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Stephen J. Schulhofer. *Unwanted Sex: The Culture of Intimidation and the Failure of Law.* Cambridge, Mass.: Harvard University Press, 1998. xii + 318 pp. $27.95 (cloth), ISBN 978-0-674-57648-3.

Reviewed by Cynthia Harrison (Department of History, The George Washington University)
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Only

With this volume, Stephen J. Schulhofer, Julius Kreeger Professor of Law and Criminology and Director of the Center for Studies in Criminal Justice at the University of Chicago Law School, joins the energetic debate over the legal treatment of sexual assault and abuse. Schulhofer distinguishes his work from that of other scholars by asserting a new entitlement, the right to sexual autonomy: that is, "the freedom of every person to decide whether or when to engage in sexual relations," without coercion or constraint (p. 99). In his construction, sexual autonomy has three components: "an internal capacity to make mature and rational choices, . . . an external freedom from impermissible pressures and constraints, [and] the bodily integrity of the individual" (p.111). This right to bodily integrity requires that the burden rests on he who seeks consent for sex, not on the other party to demonstrate that she declined. Thus, he maintains, "[e]ven without making threats that restrict the exercise of free choice, an individual violates a woman's autonomy when he engages in sexual conduct without ensuring that he has her valid consent" (p. 111).

Schulhofer thus incorporates a critique of rape law within a larger framework of human sexual interaction and "unwanted sex," of which rape is only one abuse. While Schulhofer agrees with feminists that the traditional treatment of rape in the judicial system has served more to protect perpetrators than victims, he goes further to argue for criminalization of other conduct not now usually included in penal codes, such as extortion of sex (by means of non-physical threats) or abuse of power, trust, or professional relationship to induce someone to engage in sexual activity. He also advocates imposing personal civil and criminal liability against harassers now insulated from liability under Title VII and Title IX, which hold employers or school districts responsible for misconduct. Schulhofer acknowledges the dilemmas intrinsic to protecting the right to participate freely in sexual activity while at the same time prohibiting untoward sexual advances; he merely abjures the current practice of resolving all such dilemmas, absent physical violence and "reasonable resistance," in favor of male access to female bodies.

Schulhofer begins his argument by drawing an extended analogy between property rights and rights to sexual autonomy. In the sixteenth century, he notes, the common law of theft protected ownership of property only against its forcible removal. Embezzlement and fraud escaped the notice of the criminal law; not until the last century (i.e., the twentieth) did the law punish invasion of virtually all property rights, tangible and intangible. But once that evolution was accomplished, criminal responsibility attached to and remained with the thief, regardless of the property-owner's gullibility or "contributory negligence" (p. 13).

Law concerning sexual misconduct has followed a different arc. Change comes later: Only since the 1970s have both the law of rape and the law of sexual harassment undergone substantial and positive revisions. Since those decades, the "Hale charge" has been eliminated; corroboration requirements have been struck; victims are no longer required to resist to the utmost; prosecutors can no longer examine the victim's prior sexual relationships; the law (in some places) protects wives living apart from their husbands; and new laws bar "sexual harassment" in schools and workplaces. Still, Schulhofer calls these reforms on the whole "disappointing, "meager," and "overrated." He notes that the law in practice has changed less than the statutes might suggest. Prosecutors continue to press rape charges reluctantly and only in airtight cases. Appellate courts continue to sympathize with rapists who claim to have mistaken resistance for sexual game-playing. Moreover, those who comply with demands for sex out of fear or intimidation or who place themselves in compromising situations by use of alcohol or through simple naivete have virtually

no chance of winning redress, either by criminal prosecution or through available civil remedies. Shulhofer objects, insisting that the law of property rights provides a better model: "Interference with autonomy in matters of sexual life should be considered unacceptable - and illegal - whether that interference takes the form of threats of physical injury, threats to inflict other kinds of harm, abuse of trust, exploitation of intoxication and physical helplessness..., or exploitation of authority and economic power" (p.15).

In chapters that detail the failures attending reform of rape laws and the limited reach of sexual harassment law, Schulhofer sets up the foundation for his own proposal, a model criminal statute for sexual offenses, included as an appendix. It comprises three sections: sexual assault (felonies of the first and second degree), which addresses what we now call rape - an act of sexual penetration effected by physical force or use of a weapon, or an act of sexual penetration with a person younger than thirteen years of age; sexual abuse, a third-degree felony, which applies to sex that takes place in the absence of consent freely given (that is, consent by an adult free from mental incapacity, not under the supervision of the actor, not confined in an institution, not under the coercion of a threat of a harm, not the recipient of professional treatment for an emotional condition with the actor, not misled by deceptive medical advice, and not deceived as to the identity of the actor pretending to be a physical intimate); and, finally, culpability, which imposes on the actor the responsibility to refrain from acting when he is aware of a substantial risk that an obstacle to lawful sexual activity might exist or his conduct "involved a gross deviation from the standard of care that a reasonable person would observe" in that situation.

Under the rubric of "sexual autonomy," however, Schulhofer also favors expanding choice in areas where others might dissent. He does not agree with the view of feminists Catharine MacKinnon and Andrea Dworkin that the existing power relations between men and women taint all heterosexual relationships. He would not bar all sexual relationships between physicians and patients, lawyers and clients, professors and graduate students not in their own courses, or between supervisors and subordinates. He explains: "[R]ules that completely bar sexual interaction whenever there is any imbalance of power can endanger autonomy from the opposite direction, by stifling voluntary, freely chosen relationships, many of which can led to fulfilling, lifelong commitments" (p. 170).

On the whole, Schulhofer presents a sensible, balanced argument for his proposal to expand the protection of the penal code against sexual misconduct. If there is a flaw here, it is that he overargues his case. Identical points - often points already widely conceded - are made repeatedly, and often with the same cases to illustrate them. In the areas of civil actions and of criminal law apart from rape, however, he abbreviates his discussion, saying simply in several places that such alternatives are ineffective. Even though his focus is the criminal law of rape and sexual assault, such treatment seems unduly cursory. Finally, his choice to tack on his model proposal in the nature of an appendix -and to allude to it only in the book's final footnote - is an odd one. Given his goal, the proposal should itself have concluded the text. Teachers choosing to use his model statute to provoke discussion about legal protection of "sexual autonomy" are guaranteed to have an interesting class.

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