

MEDIA EDUCATION FOUNDATION

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ASKING FOR IT: The Ethics & Erotics of Sexual Consent

[Transcript]

DR. HARRY BROD: I'm Harry Brod. We are here to talk about the ethics of sexual consent. So, to start to talk about the ethics of sexual consent, I would assume a sort of shared bottom line among us, a shared understanding that "no" means "no" and "yes" means "yes." But, as I just said, that would be an assumption and I am, by both professional training and personal temperament, a philosopher. It's my background. So, the name of the game in philosophy is to question assumptions. So, I actually want to check this out with you and see if we agree.

Now, if you haven't taken a philosophy class before, here's the way it sometimes works. Sometimes someone says something that sounds perfectly good as a general principle and people are ready to nod their heads and go on and all is well and then someone says, "Wait a minute. I can think of an example where this thing that sounds pretty good generally wouldn't work. I can think of a counterexample, a particular set of circumstances where this thing that generally sounds good doesn't apply." And, in philosophy, we don't say, "Go away. You bother me. It's good enough." In philosophy, we say, "Excellent. Good job. This is a creative use of your intellect and imagination. You have come up with a circumstance in which the general principle doesn't apply. So, now we have to back up and refine our language and take account of the set of circumstances you have come up with." This is a good thing. This is an advance in knowledge and understanding.

So, in this genuine spirit of inquiry, I'm not asking trick questions. I want to ask you, I said two things. We're going to separate them. I'm going to start with the idea that "yes" means "yes," ok? Can you think of any possible cases, and I'm not even asking you to definitely sign on to something. I'm just asking you can you think of cases where maybe, in this particular set of circumstances, "yes" might not mean "yes." Where you would say, "That "yes," I'm not sure we should really count that as 'yes.'" What do you come up with, examples?

STUDENT: Any situation where the person isn't in their right mind.

BROD: Any situation where the person is not in their right mind. Do you want to say one more sentence what you mean?

STUDENT: Drunk, retarded, not aware of what's going on in some way.

BROD: Good. Drunk, not full mental capacity, alcohol, drugs, too much caffeine, right? "I'm all wired," or something like that. Ok.

STUDENT: Or someone who feels pressured.

BROD: I am neither agreeing or disagreeing with anything anyone says at this point. I'll give you my views shortly. My agenda here is to, where are the issues? Where are the questions? Good. Thank you. Yes?

STUDENT: Women in our society are often, socialized to be pleasers, to give people what they want, to be caregivers. They're also socialized to think that if they begin a sexual interaction with someone, they need to finish it or else they will be a tease or they will be seen as somehow leading someone on, they will cause physical pain, which is a myth.

BROD: Got it. Ok, pressure, coercion, all sorts of things like that. What else?

STUDENT: A situation where there may be an age difference that comes into play, like, someone much older or in some position of power, especially if the person in question is underage.

BROD: You said several things. You said any age difference, position of power, that's a different thing, and then you said, even if not age difference, underage, right? We have what we call the "age of consent" and if someone is below that, we don't care who said what, we're not going to count that as consent. Good, good. Excellent. What else have we got?

STUDENT: A situation in which someone doesn't really understand the terms and conditions that they're agreeing to, so the "yes" comes out as "yes" but they don't really understand.

BROD: Someone doesn't understand the terms and conditions of what they've agreed to. We have this phrase "informed consent," do we not, that comes up in all sorts of contexts? You need to be clear of what it is you have consented to. Excellent, excellent. Thank you. Anything else where "yes" might not mean "yes"?

STUDENT: Even what "yes" might be might not be completely clear. I mean, there's saying "yes" and being asked but then there's also someone thinking that

“yes” is, “Oh, they’re not saying no.” The act of not saying “no” is sometimes interpreted as, “Oh, that must mean ‘yes.’”

BROD: Good, good. Some of you are way ahead of me. I’ll get there. Ok. Good, good. What else? I want to get the questions on the table. You’ll hear my views shortly. I’m not, you know, endorsing or rejecting anything at this point. Where are the issues?

STUDENT: Basically if someone says “yes” but they’re just saying “yes” because everyone else is doing it.

BROD: Ok. Thank you. Ok, we ready to switch? Ok, “no” means “no.” Any possible, where maybe, just maybe, I’m not asking you to definitely endorse, where maybe that “no” might not really mean “no.” Anybody got anything?

STUDENT: In role-playing.

BROD: Role-playing, is that what you said? Role-play.

STUDENT: A lot of the time, when people say no, they may be looking to have their hands forced.

BROD: They may be...?

STUDENT: Looking to have their hands forced.

BROD: Ok, looking to have their hand forced is what you said. Ok.

STUDENT: Also, in cultural understandings of certain protocol are what “no” means. So, in certain times, like, for example, in certain cultures, if you’re offered food you say “no” a couple times and then finally come to “yes” and so if there are different understandings between people, there is a discrepancy between what that “no” means or could lead to.

BROD: Different cultural norms. Ok. I’ve gotten some really creative responses. People have said hypnotism, if you don’t know the English language, someone once said conjoined twins. I have gotten very creative responses. Yes, what do you got?

STUDENT: Yeah, a lot of men are under the presumption that “no” means try harder.

BROD: “No” means try harder. Thank you. And I understand you didn’t endorse that. You just said, “A lot of men might think...” I, I heard you. Got it. As interested as I was and am in your answers to those questions, I’m even more

interested in your answer to the next question.

What if there's no "no" and no "yes," nothing asked and nothing answered. What's in place? Yes or no? I'll ask the same question in different ways. What's the default mode? Red light, green light. If nothing is said, what's in place? Go, stop, yes, no, whatever your, red light, green light, whatever your metaphor is, what's your answer to that question?

STUDENT: A lot of times people go off of body language when there's not a "no" or a "yes." They feed off of how the person's reacting to them.

BROD: Body language. Hold that thought. What's in place? Nothing's said, nothing asked, nothing answered.

STUDENT: What you asked, if people are naturally "yes" or "no," stop or go, I think, naturally, people want to keep going. If there's no communication, it's just implied that...

BROD: People do, some people do indeed want to keep going. My question is, are we endorsing that as a matter of the ethical standards we believe we should hold each other to? What do you believe should be the norm for our interactions with each other? What standard for behavior do you endorse?

STUDENT: I would endorse a stop behavior, where you should talk things over before anything actually happens.

BROD: So, for you, default mode is "no," unless...

STUDENT: Yes.

BROD: Ok.

STUDENT: I think that, in our culture, a "no," a "no" response is a "yes," but, in terms of consent, it should be a "no."

BROD: Ok, so you think, in fact, people think what's in place is go ahead but the standard should be "no." Ok, thank you.

STUDENT: I think in the absence of communication, it's nearly impossible to say one way or the other, but, if asked the question, without an answer it's always "no."

BROD: Ok. Ok, I'm now going to give you my answer to this last question, ok? My answer. And this is the viewpoint I'm going to recommend to you.

The only thing that's yes is "yes." Just because there's no "no," that doesn't mean there's a "yes," ok? In order for it to be "yes," there has to be something said, consent has to be created, alright? Now there's a name for my view. It's called the affirmative consent standard. For there to be consent, there must be some affirmation. Consent must be created, ok?

When I think of this, I think of something my Driver's Ed teacher said to me while I was learning to drive a car. Now, I took Driver's Ed when I was 17. I'm now 59. So, this has stayed with me for a considerable number of years, ok? We were discussing the principle of the right of way and my Driver's Ed teacher said, "The right of way is not something you have. The right of way is something the other driver gives you and if the other driver doesn't give it to you, you don't have it, no matter what you think the rules of the road are supposed to be or what you think you're entitled to. And if people really understood that, there would be a lot fewer tragic collisions on the roads.

Consent is like that, ok? Consent is not something you have. Consent is something the other person has to give you, and if the other person doesn't give it to you, you don't have it, no matter what you think the rules are supposed to be or what you think you're entitled to. Ok? That's the affirmative consent standard.

Now, here's my sort of bottom line for endorsing that and recommending it to you. Often in philosophy, the way to decide on one position is to see, there's a fork in the road, and what happens if we take the other view. Ok? If you don't have the affirmative consent standard, you're saying that what's in place is green light, go ahead, all right? If you don't have the affirmative consent standard, you are endorsing a world in which other people have right of access to your body without expressly asking you for permission to have that access. That's what you are saying if you don't endorse an affirmative consent standard, if you say the default mode is go ahead until somebody stops me, until there's a stop, right?

I think, if we really think about it, no one is really willing to live in a world like that. I don't think any of us would really endorse the lack of an affirmative consent standard if we really understood what's at stake. So, that's my bottom line here.

Now, I'm going to spell out some other implications, some other aspects of this. I said consent has to be created, something has to be said. Someone raised the issue of body language. I'm going to hold out for the standard that what's required is explicit verbal consent. That's the standard I'm going to hold out for. The danger in body language is that it's just too easily misinterpreted, and if you misinterpret, if you get it wrong, if you're reading someone's body language and you think you have consent when you really don't - we need to start using language of directly talking about what we're talking about - we're talking about sexual assault; we're talking about rape. I am not accusing people of intentionally misinterpreting. These

are situations where emotions are running high, things may be getting hot and heavy. It may be very easy, too easy to read in a misinterpretation of the signals. “In all good faith, I really thought...” Ok? It’s just too dangerous.

I was on an airplane recently and, before we take off, the flight attendant’s voice comes over the speaker system and says, “Those of you in the exit rows will be, required to indicate that you are willing and able to render assistance in the event of an emergency,” and this time I happened to be sitting behind the exit row and I watched as the flight attendant came up to the people in the exit row and asked each one in turn, “Are you willing and able to render assistance in the event of an emergency?” and the flight attendant said, “I will need a verbal yes from you,” and if you sat there and could be, you know, trying to nod your head up and down all day, going “yeah, yeah, yeah,” that was not sufficient. If you were not willing to give explicit verbal consent, you would be kindly and gently escorted to a different seat on the airplane and someone else would be seated there who was willing to give explicit verbal consent.

Now, if that’s the safety standard that we seem, as a society, to have agreed upon, then let’s be clear. We’re talking about a very rare circumstance that any of that is ever going to matter and, again, talking about what we’re really talking about, we’re talking about, basically, a plane crash where not everyone dies right away and there’s an issue of “can you render assistance,” alright? If in that remote possibility we seem to have decided we need explicit verbal consent, that’s the safety standard, I see no reason to accept less of a safety standard in these situations which are much more common and, if we get it wrong, we’re talking about sexual assault or rape. So, I will hold out for explicit verbal consent.

Now, I am aware that there are some cases where body language really can’t be reasonably misinterpreted. I do understand that, ok? I’m aware of it, ok? But, those cases are far fewer and further between than most of us would like to think, than some of us would like to think. I want to hold out for explicit verbal consent.

We standardly make a distinction between words and actions. Freedom of speech: you can say whatever you want, but actions are restricted. Anyway, it’s a clear line, separation of words versus actions, yet there are exceptions. There has been, for example, a legal doctrine of fighting words, ok? There are certain words that, if I throw at you, particularly racial slurs would be the classic example, the law recognizes that that’s like striking the first blow, ok? That’s the person who, was, with kids, “Who started the fight? Who started, threw the first punch?” That’s the equivalent.

So, in a very limited number of rare cases, we recognize it is possible to cross the line between words and actions, that there are some words, fighting words, that are like actions. So, there are some actions that are crystal clear enough that can, I understand, function as words, but I will insist those need to be crystal clear,

completely unambiguous action, before I am willing to say body language has signaled consent. In fact, the body language that I'm willing to say clearly unambiguously signals consent has to be so assertive that I start to worry, maybe we've crossed the line. Maybe it's the other, we need to worry about the other person's consent through this person's initiation. I'm going to hold out for body language has to be that clear before we say this counts as consent. So, that's my standard. It's the ethical standard I hold out for you.

So, let me, again, I'm trying to develop further principles that have come from the affirmative consent standard. I'll use a fancy term from philosophy and then I'll explain what it means. One of the core fields of philosophy is the field of epistemology. Epistemology is a fancy word for the theory of knowledge, ok?

Epistemological questions are questions about how do you know, what does it mean to know, what is the nature of knowledge? Ok, that's the field, epistemology, epistemological questions, questions about knowledge. So, some philosophers talk about epistemological responsibility or epistemic responsibility for short, simply the responsibility to know. There are all sorts of situations where society attributes to me a responsibility to know something.

Suppose I'm driving along the highway and I'm stopped for speeding and I will confess this has happened to me. I'm stopped. The police officer comes over and says, "Do you know the speed limit here? Do you know how fast you were going?" And if I honestly say, "No officer, I didn't know," the police officer doesn't say, "Well, you didn't know, so we can't hold you responsible. Have a nice day. Sorry for interrupting your trip." Right? It doesn't work that way. I am held responsible for having this knowledge whether, in fact, I had it or not. We will hold me accountable.

Someone wishing to initiate sexual activity has the epistemological responsibility to obtain knowledge that you had consent, not just "I thought...", "It seemed...", "I believed...", "It sure looked like..." What steps did you take to obtain knowledge? We assign epistemological responsibility for consent to the person who wishes to initiate sexual activity. Now, say there is some accusation of assault or rape on a college campus or in any setting and, typically, we have an inquiry. We want to know what happened in a case where the two people are telling different stories and typically we'll separate the two people and, "What happened? Tell us your version."

Now, these principles are gender neutral. You will notice I have talked about one person wishing to initiate sexual activity and the other person then responding to that initiation. Genders could go either way: male-female, female-male, two males, two females, could be more than two. I don't want to inhibit anybody's sexual practices. It's not my business. Whatever it is, the principles are the same. However, most of the cases where we run into problems are he-she and we can talk

about why that is if you wish, but most of the problematic cases are he initiating and she responding. So, for ease of communication, and because those are most of the problematic cases that come up, I'm going to switch to that terminology. I'm going to allow myself that gendered terminology of he initiating and she responding. I'm going to use that language and you're invited to either internally translate or raise a question later and we'll go over it because the principles are gender neutral. In application, we usually find it this way.

So, suppose there's an accusation of sexual assault or rape and we're now interrogating the young man. We ask him, "Tell us what happened?" And he starts to talk about, "she didn't resist, she didn't object, she didn't, she didn't, she didn't", or however the genders are... We're going to stop you. You're not answering the question. We're not talking about what she did or didn't do. We're talking about, what did you do? What actions did you take to fulfill your affirmative responsibility to have obtained knowledge that you had sexual consent?

And if all you can talk about is the other person, "they didn't, they didn't, they didn't," and you can't answer the question of what did you do, what questions did you ask, what answer did you get, then what did you do with that information? Then what happened? If you can't tell us what you did to have fulfilled your epistemological responsibility to have obtained knowledge that you had sexual consent, then you have a problem. You have a serious problem. That's the perspective of the affirmative consent standard.

Let me, further implications, throw out another principle for you. No act confers consent to any other act. Consent must be given anew with each level of sexual intimacy. Now, I understand there are gray areas. I understand that we might differ as to exactly what constitutes a new level of intimacy, a hand one inch more there, or one inch another way, one more button undone, one less... I understand there are gray areas. But, nonetheless, there is general agreement. It's interesting how often sports metaphors come up in this context. There's a general slang of getting to first base, or second base, or third base, or home run, whatever the slang is. We might differ on the specifics, but there is a general working sense of what we're talking about, so I'll use that general sense.

Suppose you don't have an affirmative consent standard. And, again, I'll use a he-she example. There equally well could be other examples. So, suppose she wants to be at second base, whatever that means. If he is not operating, if we are not operating, on an affirmative consent standard at each new level, then being on first base has already conferred permission to try for second because the default is green light, the default is go. So, if she wants to hold up at second, whatever that means, she actually has to hold up at first because otherwise we're going to second anyway. He thinks he's entitled. In the absence of an affirmative consent standard, if we're on first base, he assumes we're going to second. His only question: are we rounding second and heading to third? So, in the absence of an affirmative consent

standard, they are always two bases apart. If they want to meet at second, in my example, actually pulling in opposite directions.

If sexuality is, in any sense, about communication, about mutuality, about intimacy, connection, coming together in any sense, then in the absence of an affirmative consent standard, you never have it. You never have the two people in the same place at the same time. Therefore, in the absence of an affirmative consent standard, you can't really have a fully erotic experience. And what I often say to heterosexual young men is, "You may be surprised," if you are actually able to communicate that we are not going to do anything for which we do not have explicit verbal consent. She may, maybe for the first time, feel the freedom to be as erotic as she wishes to be in the safety that we're not going to go further than I wish to.

Now, I don't promote the affirmative consent standard because it is going to lead to hotter sex. That would be a peculiar position for me to put myself in. I promote the standard because of safety and justice and equality, and that's the bottom line. Nonetheless, I do want to emphasize that the anti-sexual assault message is not an anti-sex message. In fact, it may, for the first time, promote eroticism because it can promote safety in erotic situations that you don't have if you don't have an affirmative consent standard.

Those of us who do sexual assault prevention education, I think, have really missed the boat, have allowed the anti-sexual assault message to be hijacked by an anti-sex message and, therefore, people don't listen and they tune it out. That's why I emphasize that this is not just the ethics of sexual consent, this is the erotics of sexual consent. This is, at least potentially, a pro-erotic position. It is a position that allows for sexual expression because it creates the safety in which one can express oneself without worrying one is going to be pulled someplace one is going to go.

I also tell heterosexual young men to be prepared not to be believed because you are asking her to violate every practice of safety that she has had to learn, but if you can build a trusting relationship where there is actually the trust that we will not do anything that is not mutually explicitly agreed to, people may find themselves quite surprised. And, again, not because it will lead to hotter sex, but I think, in fact, it at least can and we are doing ourselves a disservice in trying to prevent sexual assault if we do not emphasize that, because the anti-sexual assault message has been so consistently misheard as an anti-sex message and that is really not what it's about.

There is another concern about explicit verbal consent being anti-sex, the idea that we're going to ruin the mood, have to stop. Why, things are going well so far? First of all, how could you not want this information, that your partner is as willing as you or don't you want to be sure that you are fully willing in what you are doing? How can you not be as interested in your partner's wishes? But I

understand, if you're not used to asking, it can be awkward and clumsy and I understand that awkwardness is not sexy. I get it. I mean sometimes it can be endearing and charming and all that but that's usually not what we're going for. I get it. But, it doesn't have to be clumsy and awkward. You can play with it.

"Do you think it might be ok if I kissed you sometime in the next hour and a half?" I don't know what they'll say. They might say "yes." They might say "no." They might say "check back in forty-five minutes." I don't know what will happen. I know what won't happen if we follow these basic principles of ethical conduct with each other. There won't be a sexual assault or rape that evening. And that's what I care about, and that's what you should care about. That's the perspective I'm putting before you.

Now, the issue of alcohol and drugs came up earlier in the conversation and I want to explicitly address that because I know that often this is where we get into problems, when there is sexual activity and there is alcohol and drugs involved and, again, I am aiming myself at where most of the problematic situations are and most of that is first encounter situations. If you're in a standing relationship, I understand dynamics can change. I do think at some point there needs to be an explicit affirmation but people can give each other sort of standing permission of access. We've known each other long enough. The permission can always be revoked. It's not standing in that sense, but it's permissible. People can say to each other, "You don't need to ask every time. In fact, surprise me. I might like it." I understand this might be a different dynamic.

To address directly the issues of alcohol, specifically, and first encounters, I am going to, again, turn to a driving analogy. If I get into an accident on the road, I am drunk driving and I hit another car and, again, a police officer comes over and says, "What happened?" and I say, "Well, officer, I was drunk." This does not help my case. In fact, it makes it worse. Neither does it help my case if the other driver was also drunk. That's a separate conversation. We'll talk to them later. We're not talking to you about that now.

We're talking about your responsibility to have the capacity to manage a dangerous vehicle and we're not going to let you on the road. The offense of drunk driving does not occur when I have the accident. The offense of drunk driving occurs when I start to operate the car and I am not of sound mind and body, able to safely operate this dangerous vehicle which I am bringing into the proximity of other persons who can be put in danger by my inability to control this dangerous vehicle that I am driving around. The specifics varies from state to state. I know in at least some states you can be picked up for drunk driving if you are drunk, sitting behind the wheel, with the car off and the keys in your pocket. At that point, you have made yourself a danger to the rest of us and we won't permit you to be out there.

So, the offense of being drunk and not in control of your body occurs well before the actual accident of your body or your car, if I'm going to move to that analogy. If you have been driving while drunk and you haven't injured or killed anybody yet, that doesn't mean you have been a safe driver. It just means that you and everybody around you have been lucky so far. If you have been initiating sexual activity when you have been too drunk or high to know if you have consent, then you have not been a safe sexual partner if you have not assaulted or raped anybody yet. You've just been lucky so far. So, here's the bottom line. Never mind the other person. We can talk more about that. If you have been initiating sexual activity when you are too drunk or high to know if you have consent and somebody asks you or you ask yourself, "Have you ever sexually assaulted or raped someone?" the only honest answer you can give is, "I don't know," because, by definition, you don't know. If you have been initiating sexual activity when you are too drunk or high to know if you had consent then you don't know if you have sexually assaulted or raped someone.

Now, that is hard to take on board. I'm aware of it. We like to think of ourselves that we can clearly, unambiguously answer a resounding, "no," to this question, "Have you sexually assaulted or raped someone?" How dare you even ask such a question? I am not out to blame or shame anyone. In fact, as I was thinking this through for myself, I tried to avoid the conclusion I just articulated because it's a bitter pill to swallow. I couldn't figure out a way around it. I started with my basic definition I gave you, the affirmative consent standard. Consent must be conferred by an explicit act. I spelled out the implications of that, epistemological responsibility. The initiator has a responsibility to know if you have obtained consent and if you're in a position where you don't know if you have consent, then we are talking about nonconsensual sex and you don't know if you have assaulted or raped someone. As far as I can figure out, that just follows from basic concepts. I don't see any way around it. So, I put this out to you as a challenge. When we see and, again, let me go particularly to where we most often, and not Exclusively, have the problems.

If I speak personally as a male. I see another male drunk, about to go off with what looks like a sexual conquest. Instead of congratulating him, my obligation to my classmate, teammate, fraternity brother, co-worker, friend, simply person with whom I share the planet, my obligation is to pull him aside and say, "You don't want to do this. You don't want to wake up the next morning not knowing, for the rest of your life, if you have sexually assaulted or raped someone." Why on earth would I wish this on someone that I consider a friend, teammate, classmate, fraternity brother, simply co-inhabitant of the planet? I am aware this requires a change in the culture of masculinity, in the culture of our society. There are all sorts of terms that young men use for each other that are unflattering for men who block another man's sexual conquest in this way.

I'm aware that this requires cultural change. It is eminently doable. Everyone who's here gets the message, talks to a few people, every one of those people talks to a few people. It is possible to change the culture of the campus. It is possible to change the culture of the society to actually make society safer for all of us in sexual situations. I do not believe that all is fair in love and war. I do not believe we check our ethical selves at the door when we enter the bedroom or the boardroom or the battlefield or whatever it is. I believe we live with ethical integrity everywhere, all the time, and that is the challenge with which I leave you. And I thank you for your attention. Thank you.

[END]