantic legal relief for breach of nonromantic sex-for-services contracts, *particularly* if it is the case, as Dripps seems to think it is, that our reluctance to embrace that view stems from our refusal to grant women full autonomy.

There is, however, another possible explanation for our reluctance to commodify sex. The commodification of some aspect of our world or being in large part means that we are willing to separate our selves from that which is commodified, and treat the commodified thing or service accordingly: I’ll trade my old computer, my house, or my legal services for something better, sell it to the highest bidder, give it to my favorite charity, or throw it in a trash heap. In no case does part of my self go *with* the thing so traded; to the contrary, I hold my self back *in order to* benefit from the exchange, reap the profit of the resale, bask in the glow of my beneficence, or feel free of the burden of my now disposed excess baggage. The “self” that commodifies is the self that trades, gives, or disposes and then benefits accordingly. That which is traded, given, disposed of, or sold must be separated from the self that trades. By contrast, when we “have sex,” or “make love,” at least ideally, we do not hold our “self” back in this way, and it is not clear why we should embrace a fundamental change in our consciousness that would imply that we should. Ideally—and it may be an ideal worth holding on to—the “self” is given with the giving of sex; there is no clear differentiation between the sex given and the giving and receiving self. When we try to “commodify” sex in the way Dripps describes—when we *do* consciously separate the “sex” we are giving, and hence our “sexual self,” from the self who will receive in exchange an equal or greater value—we tend to think of that sex as being to some degree injurious. When we commodify sex, we “objectify” our sexual self so as to give or sell it away. In extreme cases (such as when we “give” our sex in exchange for a promise, or just a hope, not to be killed) we justifiably think of ourselves as being in some way deadened in the process. Our reluctance to “commodify” sex may reflect our understanding that commodification is itself injurious, and that it would be so in a post-patriarchal as well as in a patriarchal world.

IV. LEGITIMACY AND ILLEGALITY: THE COMPLEX RELATIONSHIP

The greatest problem that I see with Dripps's proposed reform of rape law is that the commodity theory of sex on which it is based tends to legitimate in our minds what should properly be regarded as problematic transactions and as unjust institutions and practices. Indeed, the virtue of Dripps's essay is that he does this *explicitly*. By defining with some precision those sexual practices which are so illegitimate that they should be criminalized, Dripps hopes to clarify the "legitimacy" of our remaining practices, including many which some feminists want to problematize.³⁹ The greatest problem is that too many of the practices Dripps wants thereby to "legitimate" are in fact immoral—and hence, in Dripps's words, illegitimate—whether or not they should be criminalized. In brief, Dripps mistakenly conflates two categories which should be kept distinct: "noncriminal" sexual practices, and "legitimate" sexual practices. That a practice should not be criminalized does not imply its "legitimacy."

Let me briefly recapitulate the structure of Dripps's argument before I spell out my objection. Dripps wants to distinguish criminal from noncriminal sex not on the basis of consent, but rather, on the basis of the "legitimacy" or "illegitimacy" of the means used to procure it. He eventually delineates three categories: illegitimate means that are or should be criminal, illegitimate means which for some reason should not be criminal, and legitimate means of persuasion that should be viewed as not only not criminal but at least morally unexceptional and possibly praiseworthy. In the first category—illegitimate and criminal means of procuring consent to sex—are the two sorts of behavior that become the two crimes Dripps defines: the use of violence or threats of violence and the nonviolent disregard of a woman's expressed "no." In the second category—illegitimate means for procuring sex that should nevertheless not be regarded as criminal—Dripps places fraud, although as indicated above, he does not provide a very satisfactory account of why he is unwilling to criminalize behavior that, were the object of the fraud anything but sex, he would quite clearly want to criminalize. What Dripps is most anxious to defend, however, is the existence and importance of his third category—legitimate means of procuring sex, even where the sex procured is nonmutual, undesired, or in some other way extremely unsatisfactory for the woman. It is the existence of this category that Dripps believes severely undercuts the force of contemporary feminist critiques of heterosexual practices.

In this category, Dripps places what he calls "complex relationships."⁴⁰ In a complex relationship, a woman may, for entirely justifiable reasons, have sex with her partner from time to time even if she does not enjoy it and would not initiate it if she were acting solely on

39. See sources cited *supra* note 6.

40. Dripps, *supra* note 1, at 1789–90.

the basis of her own sexual desires, in exchange for something or some bundle of things she does enjoy or in some way value. A woman may, Dripps hypothesizes, have sex with a husband or partner even though she does not enjoy it, because she has long ago resolved that either his friendship, companionship, or economic support (or some combination thereof) is, so to speak, worth the sacrifice. Sex of this sort procured as a part of a complex relationship, Dripps argues, is morally unproblematic, and therefore the means used to procure it—the “complex relationship” itself—should be regarded as “legitimate.”⁴¹ Furthermore, it should be regarded as legitimate *even though* the sex may be nonmutual, undesired, or given in exchange for goods unjustly distributed on the basis of gender—as is surely the case if sex is given in exchange for economic security (or in exchange for money). But Dripps’s response to feminist critiques of such bargains takes the form of a *reductio ad absurdum*: surely there is nothing wrong with the woman’s judgment that the bargain is a good one, and thus there is nothing wrong with the relationship. Nor, and this is most central, is there anything “wrong” with the man’s persistence, even in the face of his sure knowledge that his partner is not enjoying his sexual penetration of her body. His persistence is certainly not criminal and should not be viewed as immoral. To the extent that feminists suggest the contrary, their critiques must be wrong.

There is, however, a great deal wrong with the complex relationship Dripps describes. Even assuming the sex within it should not be criminalized, Dripps’s insistence that it is morally unproblematic both rests on and perpetuates an unjustified complacency about our consensual heterosexual practices. Let me suggest three different ways in which Dripps’s proposal operates to legitimate what we should rightly regard as extremely problematic sexual encounters.

First, Dripps presents his particular hypothesized complex relationship as though it is *representative* of complex relationships, when in fact it is not. Even if the air-brushed marriage Dripps describes of the homely-but-successful husband and the grateful-but-sexually-unfulfilled wife who nevertheless manage to remain great friends is morally unproblematic—as I will argue below, I think it is not—it surely is not representative of many complex relationships, if we define complex relationships as those in which a woman engages in sex she would not otherwise initiate and does not enjoy because she expects something of value in return. And, those other complex relationships, unlike the one Dripps describes, are *extremely* morally problematic. By examining only his own hypothetical and suggesting its typicality, Dripps distracts attention from a far more troubling reality.

Just to complete the picture, here are some other and arguably more typical complex relationships. First, a woman may willingly en-

41. See *id.* at 1792.

gage in unpleasant and undesired sex in return for her husband's implicit promise to refrain from violently abusing her or her children. If this promise is explicit and in exchange for a particular sexual transaction close in time to the threat, then it is criminal, and under Dripps's proposal, felonious. But in vast numbers of complex relationships, these criteria are simply not met. The threat of violence may have taken place in the past, or, more typically, may never have been made explicit. The woman may simply *know* that the potential for violence is there, because she has experienced it herself, or because she has witnessed her husband's violence against others. She may simply *know* that she is living with a ticking time bomb, and she may simply *know* that one way to "keep a lid on things" is to be sexually available, and she may know all of this even if he has never actually lashed out at her. She may "consent" to both the sex and the relationship, because she has come to view herself as her husband and others view her—as a cushion, so to speak, for her husband's rage, as the means by which his anger is routinely "domesticated." If so, then violence *itself*, or even the threat of it, is no longer necessary to maintain her acquiescence. The sex in such a "complex relationship" is nevertheless very much coerced, and the woman is very much injured by it, even if we cannot and should not criminalize it, given liberal constraints on the concept of individual culpability and practical and moral limits on the use of the criminal justice system to achieve social justice.

Second, a woman may submit to undesired sex in exchange for a promise, almost invariably implicit, of protection against potential violent assault by other men. Women are taught early in life—not just willy-nilly, but are explicitly *taught*—to look for protection against dangerous men from relatively safe men. Far more women are taught to seek protection against violent men from safe men than to seek protection through self-defense classes. As most women know, being accompanied by a man on the street is the only sure way to avoid street hassling,⁴² and in a directly analogous way, to be accompanied by a man, through marriage, in life, and in the home, is the "best way" to avoid more dangerous and damaging forms of sexual assault.⁴³ This is the sense in which *all* men, even safe men who would never dream of touching a woman who does not want to be touched, benefit from rape; rape makes the practice of consensual heterosexuality and the institu-

42. See Cynthia G. Bowman, Street Harassment and the Informal Ghettoization of Women, 106 Harv. L. Rev. 517, 540–42 (1993).

43. For a modern rendition of a classic fairy tale of a woman saved from a bad man by a good man, see *Beauty and the Beast* (Walt Disney 1991). For treatments drawn from modern popular culture, see, e.g., *Alice Doesn't Live Here Anymore* (Warner Bros. 1975); *Sleeping with the Enemy* (Twentieth Century Fox 1991); *An Unmarried Woman* (Twentieth Century Fox 1978), all involving women who leave dangerous men for safe men.

tion of marriage desirable measures of safety.⁴⁴ The benefit all men derive from rape is what is meant by the feminist phrase "male protection racket,"⁴⁵ and by the oft quoted feminist claim that women do not gamble as much as men because for women, the gambling urge is completely sated by marriage—marriage is the greatest gamble of all.

Obviously, sex given in exchange for an implied promise of protection against other potentially violent men cannot possibly be criminalized—although were the bargain explicit it would sound like extortion. Nevertheless, such bargains are typical of "complex relationships." Surely, whether or not it should be criminalized, the sex in such a relationship is damaging to the woman; it diminishes her sense of self, her sense of autonomy, her sense of sovereignty over her body, and (paradoxically) her sense of security in the world. We should not criminalize such conduct—the man procuring the sex is not the man (*ex hypothesi*) that is the source of danger. But nor is the behavior commendable. By legitimating it, we legitimate as well the practices of male domination and violence that play a central causal role in the woman's eventual decision to acquiesce.

One more example. A woman may participate in a "complex relationship" and accordingly consent to undesired sex in exchange for a promise to guarantee her or her children's economic survival. Here as well, the promise and the threat may be entirely implicit. She may simply know that denying her husband sex will make it that much harder to convince him to give her money for groceries, much less school clothes or birthday presents. In other words, her and her children's access to food, shelter, and clothing may all depend upon her willingness to be sexually available for her husband. This woman is "having sex"—she is being physically penetrated—by someone who is at least willing to let her live in fear of cold and hunger, and, if the fear is justified, willing to render her homeless and hungry. Again—whether or not this behavior should be criminal, it is not commendable; this is how we treat our enemies, not our friends or loved ones. The bottom line of this complex relationship is that this woman is indeed, as the saying goes, "sleeping with the enemy." Clearly, sex obtained through such means is extremely damaging.

The second way Dripps's hypothesized "complex relationship" legitimates what are in reality extremely problematic relationships is simply that, as sterilized and rosy as it is, the hypothetical marriage he describes is still a bad bargain, although not as bad as those described above. The commodification theory obfuscates that fact by characterizing as legitimate the pressures that force women to make such bargains. Dripps's refusal to "interrogate" the value of this hypothetical relation-

44. Duncan Kennedy discusses this at some length in Kennedy, *supra* note 10, at 1324–28.

45. See, e.g., Susan Griffin, *Rape: The All-American Crime*, in *Women: A Feminist Perspective* 24, 30 (Jo Freeman ed., 1975).

ship underscores the similar lack of introspection and interrogation by the hypothetical wife. It is this failure to question that legitimates the cultural institutions that leave her willing to live in such a marriage. Of course it is possible, from time to time, to have undesired sex with someone for justifiable reasons.⁴⁶ But—and please pardon the charge of “false consciousness”—a woman who repeatedly has unpleasant and undesired sex with a man to whom she is not attracted, because if she does not he will be in a “snit” for days, or because she values the lifestyle, the economic security, and the “friendship” she gets in return *may* be deluding herself if she thinks this constitutes a good bargain. If she wants his friendship, she should be his friend. If she wants his money, she should ask him for a loan. There simply is no good reason routinely to give sex in exchange for either of these “commodities”—a judgment we more readily reach when we ask these questions outside of the context of marriage.

Here is what an interrogation of this marriage might look like. *Why* do these two friends, one of whom wants to have sex and one of whom does not, wind up having sex? If, as Dripps suggests, it is because if they do not, he will be in a predictable “snit” for days, why should she be a buffer for his ill temper? How is it that having sex becomes a condition of his staying in the relationship, but not having sex (her preference) is not a condition for her staying? Why is it okay for her to have sex even though she does not want to, but not okay for him not to have sex even though he wants to? To generalize, why is the implied background term what he wants, the term that governs if the parties fail to specify otherwise, of so many marriages? Why, in the incredibly common scenario of he-wants-to-and-she-doesn’t, do they wind up doing it? Why does she think this is an okay bargain, an okay marriage, an okay relationship? It cannot be, as Dripps wants to insist, for the sake of their “friendship.” Friends do not impose unwanted sex on each other. How can she live with, much less befriend, someone who would do such a thing?

These questions are not unanswerable; even in the absence of “duress” emanating from him, there is plenty of duress emanating from the social, cultural, and institutional forces that have influenced her. The class and the generation of women that Dripps seems to have in mind in his construction of this scenario—which sounds painfully like the old McCall’s Magazine “Can this Marriage Be Saved” correspondent—have been trained to view this as a terrific bargain, bad sex notwithstanding. Whether a woman has been told to “close your eyes and think of England,” or that not enjoying sex is evidence of frigidity and is best not disclosed, the woman who finds herself in a relationship like the one Dripps relies on is strongly predisposed to view unwanted sex as an

46. Lynne Henderson suggests that Diane Keaton’s depiction of boring and somewhat alienating but morally unproblematic sex in Woody Allen’s film *Annie Hall* is one such example. See Henderson, *supra* note 19, at 165–66.

unavoidable and not terribly consequential part of the marriage bargain. I am not sure that *anyone* has thought systematically about what all of these unenjoyed and unpleasant sexual invasions of women's bodies, followed, often enough, with a lot of lies about how great it all was, have done to women's sense of physical security, personal competency, self-esteem, and moral integrity. It surely is not unduly harsh to suspect that the cumulative effect has been quite damaging. If a woman has to give sex to keep her best friend's friendship, then her own non-sexual attributes are not being highly valued. If she gives sex to maintain her standard of living, she is obviously not capable of maintaining it through her own efforts. If she gives sex and then lies with her body and mind about it in order to prevent her "friend" from imposing his days-long "snits" on her, then her "friend" is an emotional infant, her "mothering" is misplaced, and her personal integrity—the sense of decency she might achieve by assuring alignment between her inner self and her outer actions and words—is being hopelessly compromised. Perhaps none of this sex should be criminalized, and perhaps none of it is as harmful as the sex central to the complex relationships I described above. But that does not mean it is not harmful.

The remaining way in which Dripps's argument legitimates the illegitimate can be stated more quickly. Although early on in the article he disavows the position,⁴⁷ Dripps nevertheless seems to proceed on the assumption that "legitimate" causes of unwanted sex are morally unproblematic.⁴⁸ This background assumption is revealed, I think, in at least two false but understandable inferences. First, at several points in his essay, Dripps sees "pleasure" where there is only acquiescence and the absence of criminality. Thus, at one point Dripps argues that even if a sexual encounter is the result of bargaining against a backdrop of seriously maldistributed resources, we should not interfere with the bargain for that reason alone. We should, Dripps plaintively suggests, let people get their bits of pleasure wherever they may find them.⁴⁹ Perhaps this is simply a slip in an otherwise tightly argued article, but what is being discussed at this point in the essay, at least I thought, were consensual but *undesired*, and presumably unpleasant, sexual encounters. That a woman has consented to a bargain—particularly a bad bargain—in which sex is part of the trade, does not mean that she gets any pleasure from the sex. In fact, what she gets may be a good deal of physical pain.

Dripps also repeatedly suggests that if a maldistribution of resources is "arbitrary," then whatever bargain is struck against the backdrop of that maldistribution is morally unproblematic.⁵⁰ But this is not so for two reasons. First, most maldistributions of resources are not

47. See Dripps, *supra* note 1, at 1788.

48. See *id.* at 1792.

49. See *id.* at 1792 & n.40.

50. See *id.* at 1790–92.

arbitrary; they are the result of social practices, which, as the critical legal scholars tirelessly and tediously remind us, are entirely contingent, could well have been otherwise, and can be changed. Second, even if they are arbitrary, we do not have to accept whatever bargain they might ground. My femaleness is in some sense "arbitrary"—I did not choose it or deserve it—and gender indeed determines a maldistribution of physical strength—men are for the most part bigger and stronger than women. That in turn implies a differential vulnerability to physical assault which if not equalized by the state through the criminal law is profoundly unjust whether or not the reason for the maldistribution was itself "arbitrary."

The most serious adverse consequence of Dripps's argument, however, is that by focusing on a complex relationship entered into by a relatively privileged member of the subordinate group, he diverts our attention from the quite horrific lives led by less privileged persons facing the same institutional pressures. He thus prompts the privileged toward complicity in the societal refusal to examine the value of the institutions that so influence our choices. If the complex relationship that Dripps describes is the worst that "noncriminal" patriarchy gets, then there cannot really be too much to worry about—this really is just middle class women complaining that their husbands and boyfriends are not very good in bed. We can, then, simply continue to target *criminality* rather than patriarchy, and we will have done all we really need do to provide women justice. We can continue simply to prosecute the occasional rapist rather than question the morality of our noncriminal heterosexual practices; we can continue to worry only about the occasional woman who has been clearly victimized by clearly violent, aberrational conduct rather than the class of women continually dehumanized and demeaned by quite general expectations and institutional pressures for self-denial; we can continue to worry about the occasional act of sex procured through the recognizable weapons of violence rather than the common, relentless, and dehumanizing sex "procured" through reliance on a system so pervasive as to be invisible that trains females in the fine arts of passivity and receptivity. We can accord women justice by redressing the occasional "violence" they suffer rather than by addressing the constant violations that define a "self" rendered thoroughly permeable and transparent. A self who is defined by herself and others as one who can and will tolerate painful invasions of the body cannot suffer such invasion as a violation of her being. But that does not mean she has not been injured, and badly.

Let me emphasize in closing that Dripps's tendency to legitimate the illegitimate is a function not of his logic, but of the complexity of his project: he wants to redefine rape so as to respect women's autonomy, but also defend our standard sexual practices, including the trading of sex for complex bundles of goods and services. Although I think he has not succeeded in doing so, he has provided us a useful structure not

only for rethinking rape law, but for rethinking sex.⁵¹ We need to think more than we have about the “legitimacy,” or perhaps more simply, the morality of our sexual practices. In order to do so, we may need to cease thinking in terms of consent as the defining line between not only rape and sex, but also between good and bad noncriminal sex. We might very profitably ask not which sexual practices are consensual or not, but rather which of our sexual practices are legitimate means of obtaining sex and which are not. We should not be surprised, however, if the answers “we” generate in such an analysis reflect not the shared intuitions of all of us—there may not be any—but rather, at least in part, the interests of the subgroups to which we belong.

Legality does not imply legitimacy, any more than consent implies value. Many of our sexual practices may be beyond the reach of any sensible understanding of the scope of the criminal law. But it does not follow that they are commendable, or even noninjurious. What does follow is that they are in need of criticism, whether or not in need of punishment.

51. He has also, of course, given us concrete, meritorious suggestions for the reform of rape law that I have not discussed in this piece. Requiring the woman to bear the burden of saying “no” seems sensible, given the overall direction of his proposal, as does limiting culpability to those who act with knowledge or reckless disregard of the wrongful expropriation. Dripps is less persuasive discussing negligence: it is not clear, at least to me, why his proposed reform could not include a lesser crime for the negligent expropriation of sex. See Donald A. Dripps, *More On Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West*, 93 *Colum. L. Rev.* 1460, 1470 (1993).