Alan Soble: review of Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Ashgate, 2005), in *Law and Philosophy* 25:6 (2006), pp. 663-72.

Joan McGregor. *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously*. Aldershot, U.K.: Ashgate, 2005. Pp. x+267. ISBN 0-7546-5066-9. $99.95, cloth; $29.95, paper.

Over the last two decades, much has been written about rape by philosophers and others, including, to name only eight, David Archard, Keith Burgess-Jackson, Susan Estrich, Leslie P. Francis, Catharine MacKinnon, Stephen Schulhofer, Alan Wertheimer, and Robin West. In *Is It Rape?* Joan McGregor covers the standard topics: the ontology and transformative power of consent; the disabling of consent by coercion and deception; the role of force and consent in defining rape; the *mens rea* of rape; and the moral wrongness of rape. The book revises and expands her "Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law" (*Legal Theory* 2:3 [1996], pp. 175-208).

McGregor defends many theses: that consent is a performative, not a mental state; that laws that require showing both force and absence of consent for conviction be replaced by two laws, one defining rape in terms of force, the other in terms of no consent; that, therefore, the law must prohibit nonforcible yet nonconsensual sex. She also argues that the accused has the burden of proving either that consent was present or that believing it was present was reasonable; that, similarly, the law must look for signs both that consent was absent and that it was present; and that the notions of coercion and force in the law be broadened--blurring thereby the line between rape and *quid pro quo* sexual harassment, which can be "nonconsensual sexual activity" and so "a criminal [not merely a civil] wrong" (pp. 164-165). About the wrongness of rape, her view is that it should be understood in Kantian terms, including the violation of sexual autonomy.

I was disappointed with *Is It Rape?* The book is badly written. I was bewildered, for example, by this early sentence: "I will argue that the law has wrongly excluded nonconsensual sex without legally recognized force from criminal protection," which made no sense to me unless I replaced "protection" with "prosecution" or rearranged the sentence to say "the criminal law has wrongly excluded from protection the victim of nonconsensual sex without legally recognized force" (p. 2). *Is It Rape?* contains sentences splashed here and there, distractions from the linear flow of the argument, that belong in some other paragraph, if anywhere. There

are befuddling passages about which I cannot decide whether they illustrate poor writing or confused thinking. That may be moot. What is not is that the book would have benefited tremendously from a patient rewrite and a perceptive and firm copy editor.

McGregor is unfair by not acknowledging that what she argues for has been argued for or explored comprehensively by other scholars. In the thirty-page chapter "External Constraints," in which she examines the conditions that undermine consent--when a woman's "yes" or undressing in response to a proposal to engage in sex is not genuine consent--there is not a single endnote referring to any literature on this topic. In the chapter's text, only two people are referred to, Joel Feinberg on coercion and deception and Jane Larson, to whom McGregor appeals in making the tiny point that in our erotic and romantic encounters we commonly brag, exaggerate, flatter, and lie to each other. "External Constraints" investigates difficult and fascinating questions: What is coercion? Which pressures are coercive? What is the difference between threats and offers? Can offers be coercive? Is using coercion always wrong in a sexual context? When and when not, and why? Is deception always wrong in sexual contexts? When and when not, and why? McGregor mentions no contemporary scholars who have written about these hot topics; the anonymity-granting "many theorists" is inadequate (p. 179).

McGregor is also unfair to other scholars by misrepresenting their views. In a section early in the book, McGregor lays out in anticipation five criticisms of proposals she is later going to make. Right after the section-heading "*1. No serious harm objection*" she writes, "Philosophers such as Michael Davis have argued that 'rape is *not* a *very* serious crime' (1984: 62)" (p. 12). Yes, Davis wrote that. But on the next page of his essay he wrote, "Rape *is* a serious crime." There is no contradiction: rape's being a serious crime is compatible with its not being a very serious crime--or harm; the equivocation is McGregor's. Her section title "No serious harm" attributes to Davis a view not his own. Later, she says accurately that "Davis argued that rape is not as serious an offense as is often suspected" (p. 66). That "not serious" and "not as serious" are different should have been noted earlier. In the same section, McGregor does a grave injustice to Jeffrie Murphy: "Murphy (1994) analogized forced sexual intercourse with forcing someone to eat sushi, taking something that is normally pleasurable and forcing it upon someone. . . . [T]he implication is that rape is not as serious as other crimes since a constituent part of it is pleasurable" (p. 12). Neither the implication nor the "since" was the point of Murphy's analogy. McGregor thinks that Murphy meant his

analogy to be "sarcastic" (p. 221). No. In his essay, a serious Murphy argued that cultural beliefs about sex underlie our judgments of harm: if we did not consider sex to have prodigious significance in our lives, forcing intercourse might be little different from forcing sushi. Murphy adds that forcing an orthodox Jew to eat pork would be a grave harm, because the Jew has certain culinary-religious beliefs. Forced sex is harmful for the same reason. McGregor's claim that Murphy's analogy lends legitimacy to the exculpation that forced sex is not so bad because the female victim gets pleasure from it is ludicrous.

Is It Rape? is crammed with redundancies. Several times McGregor makes the obvious point that wanting or desiring sex is not equivalent to consenting to it. "[M]any theorists have equated nonconsensual sex with unwanted sex. Stephen Schulhofer makes this mistake, even naming his 1998 book on rape *Unwanted Sex*. These are clearly different notions" (pp. 87-88). "[T]he courts and many commentators regularly conflate the two" (p. 121). "There is quite a lot of confusion between notions of consent and what is desired or wanted. Stephen Schulhofer named his 1998 book on rape *Unwanted Sex*, implying that nonconsensual sex is the same as unwanted sex" (p. 126). But nothing in his title *Unwanted Sex: The Culture of Intimidation and the Failure of Law* implies confusing unwanted and nonconsensual sex. Nor does Robin West's title, "Unwelcome Sex: Toward a Harm-Based Analysis" (in C. A. MacKinnon and R. Siegel, eds., *Directions in Sexual Harassment Law*, 2004, pp. 138-152). If a chunk of Schulhofer's text exhibits this elementary mistake, McGregor should have displayed it.

It is sadly ironic that McGregor pounces on Schulhofer, for his main theses are identical to hers. As she argued in "Why When She Says No," McGregor argues in *Is It Rape?* that the law "should require positive signs of consent" (p. 216). She contends that "if the law wants to protect women's sexual autonomy then . . . it should . . . require positive signs of consent" and that rape "is committed knowingly . . . whenever the accused fails to secure affirmative consent" (pp. 191, 192). Schulhofer had written, "By requiring affirmative permission . . . we can insist that any person who engages in intercourse show full respect for the other person's autonomy--by pausing . . . to be sure that he has a clear indication of her actual consent" (p. 273). I see no difference. McGregor is unfair to Schulhofer again by asserting that he "argues against the reformist strategy that the law ought to recognize that 'no' means no" and berating him for this error (pp. 204-206). But Schulhofer defends the reformist strategy: "It seems plausible to insist that

men remember what 'no' means, not to themselves, but to women"; "By requiring that verbal objections be accepted at face value, the law can provide a clear . . . test for consent" (pp. 259, 267). In arguing both that the law must take every "no" as meaning no, even when it might not, and that men must obtain "affirmative permission" before proceeding to sex, Schulhofer is the best friend a feminist intent on rape-law reform could want. He deserved better treatment. It is salt in the wound that McGregor badly misquotes him, including changing his "resistance" to "resistence." Compare page 205 of *Is It Rape?* with page 11 of *Unwanted Sex*.

In "External Constraints," McGregor asks whether the distinction between "fraud in the factum" and "fraud in the inducement" should make a legal difference. Feinberg discusses a case, on his view fraud in the inducement, in which a man obtains sex from a woman by promising her money, then gives her no payment or counterfeit bills. Here is his sentence that McGregor quotes disapprovingly: "The fact that a woman is willing to have sex for money implies that the sexual episode in itself is not a clear harm to her when she is not paid" (*Harm to Self*, p. 295). McGregor replies, "Feinberg's analysis is faulty because it does not follow that the sexual episode was not a clear harm." Why not? "[E]ven if she is a prostitute who does this all the time, not being paid for something that you were expecting to get paid for is a harm" (p. 186). Yes, not being paid is a harm, and Feinberg can agree, since his point is not that she was not harmed at all. What he denies is that she was harmed in the sexual episode itself. Whether she is later paid or not, her state of mind during the sex would have been the same. She will feel cheated and angry after his reneging, but that unpleasant experience is part of the harm of not being paid. McGregor might here invoke the difference between "objective" and "subjective" harm, but about this topic she strangely says little. McGregor provides another counterexample: a woman doctor, promised payment, performs a medical service, and the patient reneges. McGregor says, "The fact that she is willing to sell her services does not show that she is not harmed when she does not receive the . . . money" (p. 186). But what McGregor should have stated and defended, to engage Feinberg, is "The fact that she is willing to sell her services does not show that she is not clearly harmed in the medical episode itself when she does not receive the promised money."

McGregor offers another argument. "In Feinberg's example, the woman could be in desperate need of money and reluctantly agree to sell sex to survive. The proposal then has a coercive effect on her. . . . The fraud that induced her to have sex will make her feel

additionally violated" (p. 186). I am not sure that McGregor may add this feature of the woman's situation and use it against, and still call the case, Feinberg's example. Regardless, "The fraud that induced her to have sex will make her feel additionally violated" is troublesome. This distress does not occur in the sexual episode itself but later, after she is not paid; it is part of the harm of not being paid. McGregor might want us to infer, dubiously, from the fact that she "feels additionally violated" upon not being paid that she has been additionally harmed in the sexual episode itself. Further, maybe McGregor's claim can be replaced with or really means "The coercive offer that induced her to have sex will make her feel additionally violated." If so, fraud in the inducement *qua* coercion, not fraud in the inducement *qua* fraud in the inducement, causes her anguish. We have still not undermined Feinberg's claim that the sexual episode itself is not a clear harm when sex results from fraud in the inducement *per se*. Further, McGregor would have done well to have quoted Feinberg's reasonable concession: "there is no reason in principle why sex by fraudulent inducement in cases *where it is plausibly harmful* [an imposter convinces a desperate woman that therapy for her illness is coitus with him; *Boro v. Superior Court*] . . . could not legitimately be made a crime" (*Harm to Self*, p. 300).

One of McGregor's proposals is that a rape statute should be composed of one part that prohibits using force to obtain sexual relations and another part prohibiting sex without consent. That force by itself and the absence of consent by itself should each be sufficient for rape is one theme of "Why When She Says No" and receives sustained treatment in *Is It Rape?* McGregor frames her thesis identically in both places: the "unfortunate conjunction," force and no consent, should be replaced by a disjunction, force or no consent ("Why When," p. 181; *Is It Rape?* p. 47). West praises McGregor for this insight of "Why When":

> Rape is still defined, in most jurisdictions, as sex that is both forced *and* without the consent of the victim. . . . McGregor urges that . . . we convert the "and" in the standard definition to an "or". . . . Nonconsensual sex [without force] . . . as McGregor clearly understands[, is] presently not criminal anywhere. . . . [McGregor's] powerful suggestion-- . . . change the *and* to an *or* and criminalize both-- . . . as far as I know, is entirely novel. . . . ("A Comment on Consent, Sex, and Rape," *Legal Theory* 2:3 [1996], pp. 233-251, at pp. 233, 243)

I believe that the factual claims here, and in McGregor's essay and book, are wrong. In 1994, shortly before McGregor's and West's essays appeared, thirteen or fourteen states (or twenty or so, depending on how we read the laws) had "or" definitions, while

around six (or nineteen) had "and" definitions. Hence, *contra* West, the "and" definition was not "standard." Schulhofer, too, claims that "In most states, rape still requires proof . . . of *both* force and nonconsent" ("Rape in the Twilight Zone: When Sex Is Unwanted but Not Illegal," *Suffolk University Law Review* 38:2 [2005], pp. 415-25, at p. 420). In these thirteen or so states nonconsensual, nonforcible sex was a crime, contrary to West's "not criminal anywhere." So McGregor's idea was not novel. Some state lawmakers beat her, the rape-reform owl of Minerva, to the punch. I suspect that laws are better in the mid-2000s than they were in 1994. In English law, rape is defined entirely in terms of lack of consent, and whether a man had a reasonable belief in consent depends in part on whether he took "steps . . . to ascertain whether" the person consented (Sexual Offences Act 2003). This is as McGregorian-Schulhoferian as a law could be.

My numbers come from *A Guide to America's Sex Laws* by Richard Posner and Katharine Silbaugh (including the laws of the fifty states, D.C., and U.S. law, through 1 September 1994). I am wrong if I misunderstand the laws--I have no legal training. But consider some examples. "It is a felony for a person to engage in sexual penetration . . . without . . . consent." Sexual acts "are without consent under the following circumstances: the victim expresses lack of consent through words or conduct. . . " (Utah; p. 29). "It is a felony . . . to engage in sexual penetration under any of the following circumstances: . . . the victim is subjected to forcible compulsion . . . or . . . the victim does not consent" (Oregon; p. 26). "It is a felony to engage in sexual penetration . . . under any of the following circumstances: without the consent of the victim; [or] by threatening or coercing the victim; [or] . . ." (Vermont; p. 30). Browse for other congenial laws, but be ready for the dinosaurs: "It is a felony to assault with intent to forcibly ravish any female of previous chaste character" (Mississippi; p. 20).

The 1994 laws of Montana, Delaware, Texas, West Virginia, and others, are problematic. Maryland had a clear "and" definition: "It is a felony to engage in sexual penetration by force . . . and without . . . consent" (p. 17). Contrast this to Montana: "It is a felony to engage in sexual penetration . . . without the victim's consent. . . . Without consent means the victim is compelled to submit by force" (p. 20). Is this an "and" definition, just because it uses both "force" and "without consent"? I think not, because nonconsent is defined entirely in terms of force and so is not a separate thing that must be shown in addition to force. Nevertheless, I counted this and similar laws as "and" definitions, which explains the larger nineteen (above). Force alone was sufficient in most jurisdictions--forty-

five, which includes thirteen "or" states--but in not all these states was force necessary, and not because some are "or" states. Force was not necessary also because rape often includes, for example, X's deceiving Y that X is Y's spouse or Y's being asleep or unconscious (see Wertheimer's 2003 *Consent to Sexual Relations*, pp. 16-18). The states that literally required force in 1994, on my calculation, amounted to 28, a slender majority. It is false that "nearly all states require proof of physical force in prosecutions for rape and sexual assault" (Schulhofer, *Unwanted Sex*, p. 4).

I believe that any adequate discussion of rape must be grounded in a philosophy of sex. Here McGregor fails, in part, because she does not know the literature in this area: the works of Pat Califia, Alan Goldman, Seiriol Morgan, Jerome Neu, Martha Nussbaum, Richard Posner, Igor Primoratz, Gayle Rubin, Roger Scruton, Laurie Shrage, and Russell Vannoy, let alone the giants Michel Foucault, Sigmund Freud, and Plato. Moreover, McGregor accepts, without examination, platitudes about sex.

Here are some of McGregor's sexual pronouncements: "Most people do not treat sexual cooperation as an exchange" (p. 54). She provides no evidence for the claim; it may be wishful thinking. (See B. Baumrin, "Sexual Immorality Delineated," in R. Baker and F. Elliston, eds., *Philosophy and Sex*, 2nd ed., 1984, pp. 300-311.) "Sex, sexuality, our bodies and control over them are central [?] to who we are" is a sentence I do not understand; the same for the similar and equally faddish "Much of our personal identity is tied to our . . . sexual expression" (pp. 221, 224). Sex "should be a wonderful and pleasurable experience" is trite (p. 255) and blissfully neglects the mysteries of sexuality pondered by Freud, Morgan, Neu, and Camille Paglia. Doubly false is McGregor's romanticism that "Sexual relationships [*sic*]. . . are usually assumed to be performed by partners who have a close and caring relationship" (p. 224). Probably ninety percent of human sexual interactions throughout history have not occurred between partners in a "close" relationship, unless we employ a bloated notion of "close," and anthropologists, sociologists, and even ordinary people do not assume otherwise. Is this more wishful thinking?

One more: "Sadomasochis[m] . . . pose[s] particularly difficult issues [about autonomy] because masochists are not supposed to get what they want or consent to--actions are supposed to be imposed against their will" (p. 137). Overlook that McGregor treads dangerously close here to conflating wanting and consenting; still, it is surprising to come across this sophomoric worry about autonomy and masochism. We have been told

abundantly by members of the lesbian and gay sadomasochistic community that masochists receive exactly what they consent to through formal contracts or informal agreements. The autonomy of all parties is routinely respected and is not an issue teeming with metaphysical paradox. Masochists, in articulating and insisting on preferences, negotiating and setting limits, and planning encounters with sadists, exercise equal and substantial control. McGregor's further discussion late in the book of mostly amateurish heterosexual sadomasochism does little to bring us back to the real world.