Rape, Autonomy, and Consent

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Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Cambridge, MA: Harvard University Press, 1998. Pp. ix + 318. $27.95 cloth; $16.95 paper, 2000.

I.

Beginning in the early 1970s, feminist critics of American rape law developed a powerful case showing that many victims of rape are violated twice: first by an assailant, second by the law. Demonstrating the deeply patriarchal biases in both the common law and the statutes governing rape and sexual assault, these commentators, scholars, and reformers identified gross and undeniable moral wrongs in the legal standards determining when rape occurs; that is, what counts as rape, the rules (especially evidentiary rules) governing criminal proceedings in rape cases, and the attitudes toward and practices affecting rape victims.[1] In the real world of rape, the critics showed, these interrelated post-rape wrongs commonly begin with the insensitive, insulting, and often humiliating interrogations of police disinclined to find "real" rape in the reports of any but the most battered of victims. Additional wrongs occur at the hands of callous, abusive, or simply uninterested attorneys, including both prosecutors unwilling to pursue difficult cases (or quick to offer pleas to significantly reduced, often non-rape, charges) and defense attorneys who employ strategies designed to impugn the character of victims, thereby undermining their credibility as witnesses in criminal proceedings. Finally, there are the moral wrongs of unjust acquittals or, perhaps worse, guilty verdicts reversed by appellate courts

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[1] The path-breaking essay here is Susan Griffin's "Rape: The All-American Crime," *Ramparts*, (1971). Influential book-length treatments include: Medea & Thompson (1974), Brownmiller (1975), Gager & Schurr (1976), Russell (1977), and Estrich (1987).

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finding that whatever sort of wrong was visited upon the victim, it was not the grave legal wrong of rape.

There would seem to be little question that nearly 30 years of extensive scrutiny, sustained criticism, and persistent activism have resulted in developments that are significant, positive, and, at least arguably, far-reaching. Regarding statutory reform, for example, the crime of rape no longer requires that victims exercise extreme resistance ("resistance to the utmost") against assailants employing physical force (or the credible threat thereof). Now, resistance need only be reasonable, and in some states nonconsent to sex can be established in the absence of any physical resistance from a fully conscious, mentally competent adult victim (see Kadish & Schulhofer 1995:339, 352).[2] Archaic and bizarre rules of evidence requiring independent corroboration of police testimony of battery or victim testimony of penetration—rules wholly without contemporary analogues in the proceedings governing other criminal offenses—have been eliminated. In addition, serious limitations are now commonly placed on what can and cannot be asked of victims during trial (so-called rape-shield laws). Courts have far less tolerance of defense attempts to prove consent to intercourse via accusations or suggestions that a rape victim is not "really" a rape victim (she is somehow a witting accomplice) if there are any hints of promiscuity in her sexual history, or if she has made the "wrong" choices regarding (or even has the "wrong" attitudes about) sex, monogamy, cohabitation, and so on.[3]

As a result of these and other changes in the law—including statutory distinctions among different degrees of rape and sexual assault, with attending differences in the severity of penalties—the burdens placed on prosecutors have been lessened. Furthermore, the range of prosecutable cases (i.e., cases where police and prosecutors take the likelihood of conviction to be high) has increased. Indeed, substantive statutory reforms have had a direct effect on the successful prosecution of rape cases, with arrests and convictions now occurring in cases that 40 years ago would have ended as they began: with a humiliating police interview (see Kadish & Schulhofer 1995:362, nts. 7–11).[4]

In addition, and worth emphasizing, are other kinds of meaningful developments that reformers know to be indispensable for any enduring change in the actual implementation of

[2] Currently, New Jersey, Ohio, Michigan, Pennsylvania, Washington, and Utah do not require physical force to show nonconsent.

[3] Empirical studies indicate that shield statutes, while permitting more interrogation than initially anticipated (especially when the defense can show clear relevance), improve considerably the treatment of victims. See Kadish & Schulhofer (1995:377, n.17). The overall effectiveness of these statutes remains controversial. See generally Taslitz (1999).

[4] Worth emphasizing here is the unambiguous improvement in the prosecution of aggravated rape.

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rape law. These include efforts to effect attitudinal shifts regarding what is (and is not) proper, or at least permissible, sexual conduct and what is (and is not) proper, or at least permissible, behavior in response to this conduct. In many jurisdictions, for example, both police and prosecutors now receive special training in how best to recognize and respond to victims of rape and sexual assault. This training includes efforts both to dispel various rape myths (e.g., that victims somehow "ask" to be raped, that they "lead" their assailants on or in some way "tease" them, that forced intercourse is something that victims "deserve," etc.) and to take far more seriously the testimony of victims of acquaintance and date rape, especially those whose sexual choices and conduct have traditionally been taken to be provocative, improper, or immoral. Victims are now actively discouraged from finding fault in their own conduct and are provided support should they pursue legal remedies. Similar training is now common among certain health care professionals, including counselors and volunteers at hospitals and on high school and college campuses.[5]

This combination of statutory reform and attitudinal change has resulted in identifiable real-world implications for both the treatment of the victims of rape and the prosecution of their assailants. Therefore, it would certainly seem that the hard-working critics and reformers of American rape law, though plainly justified in their impatience and frustration with change that has been slow, inadequate, and incomplete, should take well-deserved pride in having won some important battles and should be guardedly optimistic that victory is possible in the war to reform the law of rape and sexual assault.

II.

But if in his 1998 book, *Unwanted Sex: The Culture of Intimidation and Failure of Law,* Stephen J. Schulhofer is correct, even though there have been significant changes in the statutes governing rape and some shifts in attitudes toward rape victims—changes and shifts resulting in some convictions impossible prior to the period of criticism and reform—the fundamental defects of American rape law have proved remarkably resistant to remedy. On his view, even important legal reforms—such as lowering (and in some cases eliminating) the resistance standard, improving the rules of evidence, adding rape-shield protections, and modifying or eliminating the marital exemption—have had little practical effect on the pursuit and disposition of a broad range of cases where the fundamental right of sexual autonomy is either

[5] Under the sections of the Violent Crime Control and Law Enforcement Act (1994), commonly referred to as the Violence Against Women Act, resources for these and other related purposes are provided by the federal government.

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infringed or violated. Schulhofer maintains that, in these cases (some of the more notorious and stomach-wrenching examples of which are summarized and used to great effect in *Unwanted Sex*), the operative standard of rape remains the unacceptably high standard of "forcible compulsion" (or the credible threat thereof), where force is typically understood to mean physical force plainly in excess of that required for achieving penetration.[6] "Despite three decades of supposedly dramatic change in cultural attitudes and legal standards," Schulhofer claims, "criminal law still fails to guarantee a woman's right to determine for herself when she will become sexually intimate with another person" (p. 9).

Now, Schulhofer's assertion regarding the failure of rape-law reform does not constitute empirical disagreement about whether, in fact, statutory reforms of the sort enumerated above have occurred. He recognizes that recent decades have brought sincere culturewide attitudinal changes regarding sexual choice and conduct, with attending commitments of resources for the appropriately sympathetic treatment of victims. As the early chapters of this serious and provocative effort in normative jurisprudence demonstrate, Schulhofer knows full well both that pre-reform American rape law was morally grotesque and that *some* real progress—moral, legal, and political—has been made. Indeed, the book's first five chapters offer an especially effective (albeit somewhat repetitive) overview of mid-20th-century American rape law. This overview includes the deficiencies of the law at that time, the controversies generated by recognition of the deficiencies, the statutory reforms triggered by these controversies, the constructive reaction of critics, especially feminist critics, to these reforms, and, finally, the judicial responses to the law both prior and subsequent to reform. So then, given that Schulhofer is certainly aware that legal reform, especially in areas requiring coeval transformations in social attitudes, is notoriously slow and predictably uneven in implementation, precisely what is the locus of his complaint? Why not be content to encourage diligent and continuing oversight of the reform process, fine tune as necessary, and be patient?

The quick answer is this: Rape-law reform has had positive implications for the prosecution of aggravated rape, that is, cases of nonconsensual sexual intercourse where, immediately prior to or during a sexual attack and so as to achieve penetration, assailants unambiguously employ (or credibly threaten to employ)

[6] The noteworthy exception is New Jersey, where the New Jersey Supreme Court has interpreted the statutory language governing sexual assault (which requires that "the actor uses force or coercion" to mean any amount of force used in the absence of "affirmative and freely-given permission to the act of penetration" (*State in the Interest of M. T. S.* [1992]). Thus even the force required to achieve penetration could suffice to fulfill the force requirement of the statute. Schulhofer provides a critical discussion of this case (1998:93–98).

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physical force intended or likely to result in bodily injury. However, the same cannot be said in cases where physical force is neither clearly present nor unmistakably implied. In jurisdictions where neither physical force nor resistance are now required for the crime of rape, reporting, prosecution, and conviction rates remain relatively unchanged (pp. 38–39). So, even where reform has resulted in statutory language facilitating prosecution of non-aggravated yet non- or not fully consensual intercourse, police and prosecutors tend to avoid such cases. And to make matters worse (in part because it undoubtedly reinforces this tendency), appellate courts resist understanding the law to exclude a requirement of physical force and reverse convictions in cases of non-aggravated yet non- or not fully consensual intercourse.[7] Though the reformers certainly intended to accomplish much more and had reason, given changes in statutory language, to think they had succeeded, their efforts were thwarted in significant part because of the deeply rooted perception, both popular and legal, that a necessary component of rape is force in the form of physical violence. Almost in spite of the language of the law, in the minds of citizens, including some rape victims, police, lawyers, and judges alike, when physical force is absent, so too is the crime of rape.

Of course, Schulhofer repeatedly bemoans the enduring predominance, in actual legal practice, of the physical force standard of rape. Along with other contemporary critics of American rape law, he believes that as long as this remains the effective standard in most all American jurisdictions, genuine rape-law reform of the sort to which women have a morally justified claim, and *ought* to have a legally justified right, will simply not occur. But more important, given his overall project, Schulhofer thinks that it is precisely because of the reformers' preoccupation with and failure to provide a more expansive and still-acceptable interpretation of the traditional "forcible compulsion" standard—an interpretation that would count as rape cases in addition to those in which physical force is employed—that the physical force standard has won by default. This preoccupation has drawn

[7] The legislative reaction to public outrage can result in statutory changes that explicitly exclude physical force as a requirement of felony rape. Such a change occurred in Pennsylvania, for example, in response to *Commonwealth v. Berkowitz* (1994), where a conviction was overturned by a court unwilling to interpret the force requirement of the Pennsylvania statutes to include repeated verbal expressions of "no." The effects are not unambiguously positive, for, as Schulhofer notes (1998:71–74), problems remain as to precisely what sorts of indicia should suffice to show there is coerced intercourse that should be felonious. For those thinking that expressions of "no" should count as a clear threshold, Schulhofer's discussion of the "no means no" standard serves as an effective corrective (1998:63–65). The admittedly awkward phrase "non-aggravated yet non- or not fully consensual intercourse" is used here and subsequently so as to avoid begging any questions concerning whether some or all sexual interactions occurring under circumstances where full consent is absent is or should be treated as a serious criminal offense. Of course, this says nothing about what "full consent" means or ought to mean.

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theoretical attention away from a more-promising avenue of reform, an avenue that does not proceed down the dead-end route now littered with either "better" interpretations of force, coercion, and consent, or alternatives to the standard that persist in taking the essential wrong of rape to consist in the use of physical coercion to achieve intercourse. For Schulhofer, the road to travel begins with a commitment to "sexual autonomy as a basic entitlement worth protecting in its own right" (p. 98). On his analysis, then, understanding the failure of rape-law reform means understanding the futility of tinkering with the forcible compulsion standard of rape; achieving success in reform entails adopting a different normative foundation, a foundation that grants pride of place to the fundamental right of sexual autonomy.

III.

Schulhofer's case for rape-law reform, based upon taking the right of sexual autonomy seriously, constitutes the theoretical core of his book.[8] But in order to understand why Schulhofer believes that acceptable and systematic rape-law reform ought to emanate from this normative commitment, and to determine whether his arguments for thinking this to be so are convincing, it is important to investigate certain central elements of his case for believing that rape-law reform has indeed failed. That is, it is important to see why he believes the American law of rape remains morally defective and will continue as such if an alternative moral basis for reform is not adopted. Notice, the key issue here is a normative one. There are certainly relevant empirical considerations lurking in the wings, such as whether, in fact, recent statutory reform will eventually (1) affect changes in arrest, prosecution, and conviction rates; (2) work as a deterrent to aggressive sexual conduct that was once regarded as acceptable and thus not treated as criminal; and (3) contribute to changes in attitudes regarding the choices and conduct of sexually emancipated women.[9] But Schulhofer's concern is of a different, explicitly moral, kind. For him, the basic question is this: What is the best *moral* standard for determining which sexual interactions ought to be the subject of the criminal law? Only when this question is answered correctly can reformers best determine how the

[8] See chaps. 6–8. The discussion of these chapters is critically evaluated in Sections VII and VIII.

[9] Of course, even if arrest, prosecution, and conviction rates have remained relatively constant, it does not follow that rape-law reform has failed. After all, it might be that changes in the law have had effects on the norms governing sexual interactions and thus that changes in the law are working as a deterrent to sexually aggressive conduct once generally regarded as consistent with social norms and legal obligations. See Bryden & Lengnick, "Criminal Law: Rape in the Criminal Justice System" (1996:1377–81).

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criminal law ought to respond to sexual conduct that is less than fully consensual.

Section IV, immediately below, identifies and explains, briefly, the legal context against which Schulhofer and various critics have raised fundamental objections regarding what they take to be the morally unacceptable state of contemporary American rape law. This section concludes with an important judicial response that challenges any expanded definition of rape; that is, any definition that would identify as rape a broad range of diverse cases of non-aggravated yet non- or not fully consensual sex. Section V develops a sympathetic reconstruction of this response, and employs this reconstruction in Section VI, as a challenge to the critics and reformers of contemporary rape law. In Section VII, after a presentation of the theoretical grounding of Schulhofer's own position and its implications, a critical evaluation of Schulhofer's theory and his likely response to the reconstructed challenge is offered. Section VIII includes some constructive criticisms of Schulhofer's attempt to extend his analysis of coerced consent to include certain "offers" made in contexts (e.g., the workplace) characterized by significant power differentials between persons. Section IX offers conditions and suggestions, generally friendly to Schulhofer's overall views and proposals for reform, for identifying wrongful sexual interactions occurring in certain institutional or professional contexts.

IV.

If any kind of sexual conduct is the proper subject of criminal prohibition, then aggravated rape—defined, as above, to mean nonconsensual sexual intercourse where, immediately prior to or during a sexual attack and so as to achieve penetration, the assailant employs, or credibly threatens to employ, physical force intended or likely to result in bodily injury—is certainly of this kind. Indeed, assuming that penal legislation would likely be the most effective (in terms of prevention and deterrence) and least intrusive (in terms of other individual and social costs) response to this conduct, aggravated rape falls noncontroversially within the province of the criminal law. For this conduct not only inflicts substantial and avoidable harm to individuals other than the perpetrator, but the nature of the resulting injury, to both body and mind, can be profound, often so profound as to affect the ability of persons, both immediately and long term, to take benefit from and enjoy other goods in which they have interests and to which they have rights. Because of the nature and extent of trauma suffered by victims, it is not hyperbole to claim that a person who has been raped once has likely been harmed repeatedly, if not permanently. Furthermore, as the physical and psychological harms of aggravated rape are not temporally limited

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to the moment of the assault or the time immediately thereafter, neither are the effective violations of fundamental rights. For this combination of psychological harm and personal degradation can affect the very capacity of persons to respect themselves enough to exercise those rights, the protection of which is a justifying purpose of civil society. Persons living in terror of profound personal violation are, in a very important sense, denied citizenship, and if the criminal law has any appropriate function it is to provide protections against intrusions of this gravity.[10]

But recall that the putative problem of rape-law reform with which Schulhofer is primarily concerned arises when the sexual interactions in question are *not* clearly the result of compulsion due to the use or threat of physical force. The tough cases are those of non-aggravated yet non- or not fully consensual intercourse. For reformers of the criminal law, then, the troublesome sexual interactions fall along that spectrum of cases where, though there are sufficient grounds for believing that some kind or degree of coercion is employed, that coercion does not rise to the level of compulsion resulting from the unambiguous use or credible threat of physical force. And it is easy to see why reformers would want the criminal law to reach these cases. For it certainly seems reasonable to believe that the harms and wrongs suffered by persons induced to have sex because of nonphysical force or coercion can be comparable with—if not, in some cases, identical to—the harms and wrongs resulting from aggravated rape.[11] Why, then, as is currently the case, should the criminal law shy away from treating these cases as very serious offenses? Why not treat all cases falling along the spectrum of non-aggravated yet non- or not fully consensual sex as criminal wrongs comparable with, if not equal to, aggravated rape?

In refusing to follow the path that these questions suggest, that is, the path that would take as felonies all (whether aggravated or not) cases of intercourse that are less than fully consensual, several appellate courts rendered controversial decisions that provoked the ire of feminist critics and reformers. These decisions reversed (or nearly reversed) rape convictions in two kinds of cases: (1) cases in which the evidence of the actual use of physical force (or the threat of it) to achieve intercourse was controversial, ambiguous, or weak, and (2) cases in which the coercion employed involved neither physical force nor any threat of it. In these cases, the courts relied on a well-established and

[10] Thus if the least controversial principle for determining when certain kinds of conduct ought to fall into the domain of the criminal law—the harm principle (as formulated by Feinberg [1984:26]—is combined with the well-established facts about the consequences of aggravated rape on its victims, then there is virtually no question that rape ought to be criminal and ought to be attended by serious penalties.

[11] For a relatively early discussion of the variables affecting the nature and extent of harm to rape victims, see Burgess (1983:97–113). For a recent overview, see Foa & Rothbaum (1998:chaps. 2 & 3).

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especially narrow reading of the statutes. This reading involves three important components. First, it takes the actual use or credible threat of physical force to achieve intercourse as a necessary condition of rape (or, where "rape" does not appear in the criminal statute, as a necessary condition of the most serious forms of sexual assault). Second, it denies any interpretation of "force" or "forcible" that extends beyond the actual use or credible threat of physical force. Third, and insofar as a person is legally capable of giving it, this reading takes nonconsent to be a necessary, but not a sufficient, condition of rape.

Now, this reading of the statutes presupposes certain commitments—rooted in the common law and found both implicitly and explicitly in important appellate decisions—that have been subjected to a range of criticisms. But before identifying and examining the details of some of these commitments, it will prove helpful to review quickly a pair of cases, well rehearsed in academic discussions of rape and considered by Schulhofer, in which this reading of the statutes figured prominently. For many critics of rape law, these and similar cases exemplify most all of what was wrong in late-20th-century rape law, and because the decisions in these cases rely on the narrow reading of the "force" or "forcible compulsion" requirement of the statutes, that reading has become the lightning rod of feminist criticism.

State v. Alston (1984) is an example of the first kind of case (where convictions are reversed because the evidence of the actual use of physical force was controversial, ambiguous, or weak). In *Alston*, the North Carolina Supreme Court reversed the rape conviction of Edward Alston, who, according to the testimony of his accuser and former girlfriend, confronted her on the street, verbally abused her, grabbed her arm so that she would walk with him (but released it at her request and as a condition of her willingness to proceed), and insisted (without employing physical force) that she go with him to the house of his friend. The accuser testified that she made it clear that she did not want to have sex, but once in the friend's house, Alston pulled her from a chair, removed her clothing, pushed her legs apart, and penetrated her while she remained passive and cried. The court agreed that she had not consented to sex and that she had a general and perhaps reasonable fear of Alston, based on their past relationship (a difficult and apparently abusive one) and based on the events of the day leading to their arrival at the house. But this generalized fear was not deemed pertinent to whether the specific act of intercourse in question was indeed rape. Since the evidence did not show conclusively that Alston had literally employed or credibly threatened physical force immediately prior to the act of sexual intercourse in question, the force condition had not been adequately fulfilled. Because non-

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consent is not a sufficient condition of rape, the conviction could not be sustained.[12]

In cases of the second kind (where the coercion resulted from neither physical force nor any threat of it), the result was the same. Consider *Commonwealth v. Mlinarich* (1985). Joseph Mlinarich and his wife had custody of a 14-year-old girl (the daughter of a neighbor), who had been incarcerated in a detention home prior to taking residence at the Mlinarich home. According to the testimony of the girl, over a period of time and on several occasions, Mlinarich threatened to have her returned to the detention home if she refused to allow him to fondle her and, eventually, to engage in intercourse. After several unsuccessful attempts, Mlinarich succeeded in having intercourse with the girl, who did not resist him physically, but testified to crying during intercourse. Mlinarich was convicted of several offenses, including attempted rape and corrupting the morals of a child, but his conviction for rape was reversed because the court found that the forcible compulsion requirement of the Pennsylvania statute had not been met.[13] Worth noticing here is that the court did not consider the issue of whether there was consent, let alone legally effective consent. Nor should it have, for given that the law requires forcible compulsion and the court understood this condition to mean physical forcible compulsion, of which there was none, the question of consent became irrelevant.

As a reaction to *Mlinarich* and the more recent *Commonwealth v. Berkowitz* (1994)—a case in which the Pennsylvania Supreme Court reversed the conviction of Robert Berkowitz, a college student, who, according to the testimony of his accuser, ignored her

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[12] Alston was convicted of second-degree rape, which the North Carolina General Statute § 14-27.3(a) defines as follows:

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse: (1) With another person by force and against the will of the other person; or (2) Who is mentally defective, mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated or physically helpless.

The North Carolina Code (§14-27.2) also includes a crime of first-degree rape, which differs from second-degree rape in that the assailant

> (a) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon, or
> (b) Inflicts serious personal injury upon the victim or another person, or
> (c) The person commits the offense aided and abetted by one or more persons.

See also *People v. Warren* (1983).

[13] Under 18 Pa. C.S. § 3121, first-degree felony rape occurs when:

> A person . . . engages in sexual intercourse with another person not one's spouse: (1) by forcible compulsion; (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3) who is unconscious; or (4) who is so mentally deranged or deficient that such person is incapable of consent.

The decision in this case precedes the change in Pennsylvania law that allows convictions for the second-degree felony of indecent assault.

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verbal objections and engaged in intercourse without her consent (though without force or a threat of it)—Pennsylvania is currently among the few jurisdictions in which forcible compulsion is no longer required for conviction of the significantly less-severe charge of indecent assault.[14] But in all jurisdictions, force or forcible compulsion remains a necessary condition for rape (or the most serious kinds of sexual assault) and, with the exception of cases where certain "special circumstances" are present (e.g., if the victim is mentally incompetent, unconscious, underage, or in other cases where consent is regarded as legally ineffective), there are no clear statutory provisions for serious criminal charges when forcible compulsion is absent (Kadish & Schulhofer 1995:339).[15] As long as the victim is a conscious, mentally competent adult, the courts generally read the language of the law to mean that rape occurs when and only when the assailant employs physical force to overcome the will of a nonconsenting victim. Thus rape occurs when there is physical force and nonconsent, but not nonconsent alone, even if clearly expressed. Rape, as several justices in several cases remind us, is a crime of physical violence.

The obvious and rather general response to the courts' arguments in *Alston and Mlinarich*—in effect, to the physical violence conception of rape—begins with the premise that the narrow reading of the statutes is morally defective. Certainly, Edward Alston and Joseph Mlinarich employed coercive and morally objectionable means—as coercive and morally objectionable in their use and as harmful in effect as a credible threat of physical force—to achieve intercourse with women who did not consent and would not have engaged in intercourse in the absence of these means.

Given that this is certainly the sort of immoral conduct that the criminal law ought to prohibit and does in fact prohibit effectively in other contexts (consider extortion), it follows that (as argued by Justice Spaeth in his dissent in *Mlinarich* and as urged by many critics and reformers) an alternative and more expansive reading of the force requirement of rape is both morally required and legally justified. Surely if, given the victims' nonconsent, a more expansive interpretation of the force requirement had been adopted, one that would count as force or forcible compulsion coercive measures in addition to those resulting

[14] The Pennsylvania statute 18 Pa. C.S. § 3126 (enacted after both *Mlinarich* and *Berkowitz*) defines "indecent assault," a second-degree felony punishable by not more than two years of imprisonment, as "indecent contact with another . . . without the consent of the other person."

[15] Other factors, such as the use of a deadly weapon or the use or threat of serious physical violence (such as mutilation or strangulation), will, in some jurisdictions, justify the charge of first-degree rape or sexual assault, with dramatically increased penalties. But mere force or forcible compulsion remains a necessary condition upon which such additional aggravating conditions are added (see Kadish & Schulhofer [1995:333]).

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from physical harm or the fear of harm, then the convictions of Alston and Mlinarich would have been sustained. Furthermore, given the experience in cases like *Berkowitz*, this more expansive reading could lay the groundwork for accepting nonconsent as a sufficient condition of felony rape. Thus, if the harm or wrong of rape is taken to extend beyond the fact or fear of physical harm so as to include the moral wrong of intimidation—here, a wrong constituted by an assault on an individual's dignity and autonomy, resulting from the imposition of coerced choices concerning matters of profound importance—then certainly the fact of nonconsent can and ought to suffice for the offense of rape. Indeed, although the penal law should certainly distinguish varying degrees of felony rape, commensurate with varying degrees of aggravation and intimidation, should not the entry level of this offense consist simply of nonconsensual sexual intercourse?

The courts in *Mlinarich* and *Berkowitz* rejected this argument, and in so doing echoed claims offered by the dissent in the widely discussed and very troublesome *State v. Rusk* (1981). The arguments of these courts reveal commitments, alluded to earlier, including a set of beliefs concerning the history, language, and legislative intent of the statutes, the legal costs and risks of alternative readings of the statutes, and the moral purpose of rape law. Regarding the first set of these commitments, Judge Wieand, writing for the majority in *Mlinarich*, was certainly correct to argue that, on grounds of common law, precedent, and legislative intent, the correct reading of the (at that time) Pennsylvania statute takes "forcible compulsion" to require physical force.[16] Setting these concerns aside, however, and in response to dissenting Judge Spaeth's claim that "forcible compulsion" should be expanded to include any "compulsion by physical, moral, or intellectual means or by the exigencies of the circumstances" (*Commonwealth v. Mlinarich* 1985:413), Wieand argues as follows:

> If a man takes a destitute widow into his home and provides support for her and her family, such a definition of forcible compulsion will convict him of attempted rape if he threatens to withdraw his support and compel her to leave unless she engages in sexual intercourse. Similarly, a person may be guilty of rape if he or she extorts sexual favors from another person upon threat of discharging the other or his or her spouse from a position of employment, or upon threat of foreclosing the mortgage on the home of the other's parents, or upon threat

[16] Prior to the time *Mlinarich* was decided, the Pennsylvania State Legislature had the opportunity to adopt a rape statute including a third-degree felony of "intercourse without legally effective consent," following the *Model Penal Code*'s offense of "Gross Sexual Imposition" (see the *Model Penal Code* [1985], §213.1. [2]). This offense did not require physical force. The legislature explicitly rejected this opportunity, however, leading the court to reject any notion that the legislative intent could be taken to include anything but the narrow reading of "forcible compulsion."

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> of denying a loan application, or upon threat of disclosing the other's adultery or submission to an abortion. An interpretation of forcible compulsion which employs an ambiguous, generic definition of force will create the potential for a veritable parade of threats, express and implied, in support of accusations of rape and attempted rape. To make it even more troublesome, such an interpretation of forcible compulsion will place in the hands of jurors almost unlimited discretion to determine which acts, threats or promises will transform sexual intercourse into rape. Without intending to condone any of the foregoing, reprehensible acts, our use of them serves to illustrate the intolerable uncertainty, which a wholly elastic definition of rape will create. (1985:402)

To which he adds:

> To allow a conviction for rape where the alleged victim has deliberately chosen intercourse in preference to some other unpleasant sensation not amounting to physical injury or violence would be to trivialize the plight of the helpless victim of violent rape. (1985:402)

Though it affirms the moral wrongness of extorting or attempting to extort sexual intercourse from persons via the means employed by the likes of Edward Alston and Joseph Mlinarich, Wieand's argument is noteworthy in that it raises serious obstacles for any position that would jettison the narrow reading of the statutes (as it applies to felony rape) in favor of a more expansive reading of forcible compulsion, a reading designed to identify as serious felonies the harms and wrongs of intimidation understood to include both psychological injury and the coercive assault on an individual's dignity or violation of her autonomy. The criminal law certainly ought to prohibit serious other-regarding and avoidable wrongdoing, but it must also take into consideration the costs, both legal and moral, of implementing such prohibitions. Of course, this is the heart of Wieand's argument. Judicious balancing must consider the interests and rights of not only the victims of various degrees of moral wrongdoing but also those accused of such wrongdoing. It is certainly pertinent, then, to ask whether an expanded definition of force—in effect, an expanded definition of rape—would satisfy the worries Wieand raises. It is equally appropriate to raise the highly sensitive and difficult question of whether the harms and wrongs suffered by victims of non-aggravated yet non- or not fully consensual intercourse are of a different and lesser kind than that of victims of aggravated rape. If rape is to denote more than sex by physical forcible compulsion against the will and without consent, the challenge of Wieand's argument must be addressed.

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V.

Sympathetically interpreted, and speaking generally, the challenge from *Mlinarich* (and from the court in *Berkowitz* and the dissent in *Rusk*)[17] consists in affirming this conditional: If the crime of rape is expanded so as to include sexual interactions in addition to aggravated rape, then the implementation costs of the criminal statutes—particularly those understood in terms of the fundamental rights, especially the due process rights, of the accused—jump dramatically and, in the final analysis, intolerably. In addition to the serious evidentiary problems that haunt many cases where there is allegedly nonconsent but no unambiguous use or threat of physical force, there endures, as Wieand emphasized, the core problem facing any attempt to expand the physical forcible compulsion standard.[18] This problem is the absence of a reasonable and clear criterion for distinguishing non-aggravated yet non- or not fully consensual intercourse that should count as rape from non-aggravated yet non- or not fully consensual intercourse that amounts to "unscrupulous seduction," "reluctant submission," or just regretted intercourse. The absence of such a criterion leaves unidentified or unclear the wrong of rape in such cases. It also makes it difficult to interpret and calculate the nature and degree of the harm and wrong to victims, and it leaves imprecise the conduct that the criminal offense of rape denotes. This denies the accused fair warning about what constitutes an offense, denies or blurs distinctions necessary to differentiate offenses of varying degrees of severity, and throws open the door for punishments that are excessive or simply not deserved (see the *Model Penal Code* [1962], §1.02. [c], [d] and [e]).

[17] In *State v. Rusk*, by the time Rusk's conviction of rape was eventually sustained, it had been considered by 23 judges (11 of whom would have acquitted). Although the Court of Appeals prevailed (four to three), the issue of whether Rusk was a rapist turned on the evidentiary question of whether his "light choking" of the victim could reasonably be taken as sufficient physical violence to justify a conviction on the charge of rape. The dissent argued that, though Maryland no longer required resistance to the utmost or to a point that would be "foolhardy,"

> acquiescence in the act of intercourse [must] stem from fear generated by something of substance. She may not simply say, "I was really scared," and thereby transform consent or mere unwillingness into submission by force. These words do not transform a seducer into a rapist. She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend. . . . She must resist unless the defendant has objectively manifested his intent to use physical force to accomplish his purpose. (*State v. Rusk* [1981:255], Cole, J. dissenting)

[18] The evidentiary problems alluded to are not reducible to the likely absence of corroboration of testimony regarding persons, places, and events. In cases where a determination of coercion (or of various degrees of coercion) can turn on how participants interpret the actions of others and their beliefs regarding how their own actions are interpreted by others, all manner of biased inferences are likely to enter the mix. Allowing jurors to speculate about the mental states of persons who themselves may interpret facts through a distorted lens is a recipe for mischief.

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Notice that this challenge does not depend on (though it is surely strengthened by) the truth of the empirical hypothesis (apparently assumed in *Mlinarich*) that the further one moves away from aggravated rape, especially aggravated stranger-rape, the less physical or psychological harm can be reasonably attributed to the victim. Even granting that these harms suffered by *some* victims of non-aggravated, yet less than fully consensual, intercourse can be serious and may be comparable to those of aggravated rape, on a sympathetic interpretation of this challenge the threat of imprecisely defined felony rape to fundamental due process rights simply overwhelms these considerations. Without a clear and reasonable standard identifying the kinds of non-aggravated, yet less than fully consensual, interactions that should count as serious felonies, not only will the accused be denied fair warning concerning *exactly* what kind of behavior counts as an offense, but any contributory liability of the accuser, hence any diminution of culpability of the accused, will likely be underconsidered, if indeed it is taken into account at all. The challenge is strengthened, then, by the empirical generalization that, for a variety of reasons, including the vagueness and instability of the mores currently governing such sexual interactions, the further a sexual interaction is from aggravated rape (especially aggravated stranger-rape) the greater the likelihood that accusers may bear some (if even indirect) responsibility for the conduct of the accused.

Of course, all this bears direct relevance to the substantive due process rights of the accused, for at issue here are considerations of the relative severity of offenses, the contributory liability of the relevant parties, and the degree, if any, of appropriate punishment. Properly understood, meeting this challenge successfully involves the formidable task of showing how the relevant rights and interests of both the accuser and the accused could still be protected adequately if the physical forcible compulsion standard were expanded and felony rape were taken to denote a broad range of sexual interactions, in addition to aggravated rape.

So the courts have been unwilling to set foot on a complex slippery slope where the further the downward distance away from aggravated rape the higher the rights-costs to the accused and the lower the harm- and wrongs-costs to the victim. On this sympathetic reconstruction of the courts' challenge, moving ever so slightly away from the traditional forcible compulsion standard starts the downward slide ending in that absurd place where rape is legally indistinguishable from rather ordinary seduction and, on the worst fears of some, where convictions for rape are possible when the "victim," motivated by regret, remorse, or retaliation (or the subject of self-deception or ignorance of the norms and conventions governing sexual interaction), succeeds

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in convincing prosecutors and juries that the "right" kind of consent was not present. In the absence of any nonarbitrarily identified point on this slope—where all the relevant rights and interests of all the relevant parties are reasonably balanced—the courts found it better not to set foot across the line set by the traditional forcible compulsion standard, especially when legislators had plainly refused to do so, but even where they had been willing to do so (see also *Goldberg v. State* [1979:1219]).

VI.

Some feminist critics and reformers believe that, once the patriarchal assumptions of the narrow reading of the forcible compulsion standard are exposed, this challenge can be addressed directly and effectively. But others, famously Catharine MacKinnon, have expressed deep suspicion, in effect denying the meaningfulness of the distinctions on which the challenge is based and, it is worth pointing out, on which much of the discussion of rape-law reform depends.[19] Given what MacKinnon (1989) takes to be the ubiquity and pervasiveness of male dominance, she questions the very ability of women to distinguish between rape (whether defined to require the use or threat of physical force or not) and consensual intercourse; therefore, if women cannot make this distinction, it is hard to imagine how anyone else, especially male legislators and jurists, can. Thus the slippery slope argument previously noted would seem silly indeed, for it depends on even finer distinctions: between non-aggravated rape and unscrupulous seduction, unscrupulous seduction and reluctant submission, and reluctant submission and fully consensual intercourse. If MacKinnon is right, and the difference between the top and bottom of the slippery slope under patriarchy is a hopeless muddle, there is little point in trying to meet the challenge posed earlier.

It is a great strength of Schulhofer's book that he considers the arguments of such critics as MacKinnon in detail and with care, sensitivity, and remarkable fairness. In addition to providing the backdrop against which his own views are motivated, this gives readers a solid sense of the exceptional range and diversity of opinion not only about how to understand the current state of rape law but also about the possibility of reasonable and meaningful reform. Sometimes, and the treatment of MacKinnon's view is a case in point, he seems too kind, however. Schulhofer does provide a deeply critical account of her view, which incorporates several now-standard objections and a few new ones, but he seems shy about pushing the view to its absurd conclusions. For example, if MacKinnon is correct in thinking that in the current

[19] See Schulhofer's discussion of MacKinnon (pp. 53–59).

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context women cannot be sure about whether and when consent is present and thus when intercourse is or is not distinguishable from rape, it then follows that women victims are not reliable witnesses in criminal rape proceedings. So the matter is not simply (though these are certainly important), as Schulhofer notes, that MacKinnon's views do not credit women with knowing when they chose freely, or hold morally responsible both men and women for their sexual conduct. Taken to its end, MacKinnon's view provides ammunition for defense attorneys wishing to load and fire one of the oldest weapons in the sexist arsenal—the charge that, appearances to the contrary notwithstanding, women do not really know what they want and are thus not really capable of stating the truth about whether they have freely chosen their own courses of action. It is hard to imagine a more bitter irony for feminism.[20]

Schulhofer also provides clear and effective consideration of influential feminist critics and reformers—notably, Susan Estrich (1987) and Lois Pineau (1989)—who, unlike MacKinnon, give genuine credence to the challenge offered previously and who believe it can be met head on. These theorists recognize that if felony rape is to be acceptably and effectively extended to include sexual interactions in which there is no physical force or in which the use or threat of physical force is ambiguous, then, *pace* MacKinnon, the critical question is indeed that of consent. More precisely, it is a question of providing a morally reasonable legal standard for determining when coerced consent to sexual interaction is, or must be presumed, present and when it is not. If such a standard is provided, the slide down the slippery slope could be stopped and a reasonable distinction could be made (as the challenge demands) between non-aggravated, yet non- or not fully consensual intercourse that should count as rape and non-aggravated, yet less than fully consensual intercourse that, though morally objectionable if not reprehensible, should not be criminal.

Although their proposals are different, and importantly so, both Estrich and Pineau criticize the essentially male-biased, patriarchal nature of the reliance on the physical force standard of

[20] Oddly enough, and as Schulhofer notes (p. 83), MacKinnon does say that, as a matter of legislative reform, force should be extended to mean compulsion and the absence of consent should be irrelevant, not an element of the crime. This is, of course, consistent with the view that, under patriarchy, the mere fact of a woman's consent cannot be taken to indicate whether an action is compelled. The overall suggestion is unacceptable, however, not only because, as Schulhofer notes, it provides no criterion for determining what counts as compulsion but because, paradoxically enough, it provides no criterion for determining what counts as the absence of consent. On MacKinnon's overall account, it is possible that the absence of consent is "present" even when a woman consents and believes the consent is genuine. Thus there can be an absence of consent even when sincere consent is present, and there can be rape even when a woman's consent is explicit and sincere. It is difficult to resist saying that in the absence of the absence of consent determinations of compulsion become a rather mysterious business.

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consent. As Schulhofer agrees, they are correct to find that the physical force standard reflects an essentially male understanding of consent and coercion. This understanding disregards or rejects such reactions as stunned passivity, crying, or even (and now most controversially) clear verbal expressions of "no" as reliable indicia of nonconsent or coerced consent. It is important to recognize, however, that the physical force standard enjoys prominence only because the use or threat of physical force to achieve intercourse constitutes virtually unimpeachable evidence of the strongest and most unambiguous kind of coercion, that is, evidence of an action so contrary to the victim's considered and deeply held desires that her acquiescence could only be obtained by physical injury or the threat of it. For this reason there is little question of the very serious wrong of aggravated rape: the wrong in addition to physical or psychological harm that is of the morally powerful sort constituted by the violation of a person's will, of her very capacity for free choice and action. Although, when it is employed to the exclusion of other standards, the use of the physical force standard reflects patriarchal biases, it does not follow that this standard does not serve as a model indicator of evils of the most serious kind, including both harms and wrongs. For reformers to respond successfully to the previously described challenge, they must, among other things, find additional and equal or comparable indicia of evil. But what additional or alternative standards of nonconsent or coerced consent would prove morally and legally acceptable?

Estrich endorses a *mens rea* standard of consent in non-aggravated rape, and in so doing would reject the narrow reading of the statutes noted earlier and would allow nonconsent or coerced consent to suffice for "simple" (i.e., non-aggravated) rape. The standard of nonconsent or coerced consent would then be whether the assailant intended to use coercive means to achieve intercourse, or whether he is negligent in not knowing he was employing coercive means to that end (and, there can be negligence even if the assailant honestly but unreasonably believes consent is present) (Estrich 1987:98).

This appeal to a *mens rea* standard is susceptible to several often-stated disadvantages when compared to an *actus reus* standard, whereby determinations of consent are made by looking to what occurred (the proscribed action) and asking whether consent can be reasonably inferred, given evidence concerning the nature and circumstances of the event. Not the least of these disadvantages is that if consent is to be read from a man's intentions, given only how he interprets the conduct of a woman (especially in response to assertive if not aggressive attempts to achieve intercourse), then the woman's consent will be a function of the male's patriarchal misunderstanding of his victim's behavior. Thus nonconsent will be evidenced by fistfights, since

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that is how a "reasonable person" (read "real man") responds to coercive pressure. But little or nothing falling short of earnest physical resistance (even when it would be irrational for a woman to so resist) counts as nonconsent. Furthermore, employing a *mens rea* standard means placing victims on trial, especially in cases when there is or has been an intimate relationship between the accuser and the accused. Because the surest way to defeat *mens rea* is to establish consent, it would be unfair to the defense if a vigorous interrogation of the person whose testimony is most pertinent to the question of whether consent was given—the accuser—were blocked. To find the absence of *mens rea* in non-aggravated rape, juries must assess whether the accused was reasonable in believing there was consent. But how can they do so in the absence of physical forcible coercion if they have only limited knowledge of the accuser's conduct, demeanor, and, where pertinent, history with the accused?

Nevertheless, these disadvantages disappear when it is remembered that the present problem concerns finding a criterion of nonconsent or coerced consent in *non-aggravated* sexual interactions and *not* in cases where coercion is plainly present, i.e., in cases of aggravated rape. The *actus reus* standard of consent enjoys favor with the courts only because they assume that the only real rape is aggravated rape; so, when forcible compulsion is employed it seems foolish to take seriously the idea that the assailant should be exonerated because he did not intend to use coercive means to achieve intercourse. In fact, and as Estrich effectively argues, the problem of a patriarchal understanding of reasonable resistance would apply more powerfully to an *actus reus* standard of consent if such a standard were to be employed in cases of non-aggravated rape (1987:95–97). After all, absent any alternative to a physical force standard of non- or coerced consent, the interpretation of the conduct of alleged assailants and their accusers falls on jurors or jurists who, influenced by the same patriarchal understanding of coercion, will find nonconsent wherever there is physical force, but in precious few other cases. Furthermore, if an *actus reus* standard were employed when there are charges of non-aggravated rape there would be no good reason to shield putative victims from vigorous and extensive interrogation. For, if physical forcible compulsion is absent reasonable mistakes about consent are possible, as are questions concerning the contributory liability of victims and the degree of harm and wrong of the conduct.

In her defense of an *actus reus* standard of consent in cases of non-aggravated rape, Lois Pineau provides precisely the sort of nonphysical force standard that would address the concerns raised by Estrich. Pineau defends a standard whereby consent is determined by appealing to a highly moralized model of exceptionally communicative sex such that if it is reasonable to believe

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(on a nonpatriarchal understanding of reasonableness) that a sexual encounter does not conform to the "kind of sex" consistent or compatible with this model, then it is also reasonable to believe that a reasonable woman would not have consented to that encounter (1989:221–25, 233-37). Assuming that on this standard, nonconsent could be established in the face of defense efforts to defeat *mens rea* via assertions of "reasonable" misunderstandings and without subjecting the victim to extensive courtroom interrogation (though this surely would establish a near requirement that the accused take the stand in his own defense), the alleged defects of an *actus reus* standard in non-aggravated rape could be remedied. The result, then, could well be precisely the sort of response that could succeed in addressing the reconstructed challenge previously offered; that is, a response that provides a morally reasonable legal standard for determining when consent to a non-aggravated sexual interaction is coerced.

Schulhofer will have none of this, however. In his critical evaluation of Pineau's position, he demonstrates precisely why an *actus reus* standard of this kind will not establish the morally reasonable point at which the slide down the slippery slope can be stopped (pp. 85–88). In addition to creating troublesome evidentiary and burden-of-proof problems (which Schulhofer does not address), a morally fundamental problem with a "kind of sex" *actus reus* standard is its paternalistic interference with the choices of women whose considered sexual preferences are for precisely the sort of sexual interactions that Pineau's model eschews as unreasonable.

Schulhofer reads Pineau's proposal as violating the autonomy of women who in fact make noncoerced choices to engage in the "kind of sex" that Pineau finds presumptively nonconsensual. This may be an unfair reading, because Pineau does allow that if a man were to communicate properly his interest in a certain kind of sex and the woman consents to this request, the sexual encounter could in fact be deemed consensual and compatible with the woman's autonomy. Therefore, if the woman does not give her express consent he should presume she is not interested. Pineau might argue that the autonomy of the woman has been respected if the man thus seeks the consent of a woman to engage in the "wrong" kind of sex. But surely this will not do. For precisely the problems that moved Pineau away from a *mens rea* standard are now resurrected. By what criterion other than those of the man's perceptions will determinations of whether there was full consent to presumptively suspect sex be made? How will the man ever really know if he has bona fide consent to certain sex acts of the "wrong" kind? To what degree, if any, would apparently genuine consent (but in some final analysis nonconsent) mitigate the liability of the man? Indeed, how can wrong be affixed in these circumstances?

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So, this brings us back to a *mens rea* standard, especially to Estrich's proposal, which would hold men criminally liable for the use of coercive measures (e.g., "extortionate threats" and certain forms of misrepresentation) of the sort at home in other areas of the law, specifically property law. Schulhofer considers this proposal "plausible but vague" and provisionally rejects it because, following other critics, he finds these criteria, at least in their unexplored form, too broad and thus plainly inadequate for establishing *mens rea* (presumably on grounds of both fair warning and contributory liability) (p. 84). Even though he is correct to reject Estrich's unexamined appeal to categories such as extortion and misrepresentation, Schulhofer recognizes the great advantages of finding a standard that could establish criminal liability for sexually coercive conduct that results in serious harm and wrong even when there is no overt use or threat of physical force, no physical injury, and no physical resistance. As in other areas of the law, if this proposal could be successfully explicated and modified assailants would be held criminally liable for coercive conduct resulting in serious harm and wrong; they would not be allowed to hide behind a physical force standard when they are plainly culpable for willfully coercive conduct resulting in serious and complex injury. If a revision of Estrich's proposal were forthcoming (and in effect Schulhofer provides this)—which could address adequately the due process considerations previously offered—victims of coercive sexual conduct could be treated as respectfully as victims of extortion or blackmail.

VII.

Recall that Schulhofer believes that as long as the preoccupation with the force standard of consent endures, little progress will be made in finding an acceptable solution to the root problem for rape-law reform, that of finding a morally reasonable legal standard for consent in non-aggravated sexual interactions. As noted earlier, Schulhofer understands the failure of rape-law reform to consist precisely of its neglect of sexual autonomy as an entitlement deserving of protection in its own right. So, on his view, successfully addressing the failure of rape-law reform involves shifting attention away from force and toward sexual autonomy, which Schulhofer defines as the "right of self-determination in matters of sexual life" (p. 11). Only with this shift will the law begin to do what it ought to do: guarantee a woman's right of sexual self-determination, which includes appropriately unencumbered decisions concerning when, with whom, and under what circumstances to be sexually intimate.

This strategy presupposes the important moral premise that the correct standard for determining whether the basic moral

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rights of persons have been violated or in some other way unjustifiably infringed is undeniably lower than that provided by physical violence or the unambiguous threat thereof. This premise has plainly been affirmed by and incorporated into the law (especially in constitutional jurisprudence), and it is certainly operative (in both civil and criminal law) when all manner of conduct legally recognized as rights-violating is proscribed or actionable—consider especially conduct involving either psychological coercion not necessarily based upon fear of physical injury (e.g., extortion and blackmail) or deception (e.g., fraud). Schulhofer takes this moral premise to the law of rape, and he does so by providing an analysis of autonomy (and, *a fortiori*, of sexual autonomy) that he contends will entail a solution to the persistent problem of determining when consent to non-aggravated sexual interactions is present and noncoerced, and when it is not. But the eventual success of his strategy depends on whether he can derive from his commitment to sexual autonomy a solution to the problem of consent that will adequately meet the due process concerns raised by the reconstructed challenge offered in Section V. Can this commitment to sexual autonomy as something to which persons have a fundamental right be made consistent with other fundamental rights, specifically those of due process?

As Schulhofer notes, philosophical concerns with autonomy are both deeper and broader than those of the law. Philosophers' analyses of autonomy are a honeycomb of complexity, many chambers of which bear little direct relevance to the far-narrower conception of autonomy traditionally of concern in and to the law (p. 105). Schulhofer recognizes that if he is to succeed in showing how an appeal to autonomy and the right to sexual autonomy will address the problem of consent he must distinguish legal autonomy from philosophical autonomy without losing the moral import lying at their intersection. After all, in the context of moral philosophy at least, autonomy (or, more accurately, the capacity for autonomy and the ability to exercise it) has been taken to have fundamental moral value partly because of its putatively indispensable connection to the ascription to persons of both rights and obligations. Getting clear about the minimal conditions of autonomy in this philosophical context thus bears direct relevance to getting clear about what the law should do about autonomy and, in the context of rape-law reform, what the law should do to respect properly the right to sexual autonomy.

To determine whether a person's actions or choices are autonomous, one cannot rely simply on evidence showing that she acts or chooses in accord with her immediate needs, wants, desires, or preferences. Heroin addicts need heroin, but their choice to inject their next fix is not autonomous simply because this need is present. A woman who desires to avoid death or seri-

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ous injury does not, simply because this desire is present, act autonomously when she acquiesces to a sexual attack. So determining whether a person's acts or choices are autonomous means knowing more, sometimes a good deal more, about her motivations and dispositions. It means knowing whether, in some nontrivial sense, the needs, wants, desires, preferences, or, perhaps most important, principles on which she acts are in fact hers, that *she* has freely chosen which of her needs, wants, desires, preferences, or principles will be effective and that, in a particular case, her decisions and choices are compatible with these freely-chosen sources and causes of action.[21]

Though some philosophers are deeply skeptical about whether and to what extent persons ever freely select all or even part of their second-order dispositional and motivational structure (Schulhofer avoids philosophical debates concerning the possibility of "full" autonomy), there is agreement that the presence or absence of certain factors or forces is plainly relevant to determining whether a person's acts or choices are autonomous. Thus, no matter how one falls on the metaphysical problems of free will and autonomy, one can agree that *if* there are such things—if there are free persons who can act and choose autonomously—then certain conditions must be present and others not.

Nevertheless, as Schulhofer correctly argues, not all of these conditions are relevant to legal autonomy; that is, they are not all relevant to determining when the right of autonomy and of sexual autonomy is at stake in the narrow and quite specific sense in which another individual should be held legally liable for violating or infringing this right. Men have no affirmative legal duty, for example, to provide women with the financial resources necessary to avoid the circumstances in which they must choose to labor for exploitative employers. Nor does respecting the right of autonomy imply that an employer who hires a woman whose choice to work is not autonomous (for reasons having nothing directly to do with the employer) should be held legally liable for violating her autonomy (p. 108).[22] Even if a mature woman's choice to engage in sexual intercourse on a particular occasion (she acts impulsively, e.g., or out of financial desperation) were not the result of her careful, considered, and rational reflection about when, in general, to have sex and when, in general, to permit certain needs, wants, desires, and preferences to be effective, the *mere* absence of fully autonomous choice is not sufficient to hold her sexual partner legally liable for violating her rights. As

[21] These comments concerning free will and autonomy are influenced by Harry G. Frankfurt's well-known paper, "Freedom of the Will and the Concept of a Person" (1971:5–20).

[22] For this reason, a man who hires a prostitute, pays what she asks, and treats her respectfully is not violating her sexual autonomy, not raping her. Schulhofer's arguments are telling against persons, such as MacKinnon, who confuse general and global injustice with individual wrongs. (See Schulhofer, p. 109).

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Schulhofer repeatedly insists, understanding autonomy as a legal entitlement means understanding the purpose it serves, and apparently this purpose does not include global considerations affecting autonomy (such as the maldistribution of important social and economic resources or opportunities) or those for which an individual herself or her sexual partners are neither directly nor indirectly responsible. Neither a person's poverty nor her weakness of will is sufficient to ground another person's legal liability.

The purpose served by the legal recognition of autonomy is to protect persons from coercive conduct designed to elicit actions inconsistent with their considered choices, that is, choices inconsistent with their considered second-order dispositions and motivations. Applied for the appropriate legal purposes to the realm of sexual choice and conduct, this means that "A person violates another person's autonomy—and therefore should be considered guilty of sexual abuse—whenever he attempts to engage in sexual intercourse with consent that was obtained by coercion"(Schulhofer 1998:115).[23] But the realm of sexual interaction is, as Schulhofer explains, importantly different and more complex than other contexts where the law takes coercive interferences with autonomy and rights seriously; for example, in property law. This may be why, as noted earlier, Schulhofer finds Estrich's suggestions "plausible" but rejects her property-based (rather than autonomy-based) standards for identifying sexual wrongdoing as inappropriate. For he argues that while correctly identifying coercion in both realms involves understanding the difference between threats and offers—between, on one hand, coercive and wrongful proposals and "takings" that worsen a person's position and, on the other, noncoercive and permissible proposals that are not intended for this purpose and can in fact improve a person's position and opportunities—the realms of property transactions and sexual interactions are importantly different. Understanding this difference involves recognizing that persons can reasonably be assumed to value and behave toward their property (specifically tangible property) in ways profoundly different than the ways in which they value and behave in accord with their sexuality. So, any successful attempt to employ the distinction between threats and offers as it applies to and is employed in property law so as to identify coerced consent in sexual interactions must reflect this difference.

But how does one best identify coerced consent in sexual interactions not resulting from the use or threat of physical force? Unlike property transactions, where there is a strong presumption that persons usually have no good reason to and will receive

[23] "Sexual abuse" is Schulhofer's term for "nonviolent interference with sexual autonomy" (p. 105).

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no obvious benefit by simply giving up their property to another with whom, e.g., they are engaged in casual social conversation, the same presumption may not even be present (let alone strong) regarding sexual interactions. Giving up tangible property without compensation usually means losing possession and control of something of monetary value. Assuming a permanent loss, there is neither residual nor retrievable benefit to the owner; the owner is worse off. But in sexual interactions, as Schulhofer notes, there is no transfer of control of an object of value, and there may indeed be no loss to the "owner" at all. In fact, she may well be better off as a result of the interaction, and because it is reasonable to believe that she knows this to be true the law regards it as reasonable to seek evidence of consent in cases of sexual interactions, which it would not do in even roughly analogous property transactions (p. 117). Identifying coercion—coerced consent—in sexual interactions must somehow take this and other pertinent differences into account.

Schulhofer believes this can be accomplished by appeal to a technical understanding of threats and offers and the distinction between them (pp. 119–35 and throughout).[24] On this analysis, a threat (as opposed to an offer), involves a person being confronted with the denial of alternatives to, or with respect to which, she has rights. A threat, then, renders a person worse off, given what she has a right to, while an offer is a proposal that enables a person to improve her situation and involves no rights-based worsening of her situation. To use Schulhofer's examples, when a thief says, "Your money or your life," she threatens her victim because the victim has rights to both his money and his life. But, "Pay me five dollars or I won't wash your car," is an offer because the car's owner has no right to the wash in the absence of the monetary exchange. Schulhofer occasionally speaks carelessly about being "better off" and "worse off"; that is, he sometimes forgets to say (or to be requisitely clear) that these characterizations are rights-based, but once the intended meaning of the distinction is recognized, its import becomes clear. By employing the distinction, Schulhofer can accomplish exactly what he sets out to do: take physical force out of the equation for identifying coerced consent.[25] Of course, this places the rights of sexual autonomy—understood in terms of decisions regarding

[24] Schulhofer's understanding borrows from Alan Wertheimer's analysis in *Coercion* (1987).

[25] To neglect the rights-based nature of being better or worse off and to understand the relative advantage or disadvantage in ordinary terms would deny the possibility that some offers are bad offers. Schulhofer says that a person "will be better off if she accepts, and if she refuses, she will be no worse off than she would be if the offer had never been made. But a proposal that will leave her worse off is a threat" (p. 120). He must mean "worse off" in terms of rights here; alternatively, anyone who has accepted an offer that resulted in her being worse off (in non-rights-based terms) was the subject of a threat, not an offer.

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whether and when to exercise one's rights—under firm legal protection. As an example, and setting aside the girl's age, reconsider *Mlinarich*. Because Mlinarich had agreed to take her into his home on a foster-care basis, she had a right to stay in the home; because she has the right of sexual autonomy she has the right to refuse a sexual interaction with Mlinarich. Thus, when Mlinarich told the girl she must either have sex with him or he would return her to the detention home, he threatened her, and on a threat standard of consent her consent was coerced. On Schulhofer's view, no physical force need accompany this threat; the threat would suffice for a felony conviction of sexual abuse.

But there are problems here. This analysis of threats does not entail coercion in the ordinary psychological sense; that is, one could be the subject of a threat on this analysis and not be psychologically coerced at all. Imagine, for example, that the robber says, "Your money or your life," and you, a trained martial arts expert, see there are no bullets in her revolver, determine you are at no risk whatsoever, and simply walk away. Although there is certainly a threat in the technical sense that Schulhofer employs—the robber attempts to deny you choices to which you have rights—there is no coercion. Ordinarily, threats are taken to be coercive depending on the options available to the person threatened *and* the nature and extent of the pressure brought to bear on the person to whom the threats are addressed (given her considered second-order decisions). This fact would certainly seem pertinent to any attempt to reform rape law by appeal to autonomy. A person whose autonomous choices and actions are only marginally affected by a threat (in the technical sense) is not necessarily a person whose right to sexual autonomy is violated or so seriously infringed upon that she requires any legal protection. Of course, under some circumstances, it may be argued that she (and others similarly situated) is in need of such protection. But then on what standard would such an argument be made? This resurrects precisely what Schulhofer would prefer to keep buried: the physical force standard and the reasonable resistance requirement. If, in the technical sense, the threat is not accompanied by some reason to believe some evil or serious harm will befall the person to whom the threat is addressed (whether or not she has a right that this not happen) such that the person's choices or ability to make them is genuinely affected, the case for coercion (or coerced consent) has not been made and the threat standard of consent is unacceptable.

Schulhofer has no easy response to this objection. He does note that although there are cases in the law (other than rape) in which reasonable resistance is required to determine whether coercion is present—e.g., in extortion—even if there were alternative courses of action open to the victim, once she accedes to the extortionate threats the extortionist commits a crime. Indeed,

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again, in the technical sense, in a case in which a person is threatened Schulhofer wonders why it should be relevant that her having alternative courses of action should count as a defense (pp. 128, 129–30). And so he concludes that wherever there are prohibitions of

> *all* unjustified impairments of autonomy, an impermissible threat is, by definition, an improper interference with freedom of choice. There can no longer be a reason to scrutinize the possible avenues of escape. . . . A wrongful threat intended to induce sexual compliance is coercive in itself. (p. 131, emphasis in the original)

Coercion has taken on a special meaning, such that it need have no literal effect on a person's ability to act or choose in one way or another. "Coercion" has apparently become a stand-in term for the dignitary wrong intentionally committed by those not respecting the rights persons have to make certain decisions. Even if their threats (in the technical sense) are inept and can accomplish little or nothing to impede either the decision being made or the actions stemming from this decision, on this view persons issuing these threats commit a serious felony.

It is surprising that Schulhofer reverts to comparisons with extortion, after warning of the reasonable and important differences in the assumptions and conventions governing, respectively, property transactions and sexual interactions. Identifying threatened violations of property rights is significantly easier than identifying threatened violations of rights of sexual autonomy, especially when (and as Schulhofer repeatedly notes) the behavior of persons regarding their true sexual preferences and interests is frequently unclear, and they commonly are reluctant to express their preferences, let alone state whether they wish to engage in sex. Furthermore, persons may be unclear in their own minds about whether and under what circumstances they will engage in sex. They may not have made an autonomous judgment concerning how they will or will not act in the full range of situations, let alone in a particular instance in which a sexual interaction is possible. In short, their autonomy may not be, as it were, fully developed and operative.

But if all this is true, how can it be determined if someone has issued an offer or a threat? What standards (*mens rea, actus reus*?) should the courts employ when determining whether threats are present, especially when the conventions governing seduction permit (if not encourage) male assertiveness and female ambiguity or feigned resistance? Is there not a serious fair warning problem here, especially given that because no resistance need be given (indeed, if the threat were ineffective or inept, none would likely be given), a man might never know if his proposal in an individual case were an offer or threat? Does the threat standard of consent constitute any advance over alterna-

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tive standards (either Estrich's *mens rea* standard or Pineau's *actus reus* standard) with respect to fair warning problems? One might wonder the opposite of what Schulhofer does. In cases in which an extortionate threat is ineffective, trivial, or inept, why should not the presence of easily taken alternatives count as a defense? If the alleged extortionist knew or could be shown to have reasonably believed that easily taken alternatives were present, would not that tend to defeat *mens rea* and provide grounds for thinking that the pertinent actions were not proscribed, that in fact the "threat" was really a misconstrued offer? "I knew she could just leave, I used no force and the door was unlocked," an Alston or Berkowitz might say, "so I certainly wasn't threatening her." Notice, the response cannot be to search yet again for a criterion for distinguishing coercive and noncoercive threats. Using this theory, all threats are coercive by definition.[26]

There is another, perhaps deeper problem. Recall that autonomy involves the developed capacity for freely choosing which of one's needs, wants, desires, preferences, or principles will be effective, that is, which will determine our choices and actions in particular circumstances. This does not mean that autonomy is equivalent or wholly reducible to certain rights; indeed, it cannot mean this if it is to serve as the basis of these rights. So, the question of whether an infringement or denial of a particular right will or does result in an intolerable assault on a person's autonomy is always an open one, not one that can be answered a priori or by definition; thus it is certainly reasonable to believe that simply being confronted by a threat (in the technical sense) may be of no consequence for one's autonomy at all. This does not imply that no moral wrongs are intended by or result from such threats. It means only that these moral wrongs are not necessarily of the profound moral kind that do serious damage to an individual's autonomy and, as a result, that fall within the range of autonomy concerns with respect to which the criminal law has a legitimate purpose. Thus the wrong of confronting persons with the denial of alternatives to which they have rights may not be serious enough to trigger legal scrutiny, let alone penal sanctions.

Schulhofer underestimates the complexity of autonomy, therefore, both in terms of what kinds of intrusions are relevant to its diminution and insofar as it serves as the basis for the specification of the moral and legal rights constitutive of sexual autonomy. As a result, he overestimates the significance of certain in-

[26] Sometimes Schulhofer writes as if threats are not coercive by definition, as when he argues (see p. 134) that evidence for showing that consent is coerced may be difficult to obtain. Here, the evidence seems pertinent to whether the alternatives available to the person are such that the person could do otherwise. This is precisely the opposite of what one would expect Schulhofer to argue, but it does show the problems with taking threats, as technically defined, to be inherently coercive.

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fringements (here, impediments to the exercise) of rights for a person's autonomy, especially when these intrusions are not psychologically coercive in a way that has serious effects on the ability of ordinary persons to make carefully considered determinations about how they should and will behave when the prospect of sexual interaction is presented to or by them. This overestimation is serious. It results in due process concerns in addition to those of fair warning: about whether the legal penalties Schulhofer endorses are disproportionately severe, and whether the degree of contributory liability is being seriously underconsidered. These concerns raise serious questions about whether Schulhofer's account can adequately address the reconstructed challenge previously offered. Can his account provide an acceptable way to distinguish coercive threats that intrude upon autonomy intolerably, because they carry the prospect of physical harm or psychological disruption serious enough to undermine the very capacity for free reflective deliberation and choice, from those that do not?

VIII.

If the above objections to Schulhofer's threat standard of coerced consent are correct, it seems improbable that proposals falling short of threats (in the technical sense) could violate or wrongfully infringe upon autonomy in a way that is of concern to the law. And even if these objections are mistaken, there are other reasons—consistent with taking sexual autonomy as an entitlement—for thinking that nonthreatening though exploitative proposals for sex, though sometimes immoral, should not be illegal. For example, an offer by an employer to give an economically desperate woman a job only if she has sex with him could create a strong psychological inducement to accept both the job and the sex. The same might be said about a woman who accepts a date and consents to sex with a man who, though not her employer or supervisor, can advance her career by making a phone call to an employer friend and who offers to do so in return for sex. Because these offers afford these women benefits to which they have no apparent right, and from which they may simply walk away, accepting the offers does not appear to constitute coerced consent in the sense implied by an entitlement to sexual autonomy; that is, their rights of sexual autonomy seem to be neither infringed nor violated. In fact, it could be argued that rather as when a woman rejects such offers she affirms her sexual autonomy; in accepting the offers she does the same thing. This does not mean that there is never anything immoral about similar exploitative offers, but if all immoral advantages taken as a result of such offers were transformed into criminal conduct, the police would be very busy indeed.

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Schulhofer believes that much more needs to be said about such examples. He believes that there are coercive offers and that, for good reason, the law already recognizes and rightly criminalizes certain nonsexual coercive offers (in particular those that are illegitimate to start). For roughly similar reasons, he believes that certain coercive sexual offers should constitute criminal sexual abuse (and others should be grounds for civil actions). His conclusions are crucial for several of the most informed, insightful, and important chapters in his book because of their significance for matters of urgent public concern. In three chapters (see chaps. 9–11) he is concerned with how the law should respond to the use of sexually coercive offers in a range of encounters between persons—supervisors and employees, teachers and students, various professionals (psychiatrists, psychologists, physicians, lawyers) and their patients or clients—whose relationships to each other are, because of the contexts in which they are set, especially susceptible to exploitation, coercion, and abuse. Schulhofer attempts to show that in these contexts persons ought to be afforded legal protection against certain offers that are coercive because of the power relationships characterizing the contexts in which they are made. In what follows, reasons will be given for thinking that while Schulhofer's arguments are in need of some clarification, revision, and qualification, his conclusions are correct and indispensable to sound regulation of sexual interactions in those contexts that, for autonomy-endangering reasons, abound with opportunities for wrongdoing.

Schulhofer argues that offers are coercive when two conditions are met: first, "the offer must be illegitimate"; second, the offer "must arouse justifiable fear of injury for anyone who turns it down" (p. 143).[27] Here, Schulhofer continues with the strategy of locating legal wrongs in one area of the law (he again looks to extortion), with the aim of taking it to another area (again, sexual abuse). He notes that the law treats as extortion illegitimate offers (e.g., classic shakedowns) where persons can improve their situation—can be better off—by accepting an offer they know full well to be illegal. So a corrupt public official extorts money from a compliant contractor paying a kickback even if the contractor benefits, even if the contractor consents happily (because, for example, he receives a contract he would have otherwise lost) to the illegal arrangement. Notice, as Schulhofer does, the law does not treat the contractor as a co-conspirator even if he could, without fear of loss, walk away from the offer; it treats him as a

[27] It is curious that Schulhofer finds a psychological consideration, here fear, to be a necessary condition for coercive offers, but he does not do so with respect to threats. One cannot help thinking that if he had treated threats as coercive only if some serious degree of psychological coercion were present, then the forcible compulsion and reasonable resistance standards could not easily be avoided.

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victim of theft (pp. 139–40). Notice also that there need be no evidence of an explicit threat of harm or injury. Given government agents' positions of power and their ability to cause all manner of grief and loss, their behavior may be seen to be presumptively fear-inducing and coercive, even when victims may have no legal right *not* to suffer such grief and loss (e.g., when a retaliating official selectively and zealously enforces obscure but legitimate regulations).

However, there are obstacles to extending this analysis so as to both identify and proscribe putatively-coercive sexual offers, the first of which consists of interpreting the illegitimacy condition.

On Schulhofer's account, a coercive proposal must be illegitimate, and in his references to certain kinds of extortion "illegitimate" plainly means "illegal." That cannot be the meaning of "illegitimate" in all of the contexts (supervisor/employee, teacher/student, lawyer/client, etc.) with which Schulhofer is concerned, though, because, as he ably shows, the laws currently governing these particular contexts are inadequate for finding illegitimate certain sexual offers that he takes to be coercive.[28] So the appeal here must be to a moral sense of illegitimacy, such that the offer is one that a person has no moral right to make. Schulhofer's appeal invokes the moral argument that if the law finds extortion, and thus coercion, in certain wrongful offers (the acceptance of which can benefit a victim), it ought to do the same in relevantly similar wrongful offers for sex. His argument gains strength only when it can be shown that the same or similar rights and interests that are endangered or denied in the extortion cases are also at stake when certain sexual offers are made, even if accepting the offers results in a benefit.

This opens the door to turning the argument against itself. It warrants the question of whether in treating some kinds of illegitimate offers as extortion (rather than as solicitation of bribes, for example), the law makes a mistake, a mistake that would be compounded if it were extended into other realms. But there are good reasons for thinking that in some (but certainly not all) of these cases the law's response is correct and that Schulhofer's views can be revised and explicated in ways that are consistent with this response and helpful to his overall argument. Nonetheless, in extending the analysis to contexts in which sexual interactions are to be expected to originate (e.g., the workplace), it proves important to reconsider whether, on those occasions when an offer does not arouse fear of injury, the law errs in not treating the compliant contractor as having any contributory liability. Eventually, it pays to question, absent an immediate and

[28] See, e.g., his discussion of sexual harassment laws (chap. 9).

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reasonable fear of injury, which contexts ought to be regarded as presumptively coercive.

Seeing the appropriateness of treating these offers as extortion entails recognizing that when the "offers" at play in these cases are coercive, they are in fact threats. The victims to whom the "offers" are directed are confronted with no reasonable alternatives other than those that violate their rights. As a result, any benefit accrued by the victims is irrelevant because of the rights infringements or violations the "offers" entail.

If a known mobster "offers" a store owner a "good" price on packages of cigarettes that do not have the requisite tax stamps, the "offer" is indeed a threat, notwithstanding any benefit to the store owner as a result of accepting the "offer." Here, benefit is not the issue any more than it would be in a case where as a result of consenting to sexual intercourse with a knife-wielding rapist the victim happens to enjoy the sex. The store owner's rights (to reject the "offer" and purchase from reputable dealers, to sell only properly taxed commodities, to fear not for her personal safety and property, etc.) are infringed or violated because she reasonably fears (even in the absence of an explicit threat) that she will endure retaliatory injury if she attempts to exercise her rights by refusing the "offer." But notice that the reasonable fear of the use of retaliatory force or injury is a necessary condition of the "offer" being a threat. Absent the fear—say, the store owner is offered the cigarettes by someone she knows she will probably never see again—there is no coercion. The illegitimate offer is not coercive—and it certainly is not a threat—and there is no extortion if the offer is accepted. In fact, in accepting the offer the store owner is properly held criminally liable.

Therefore, Schulhofer's analysis of coercive offers is best taken as an analysis of covert threats. As such this analysis constitutes an improvement over his own account of overt threats because it includes precisely what that analysis neglects, an account of coerced consent that has as a necessary condition a psychological component, the arousal of the justifiable fear of injury.

With this said, however, there are other related obstacles that need to be overcome in order to extend successfully the analysis of what now seems best described as covert extortionate threats to the contexts with the potential for the sorts of wrongful sexual interactions (resulting from covert threats of sexual abuse) to which Schulhofer directs his attention in the last third of his book. Given Schulhofer's commitment to an autonomy-based theory of reform, not the least of these obstacles is that of explaining how, exactly, the law's purpose in treating cases like that of the compliant contractor as extortion can be taken to include a concern with the contractor's autonomy. After all, if the contractor accepts what he knows to be an illegal offer with the aim of profiting from it, the reasonable interpretation of the law's

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purpose in treating any eventual payment as a form of theft (rather than a bribe) would be that of deterring public officials from soliciting or accepting bribes and encouraging them to act in accord with their duties to the public (e.g., to hire the best contractors available for the job). Given that securing evidence against the corrupt official soliciting the kickback could be exceptionally difficult if compliant contractors feared being charged with bribery, the law's purpose seems to have little or nothing to do with concern for a greedy contractor's autonomous control over his ill-gotten money but everything to do with successful prosecution of corrupt officials.

But this obstacle to extending the analysis of covert threats to cases of sexual abuse falls when one notes that a law can have more than one statutory purpose. More important, one must remember that the law takes the context in which the corrupt official makes his "offer" as presumptively coercive. This presumption may prove factually suspect in some cases. Even when one can determine that a specific context is coercive, it does not follow that *all* offers made in that context are covert threats. When illegitimate offers merely give free play to the autonomous choices of crooked contractors, certain real questions concerning contributory liability arise. The point remains, however, that if the context in which illegitimate offers are made is characterized by certain kinds of power relationships—those in which persistent fears of wrongful loss or injury are reasonably grounded—then the "offers" made therein should be regarded as *prima facie* covert threats that endanger or violate certain basic rights of autonomy.

Thus when corrupt officials whose "offers" are backed by the wrongful use of retaliatory power prevent persons from having their considered principles determine their courses of action, these officials endanger or violate the rights of citizens. And rather as it is reasonable to regard these covert threats as attempted extortion, it is equally reasonable to regard the covert threats of a supervisor who, in an analogously coercive context, offers a job promotion (even one that is not clearly deserved) to a woman in exchange for sex as an attempted sexual abuse. It would seem, then, that a properly qualified analysis of certain kinds of extortionate threats can do precisely what Schulhofer wants: It can be extended to identify sexual abuse that properly concerns the law.

IX.

With these and other considerations in mind, it is possible to offer a general account, sympathetic to certain (but not all) components of Schulhofer's program, that identifies sexual interactions occurring within institutional and professional contexts

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that are cases of sexual abuse and thus ought to be susceptible to measured legal responses, both civil and criminal. Furthermore, this account can be explicated in ways that address the due process concerns raised at the end of Section VII, with an eye to protecting the autonomy interests of all relevant parties.[29]

Regarding the first task, then, sexual interactions occurring in institutional or professional contexts are morally wrong and deserving of careful legal scrutiny and response, including civil remedies or criminal liability, only when certain conditions are fulfilled. Included among those conditions are: (1) the nature of the power relationships between the relevant parties is such that one person (e.g., an employer, supervisor, police officer, or public official) can use his or her institutional or professional power to limit or deny benefits or opportunities to those not similarly situated; (2) the sexual interaction occurs because of a threat, either overt or covert, issued by a person who is in a position of power over the recipient of the threat;[30] (3) the victim's decision to engage in the sexual interaction is not one he or she could reasonably have been expected to make unless the victim had not been in a position of subordination or dependency with respect to the person issuing the threat; and (4) the psychologically coercive component of the threat depends, in general terms, upon the power differential between the person issuing the threat and the person receiving it. Thus for a sexual interaction to be actionable in these contexts, it must be reasonable to believe that the person issuing the threat has the ability to exercise or exploit his or her position of power or trust so as to deny those benefits or opportunities available to persons who, because of their standing in an employment or professional relationship with another issuing the threat, properly have a justified claim to those opportunities or benefits, or to the competition for them.

In most social contexts outside and independent of those established by specific institutionally or professionally established norms, as Schulhofer often points out, sexual interactions are governed by conventions that are unstable, inconsistent, easily misunderstood, and unlikely to serve as the basis of a reasonable set of consistent and mutually understood expectations. Unlike sexual interactions occurring in contexts of the sort where the reconstructed challenge offered in Section V has maximum power and where uniform rape-law reform has understandably

[29] Nothing that follows should be taken to imply that Schulhofer's threat standard of consent in contexts *other* than the institutional and professional contexts considered later is acceptable. The argument in Section VII takes that analysis to be defective; thus, the reconstructed challenge of Section V remains unanswered.

[30] "Threat" is taken to combine the technical analysis Schulhofer affirms and the condition he employs to identify coercive offers: arousal of a "justifiable fear of injury." Thus threats include situations in which persons are confronted with options that both deny them that to which they have rights and include the psychologically coercive component of a reasonable fear of injury or serious loss.

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stalled, those occurring in the workplace or between persons involved in professional relationships are far more easy to regulate. When the success of the relationships depends on honesty, fairness, and trust, they are more susceptible to the establishment and implementation of a system of consistent, reasonable, and understandable rules. Assuming the existence and promulgation of such a set of rules, persons in positions of relative power and those over whom this power is exercised can reasonably be expected to know and understand when their sexual interactions with those they supervise or who depend on their professionalism are permissible and when they are not.[31] Unlike other contexts in which the conventions governing sexual interaction can be sufficiently ambiguous as to raise the fair warning concerns identified earlier and trigger strategies to defeat *mens rea* by implicating allegedly complicit victims, here, with rules establishing a strong presumption that sexual offers in these contexts are coercive because they function as covert threats, these concerns can be reasonably addressed. And so if, by regulation, actions such as sexual advances on subordinates are deemed presumptively coercive, the burden of showing that an advance is not coercive, not quid pro quo, must be borne by the person in the institutionally or professionally based position of relative power.

This does not mean that the burden can never be met, or that the conduct of alleged victims is always irrelevant to mitigate or eliminate the wrong. For example, in the workplace or in universities noncoercive, non-autonomy injuring sexual interactions regularly occur between reasonable and mature persons whose work relationships are characterized by significant differences in power and where one party could but does not employ that power to threaten the other. So it is surely not true that all sexual offers made in these contexts are coercive—that they are all threats—or that they all ought to be treated as if they were.[32] It is reasonable, then, to hold responsible those subordinates who indicate an interest in, or initiate sexual interactions with, persons having some measure of power over them. Maintaining a reason-

[31] Schulhofer notes that professional codes of ethics (for example those of the American Psychiatric Association and the American Medical Association) explicitly prohibit (in the former) or deem unethical (in the latter) sexual contact between therapist or physician and patient. He claims that these codes have little practical importance (pp. 212, 228).

[32] There are important exceptions. As Schulhofer argues, there is good reason for regulations that bar sexual interactions between college and university professors and their students during the time when the student is in a class or under the direct supervision of the faculty member. Because the "current student" relationship is relatively short-lived, such restrictions do not needlessly interfere with autonomous choices to pursue sexual relationships after that relationship has ended. However, as Schulhofer notes, this is not a reasonable restriction in workplace circumstances wherein the inequity in power can endure far longer. For this reason, tolerance of sexual advances in the workplace must be higher than in colleges and universities; to do otherwise would infringe on the autonomy of those freely choosing to have sexual relationships with their superiors or inferiors (see pp. 183–87, 198–201).

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able set of rules governing the interaction of persons in these relationships will provide a person accused of sexual abuse the opportunity to offer evidence that the interactions did not occur because of either overt or covert threats, or that it is reasonable to believe that another of the conditions offered previously has not been satisfied. The establishment of standards may help to address issues of contributory liability and appropriate, as opposed to disproportionate, severity of penalties in response to charges of sexual abuse. It does so by taking the sexual autonomy of all the relevant parties into account. In fact, the absence of rules that would allow the introduction into evidence such facts as whether an employee initiated the sexual interactions, whether there is any history of threats or use of retaliatory power between the parties, or whether there was an established and respectful romantic relationship between the parties, for example, can constitute an insult to all the relevant parties when charges of sexual abuse arise, as well as an injustice to the accused. The exclusion of these considerations implies that simply being in a position to make a wrongful sexual advance is tantamount to doing so, even if there is clear evidence of reasonable and respectful consideration of another person's wants, interests, and desires. It also implies that one's capacity for autonomous choice has been automatically and hopelessly compromised simply because one has been subjected to a sexual threat, no matter the response or the reaction to the response. As suggested early on, autonomy is not, and should not be, treated as if it were so fragile. Thinking the opposite can mean failing to apportion proper responsibility as well as affix proper blame.[33]

The previous conditions are also designed to range over cases of great concern to Schulhofer; e.g., sexual abuse occurring in professional relationships, such as those between psychiatrists or psychologists who exploit their patients' profound emotional vulnerability, or attorneys who exploit clients' vulnerabilities of a different but comparable kind, given the overwhelming power of the state to incarcerate them or to subject them to potentially catastrophic and irretrievable financial or personal losses.

Admittedly, the language of "threats" in the second condition does not quite capture the extent of the wrongdoing of a psychiatrist who has intercourse with an exceptionally vulnerable patient without overtly threatening anything (or, perhaps worse, by employing deception to make the patient believe that sexual intercourse is a viable treatment). Given the vulnerability of a person who, in the context of treatment, is at best considered to be incapable of nondefective consent, it is reasonable to think that the

[33] This is intended to be consistent with Schulhofer's important arguments insisting that a significant improvement in contemporary sexual harassment law would include holding individuals (rather than only corporations or institutions) responsible for the sexual abuse of subordinates (see p. 181).

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psychiatrist's conduct is functionally equivalent to a covert threat. Given the justified expectations of a patient in the context of properly conducted therapy, the psychiatrist's conduct confronts the patient with the denial of options to which she has rights. She has rights, for example, to expect that her psychiatrist will strive to provide her with effective treatment, the right to trust the psychiatrist to employ techniques consistent with that end, the right to expect that the psychiatrist will not exploit her faith in his judgment regarding treatment regimes, etc. And given the obvious fact that psychological therapy occurs in a context where the fear of injury can be palpable, it does not seem unreasonable to think that sexual abuse occurring in these contexts falls within the range of the second condition offered previously.

The third condition is a generally stated placeholder, intended to augment the more-specific terms and concerns of the first two conditions. It raises the important question of evidence concerning mitigation and contributory liability in both workplace and dating contexts. This condition may be vague and in danger of misuse because it is counterfactual. Questions concerning how it should be applied in specific situations depend on the conventions governing those contexts, the rights occurring therein, and speculation concerning what persons can reasonably be expected to decide and what they do when making choices independent of the contexts characterized by the power differentials that are likely to effect choice. Nevertheless, the condition is important. It allows persons accused of exploiting their role in contexts fertile with opportunities to issue overt or covert threats to seek and employ evidence showing that even if the context (say, the workplace) were absent the accuser could reasonably have given noncoerced consent to sex. So, for example, if an employee has a long-term consensual sexual relationship with a supervisor, even if there were evidence of preference to the employee (perhaps especially so), the existence of the relationship is relevant in determining whether there is meaningful consent, and thus whether and to what degree the supervisor is liable should a charge be brought against him.

In the circus of conflicting conventions governing dating, especially among younger persons, this fact can be especially important because, as Schulhofer provides in his "Model Criminal Statute," a person can be convicted of the third degree felony of sexual abuse if they "know" they do not have consent, but their knowledge may depend on their proper recognition of "words or conduct indicating affirmative, freely given permission to the act of sexual penetration" (p. 283). Given the degree and extent to which instability and ambiguity characterize the conventions currently governing sexual interactions in dating, a broad range of evidence concerning the nature and circumstances governing the relationship and interactions of the relevant persons should

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be admissible when charges of sexual abuse are made. Because the legitimate expressions of sexual autonomy can be easily misinterpreted, and because solidified social conventions governing consent to sex are nowhere on the horizon, the time when anything like a strict liability standard could be applied in alleged cases of sexual abuse, given the enduring reality of reasonable mistakes, is some time away (see Husak & Thomas 1992:95–126).

X.

Stephen J. Schulhofer's *Unwanted Sex* is a theoretically engaging book that is careful, rich in detail, reasonable in its concerns, fair to alternative views, and wisely measured in its conclusions and recommendations. It is also a book of some breadth that provides important information regarding the complexity of real-world interactions in extraordinarily complex circumstances. Both the theoretical and practical considerations provided in this volume should be of concern to those wanting to develop informed beliefs pertinent to the evaluation, revision, and reform of judicial and statutory responses to allegedly inappropriate or wrongful sexual conduct, especially in that broad range of institutional and professional contexts in which opportunities for unwanted sexual attention and sexual coercion are plentiful. Any serious work in this area that proceeds without attention to Schulhofer's important contribution will do well to repeat what he has done; any serious work intending to further the discussion will do well to address his arguments and recommendations.

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