

Elusive Consent

Abstract

Deception, like coercion, can invalidate the moral force of consent. In the sexual domain, when someone is deceived about some feature of their partner, knowledge of which would be dispositive of their decision to have sex – a dealbreaker – the moral validity of their consent is undermined. I argue that in order to determine whether someone has discharged their duties of disclosure in the sexual domain, we should ask whether, upon receiving a token of consent to sex, they have a justified belief that their partner would consent to the sexual encounter given all the features that it has. I argue that whether an agent has a justified belief in this proposition is a function of the agent's body of evidence and which alternatives uneliminated by their evidence are relevant in the agent's context.

keywords: consent; deception; relevant alternatives; justified belief

Deception, like coercion, can invalidate the moral force of consent. For example, if a patient consents to a medical procedure on the basis of false or misleading information provided by the doctor, then their token of consent to that procedure fails to be morally transformative. In the sexual domain, when someone is deceived by their partner about some feature, knowledge of which would be dispositive of their decision to have sex – a dealbreaker – the moral validity of their consent is similarly undermined. This raises serious epistemic questions that demand answers.

What information do we have a moral duty to disclose before having sex? And under what conditions are we justified in believing that others have given consent to a sexual encounter? It has been argued that given the relationship between consent and deception, agents in the sexual domain have implausibly extensive duties of disclosure. For example, one might worry that the relationship between consent and deception entails that individuals must disclose a long list of features about themselves to their prospective sexual partner, just to make sure that none of those features is a dealbreaker. In this paper, I defend a framework that can provide guidance in this domain. I maintain that in order to determine whether someone has discharged

their duties of disclosure, we should ask whether, upon receiving a token of consent to sex, they have a justified belief that their partner would consent to the sexual encounter given all the features that it has. Whether an agent has a justified belief in this proposition is a function of the agent's body of evidence and which alternatives uneliminated by their evidence are relevant in the agent's context.

The structure of this paper is as follows: in the first section, I give an overview of the relationship between consent and deception; then, I explain why this view generates an epistemic problem, and why existing responses to the problem are insufficiently specific. In the second section, I argue for a framework, based on David Lewis's relevant alternatives account of knowledge, that specifies the scope of our duties of disclosure in the sexual domain. In the third section, I delineate the consequences of my framework for the both the recipient and profferer of consent's duties of disclosure and apply my framework to some real life cases. Finally, in the fourth section I respond to objections.

I. Consent & Deception

A. *Why deception invalidates consent*

The importance of morally valid consent is widely recognized. Consent "turns trespass into a dinner party; a battery into a handshake; theft into a gift; and invasion of privacy into an intimate moment".¹ Consent can transform the moral landscape in such a way that makes it permissible for someone to do what was antecedently impermissible for them to do. Importantly, an agent's having the *intention* to consent to a given state of affairs is a necessary condition for morally valid consent. The appropriate way to characterize this intention is subject to debate; Alex Guerrero usefully defines it as "an attitude of affirmative endorsement toward some state of affairs".²

Consent requires this affirmative mental state because merely uttering the words “I consent to X” is not morally transformative, for example, when it is prompted by something like fear or intimidation.³ Even if we make an exception for coercion cases, we might still think that assertions of “I consent to X” are not morally transformative when made on the basis of a whim or when the person’s mental state has been sufficiently altered by a substance, especially when the consent is to something serious such as surgery or sex.⁴ Therefore, for consent to be morally transformative, it must be the case that the agent consenting has the intention to consent, not that they merely say the words.

A token of consent can fail to successfully generate a permission in a number of ways, including *deception*.⁵ For example, if someone were to consent to a medical procedure on the basis that it will cure their illness, and the doctor knows this and also that it will do no such thing, then their consent fails to be morally transformative. This is because the profferer’s attitude of affirmative endorsement picks out the state of affairs in which the surgery cures their illness, not the state of affairs in which the surgery does not cure their illness. If a doctor performs the procedure on the basis of such morally invalid consent, then their actions are seriously morally wrong. Deception can have the same effect on consent to sex.⁶ Consent is of particular importance in the sexual domain. Be it because sex is central to our identity as human beings or because sex involves the use of one’s body in a distinctly intimate way, most people agree that protecting sexual autonomy is crucial.

Tom Dougherty argues persuasively that deception about a *dealbreaker* invalidates consent to sex, no matter the content of the dealbreaker. A dealbreaker is a feature that is dispositive of someone’s decision to have sex. That is, “it must be the case that the other person is all things considered unwilling to engage in the sexual encounter, given that it has this

feature”.⁷ For example, if Alice consents to have sex with, Bob, but it turns out that the person to whom she consented is actually Bob’s twin brother, Bill – who pretended to be Bob and to whom Alice would not have given consent – then this sexual encounter has taken place without Alice’s morally valid consent and is seriously morally wrong. Most people agree that in cases like this, deception undermines the moral validity of consent.

Dougherty maintains, and I agree, that it would be problematically moralistic to agree that deception about identity can invalidate consent, but that deception about other features cannot invalidate consent. In other words, he argues against endorsing an objective list of dealbreakers. Even though we might think that some dealbreakers are vain or trivial, as long as it genuinely is the case that the person is unwilling to engage in the sexual encounter given that it has that feature, when an encounter in fact has that feature, consent is undermined. As such, even if Bob had lied to Alice about the fact that he paints his toe nails pink, as long as this is a dealbreaker for Alice, then her token of consent to sex fails to be morally transformative.⁸

B. Does this entail implausibly extensive duties of disclosure?

Many people have concerns about the consequences of Dougherty’s argument for the scope of our duties of disclosure in the sexual domain.⁹ On the one hand, most people agree that individuals have a moral responsibility to disclose whether they have an STI prior to engaging in a sexual encounter; this is even entrenched in the law in many places.¹⁰ On the other hand, there is significant disagreement about our responsibility to disclose other features: must we disclose our star sign to a prospective sexual partner, just in case that partner would only consent to have sex with a Pisces?¹¹ What about political affiliations or considered moral convictions, such as whether or not we eat meat or our stance on the moral permissibility of abortion? This question is of particular importance for people who have sex with partners they do not know very well.

The question is: how do we determine which features of ourselves we should disclose before having sex? Which features can we keep to ourselves?

It is clear that when someone makes their uncommon dealbreaker known, and the recipient of consent lies about that feature in order to have sex, then it is straightforward that they have done something morally wrong. For example, suppose Chelsea tells David that she would not consent to sex with a Trump supporter and David lies and says that he is a Democrat. If they subsequently have sex, it is clear that David's lie is morally wrong. We can diagnose what has gone morally wrong in this case by appealing to David's epistemic state. David did not have a justified belief that Chelsea would not consent to the sexual encounter given all the features that it actually has because he was made aware of the fact that Chelsea would not consent to sex with a Trump supporter.

Importantly, consent is not only invalidated when deception is intentional. Consent requires a pro-attitude towards the object of consent to be morally transformative. This pro-attitude is also absent when the profferer of consent has a false belief that does not result from overt deception on the part of the recipient of consent.¹² As such, while I am using the word 'deception' to indicate intentionally misleading someone, it should be understood to include *the mere absence of dealbreaking information*.

It may be objected that when a dealbreaker is unknown to both parties, mere lack of information about the dealbreaking feature cannot invalidate consent. However, there is a counterexample to this: even if the profferer does not make her dealbreaker about STIs known, her consent to someone who is STI positive would still be invalid. It is the responsibility of the person with an STI to disclose that status. We need a plausible way of capturing this case (and

cases like it), without also requiring that individuals disclose everything about themselves before responsibly proceeding to have sex.¹³

C. *Dougherty's duty of due diligence and why it fails*

Dougherty recognizes this problem, and argues that it can be solved by positing what he calls a Duty of Due Diligence. He articulates this duty as follows:

Duty of Due Diligence: If X needs Y's consent to perform an action A, then X has a duty of due diligence owed to Y regarding X's performance of A. X avoids breaching this duty iff: either (i) X refrains from performing A; or (ii) X has adequately investigated that Y has decided that they are willing for X to perform A.¹⁵

Dougherty leaves what it means for someone to have "adequately investigated" vague. He maintains that the conditions under which an agent has discharged their duty of due diligence will vary depending on what is at stake. It seems clear that the sexual domain is a high stakes domain, so any adequate investigation into sexual consent will have to be quite extensive.

Unfortunately, this view fails to tell us anything more – it only tells us to gather more information. In that sense, it does not really put us in a better epistemic position with regards to the question of what *specific* features agents have duties to disclose and which ones they can permissibly keep to themselves.

II. The Epistemology of Consent & Deception

The problem at issue in this paper is *epistemic*: it concerns what information agents should have before they can give morally valid consent to a sexual encounter, and in turn what information agents have a duty to disclose to a prospective sexual partner. As Alex Guerrero points out, much of the debate surrounding consent has (mistakenly) focused on establishing a plausible metaphysics of consent. Instead, Guerrero suggests that we should acknowledge the epistemic dimensions of consent. He points out that, "It is morally important for us to know whether other people consent to various states of affairs".¹⁶ For example, David does something morally wrong

when he proceeds to have sex with Chelsea when he has insufficient justification for believing that she would consent had she known that he supports Trump.¹⁷

I maintain that in order to discharge their duties of disclosure in the sexual domain, agents must, upon receiving a token of consent, have a justified belief in the proposition that their prospective partner would consent to the sexual encounter given all the features that it actually has.¹⁸ In this section, I first consider a seemingly plausible suggestion in response to this question from epistemology, and argue that it is no more successful than Dougherty's duty of due diligence because it, too, is insufficiently specific. I then go on to argue for a relevant alternatives framework, which does provide the guidance needed.

A. Moral Encroachment: The threshold view

A seemingly plausible way of solving the problem at hand is to appeal to moral encroachment. In fact, Dougherty's Duty of Due Diligence presupposes moral encroachment. The relevant alternatives framework that I endorse below is compatible with moral encroachment – in fact, it takes on board the main commitment of moral encroachment – but it does better than moral encroachment at solving the problem at hand because mere moral encroachment underspecifies the scope of our duties of disclosure in the sexual domain. Let me explain.

Moral encroachment theories hold that the epistemic status of a belief can depend on its moral features.¹⁹ Moral encroachment accepts fallibilism: that agents can have justified beliefs in propositions in which they are not 100% confident. What degree of confidence does an agent need to justifiably believe a proposition? The moral encroachment theorist argues that the level of justification needed for outright belief shifts up or down depending on what is at stake conditional on the truth of the proposition. For example, I need less evidence to justify my belief

that it won't rain tomorrow when I am idly wondering about the weather than when I am getting married the next day.

Guerrero defends a view that employs this framework.²⁰ On his view, agents require stronger evidence to justifiably believe the proposition that their partner has consented to the sexual encounter than they would otherwise require due to the high moral stakes of getting it wrong. Unfortunately, this suggestion is not much more promising than Dougherty's Duty of Due Diligence. Moral encroachment merely tells us that the threshold for justified belief is higher in the sexual domain than in other domains. The threshold view of moral encroachment cannot tell us what specific features of themselves agents are responsible for disclosing. Even Guerrero admits that "Exactly what "more" a person must do, or what better/stronger evidence they must have, will be hard to state in a general way".²¹

The sexual domain certainly is a high stakes domain, and thus requires stringent evidential standards; this is a *quantitative* claim. The relevant alternatives framework that I defend here accepts this and adds a *qualitative* dimension to the explanation: it provides guidance for how agents can figure out what *specific* features of themselves they should disclose before proceeding with a sexual encounter. As such, the framework I defend here does a better job than both Dougherty's Duty of Due Diligence and Guerrero's application of moral encroachment at delineating the scope of our duties of disclosure in the sexual domain.

B. Elusive Knowledge

I suspect that what generates the concern at issue in this paper is something like the following: when someone tokens consent we can usually take this as evidence that, under ordinary circumstances, gives the recipient defeasible justification for believing the proposition that the profferer would consent to the sexual encounter given all the features that it actually has. There

are some contexts, though, in which that very same evidence no longer gives the recipient justification for believing: perhaps the recipient of consent has not disclosed that they have an STI. This is because even though the profferer may have tokened consent, the recipient has information that makes salient the possibility that this token of consent fails to be morally transformative.

David Lewis noted an analogous problem when we try to articulate the necessary and sufficient conditions for knowledge. For example, in ordinary circumstances when I consider the proposition “there is a zebra” when I am at the zoo, the possibility that the zoo has put painted mules into the zebra enclosure is simply not relevant. In ordinary situations involving practical deliberation, my perceptual evidence of a zebra suffices to give me knowledge that there is a zebra in front of me. However, when I consider the proposition “there is a zebra” after learning that the zoo I am at has a history of nefariously engaging in the misrepresentation of the animals in its enclosures, the possibility that the animal in front of me is a mule painted to look like a zebra becomes salient. In the latter context, the standards for knowledge have changed and I no longer have knowledge that “there is a zebra”, even though I have the have same evidence that gave me knowledge in the former context.

This is known as a relevant alternatives framework. The idea of relevant alternatives was first introduced by Alvin Goldman in a 1976 article “Discrimination and Perceptual Knowledge”, and it has subsequently become a canonical position within epistemology. For example, such a framework has recently been defended by Sarah Moss in her account of legal standards of proof.²² Lewis also articulated a compelling version of this view that he calls “Elusive Knowledge”. David Lewis first applied this framework to knowledge, and it has

subsequently been applied to many other epistemic notions, including justified belief. In this paper I focus on justified belief.

In what follows, I argue that Lewis' relevant alternatives framework can provide us with the resources to answer the question at issue in this paper. Lewis claims that a subject S knows (or for my purposes, has a justified belief in) a proposition:

If and only if S's evidence eliminates every possibility in which not-P - Psst! - except for those possibilities that we are properly ignoring.²³

Or, as Moss puts it, "it is not exactly that the fridge gets *dirtier* when your mother-in-law looks at it, but rather that in the context of your very own kitchen, 'clean' and 'dirty' may start to be interpreted relative to a higher standard than before".²⁴ Lewis calls this knowledge 'elusive' in the sense that whether or not an agent has knowledge – or in this case justified belief – depends on the context in which the claim is being made. Just as my fridge can be clean or dirty in different contexts, without actually changing anything about the amount of bacteria in the fridge, so too can the truth of my attributions of justified belief change, without a corresponding change in my evidence.

This raises the important question: which possibilities are properly ignored and when? Lewis articulates seven rules to answer this question. The rule of *actuality* tells us that a possibility that actually obtains is not properly ignored. The rule of *belief* tells us that a possibility cannot be properly ignored when an agent gives it or ought to give it a sufficiently high degree of confidence. The rule of *resemblance* states that if some possibility cannot be properly ignored, neither can possibilities that saliently resemble it. These rules are restrictive: they tell us what possibilities cannot be ignored.

The following rules are permissive: they tell us what possibilities can be ignored. The rule of *reliability* states that possibilities in which our usually reliable faculties (perception,

memory, testimony, etc.) fail can defeasibly be ignored. The rule of *method* states that possibilities in which standard methods of non-deductive inference fail can defeasibly be ignored. The rule of *conservatism* states that possibilities that are conventionally ignored (and this is common knowledge) can defeasibly be ignored. The rule of *attention* states that when a possibility is not being ignored a context, then that possibility is not properly ignored in that context.²⁵

Are all of these rules useful for the purposes of figuring out what possibilities can and cannot be properly ignored by agents in the context under consideration here? Given that we are concerned here with justified belief, the rule of actuality is not relevant because agents can hold false justified beliefs. I will now articulate how the relevant rules can be constructively applied to cases of sexual consent.

C. Elusive Consent

I begin with what I take to be the three rules that do the most explanatory work in my view: the rule of conservatism, the rule of belief, the rule of attention. These three rules allow us to capture three important aspects that we intuitively think agents ought to take into account in the sexual domain: convention, broad context, and local context. The remaining three rules play a more auxiliary role.

The rule of conservatism. This rule invokes the importance of paying attention to convention. In particular times and places, there are certain features that are conventional dealbreakers; these conventional dealbreakers shape people's expectations within the sexual domain. The rule of conservatism helps explain both why it is permissible for individuals to take into account the possibility of some dealbreakers (like positive STI status) and why it is permissible for individuals to ignore the possibility that a prospective sexual partner has any

number of idiosyncratic dealbreakers: that they will only have sex with a Pisces, with someone with pink toe-nails, etc.

The rule of belief. According to this rule, possibilities in which agents have or ought to have sufficiently high confidence cannot be ignored. Where this threshold sits depends on what is at stake. We already established that the sexual domain is a high stakes domain: error would indeed be disastrous – my framework accepts the core tenet of moral encroachment. This entails that the threshold for relevance is lower in the sexual domain than in domains with lower stakes. This is because when there is a lot at stake, more remote possibilities need to be ruled out before an agent has a justified belief. This rule allows us to capture the fact that it is important to take into account the *broad* context in which the encounter is taking place: agents should pay attention to the features of their context that might broadly differentiate their context from the default convention. In that sense, this rule allows my framework to take on board Dougherty’s and Guerrero’s (correct) views that we must rule out a great many possibilities before being justified in believing that a prospective partner would consent, but it allows my view to go further in precisifying exactly what features to watch out for.

Let me illustrate this rule using an example. Suppose, Kathleen meets Joe at a ‘Vegan Support’ rally. Everyone there, including Kathleen, is passionate about animal ethics and sensitive to the moral wrong of using and consuming animal products. In fact, Kathleen is actively disgusted by meat-eating and does not hide this fact. Joe is attending because he just moved to the city and would like to meet new people. He is not a vegan; he regularly eats meat and uses animal products. While he is intrigued by the passion that vegans feel towards their cause, he is confident that he will not be going vegan any time soon. In this context, the rule of belief tells us that Joe ought to have reasonably high confidence in the possibility that Kathleen

has an animal related dealbreaker. Although an animal related dealbreaker is not conventional, the rule of belief defeats the presumptions set by the rule of conservatism. As such, according to the rule of belief, Joe cannot properly ignore this possibility. That is, Joe cannot justifiably believe that Kathleen would consent to the sexual encounter given all the features that it has until he rules out the possibility that Kathleen has an animal related dealbreaker.

The rule of attention. This rule states that when a certain possibility is not in fact being ignored, then that possibility is no longer properly ignored. This rule allows us to capture the importance of taking into account the *local* context of a prospective sexual encounter – the context of the particular encounter itself. This rule tells us that even under ordinary circumstances, such as Joe meeting Kathleen at a bar, if the conversation turns to veganism and Kathleen expresses that she has deeply held moral convictions against eating meat, then Joe can no longer properly ignore the possibility that Kathleen as an animal related dealbreaker. This differs from the rule of belief since, even when the agent ought to have very low confidence in a possibility, if that possibility is discussed in the conversational context, it becomes relevant. This rule preserves the idea that once someone makes their dealbreaker known, the recipient of consent cannot properly ignore the possibility that their having that dealbreaking feature means that their prospective partner would not consent to the sexual encounter, given that it has this feature. This is so even when the dealbreaker is very idiosyncratic and uncommon.

The rule of resemblance. This rule tells us that if one possibility “saliently resembles another” possibility that cannot be ignored, then it cannot be properly ignored. So, at the ‘Vegan Support’ rally, just as Joe cannot properly ignore the possibility that Kathleen will not have sex with people who eat animals, he cannot ignore the possibility that Kathleen will not have sex

with people who hunt animals for sport. This is because the two possibilities are saliently similar, given Kathleen's love of animals.

The rule of reliability. This rule explains why we can take someone's token of consent as evidence for the moral validity of their consent: because tokens of consent are defeasibly reliable indicators of morally valid consent.

The rule of method. This rule explains why agents can ignore possibilities that don't fit well with their existing body of evidence and why agents can take statistical evidence about the likelihood of certain dealbreakers as part of their body of evidence.

What exactly is the relationship between these six rules? Is there a possible tension between the rule of conservatism and the rule of attention?²⁶ For example, suppose it is conventional to ignore political dealbreakers, but agents are at a political rally. Alternatively, suppose it is conventional to ignore the possibility of an astrology related dealbreaker, but an agent talks at length about her love for astrology and how important it is to her life. No tension arises in either of these cases because the rules invoking convention and broad context are defeasible by whatever is going on in the local context. The rules of conservatism and belief are helpful in the absence of information about the local context, but once attention has been drawn, even to an idiosyncratic dealbreaker, then the possibility of this dealbreaker is no longer properly ignored. As for the possible tension between convention and broad context, convention can also be defeated by information about a particular broad context such that at a political rally, the possibility of a political dealbreaker is not properly ignored.

These six rules are tools that allow us to determine whether an agent has properly or improperly ignored a possibility consistent with their evidence that bears on whether a prospective partner would consent to the sexual encounter given all the features that it has.

III. Duties of Disclosure

I have argued that in order to determine the scope of our duties of disclosure in the sexual domain, we should ask under what conditions an agent has a justified belief that their prospective partner would consent to the sexual encounter given all the features that it actually has. I maintain that an agent is justified in believing this proposition when their evidence eliminates every possibility in which their partner would not so consent, except those possibilities that they are properly ignoring. Possibilities are properly or improperly ignored on the basis of the six rules I focus on above: the rules of belief, attention, resemblance, reliability, method, and conservatism. This framework generates duties for both the recipient and profferer of consent that are consistent with our pre-theoretic intuitions about particular cases, and which can provide guidance in cases plagued by disagreement.

The relevant alternatives framework provides the tools necessary to answer the question of what specific features of themselves *the recipient* of consent has a duty to disclose to a prospective partner before responsibly proceeding to have sex. If the possibility that a prospective partner has dealbreaker X is properly ignored, then the recipient of consent does not have a responsibility to disclose feature X. Conversely, if the possibility that their prospective partner has dealbreaker Y is not properly ignored, then the recipient of consent does have a responsibility to disclose feature Y.

This framework provides guidance that is consistent with our pre-theoretical intuitions about particular cases. For example, except in unusual circumstances agents have no responsibility to disclose their star sign because it is not conventional to have a star sign related dealbreaker. The same can be said about thousands of other features that would only be the basis for a very idiosyncratic dealbreaker. On the other hand, agents should disclose whether they have

an STI because that is a conventional dealbreaker for people to have. Thus, the relevant alternatives framework captures cases in which failure to disclose would clearly be problematic, without requiring that individuals disclose every feature of themselves to a prospective sexual partner. Furthermore, it explains why people who have idiosyncratic dealbreakers should disclose those before proceeding with a sexual encounter.

Now that I have extolled the virtues of the relevant alternatives framework in explaining the general scope of duties for the recipient and profferer of consent, I will go on to apply the framework to some particular, real life, cases. I maintain that my relevant alternatives framework not only provides verdicts that are consistent with our pre-theoretic intuitions, it also provides us with plausible answers in cases for which there is considerable intuitive disagreement. Consider a case concerning a dealbreaker about appearance:²⁷

WIG: Rose meets Jack at the gym in New York City. When they meet, Rose is wearing long blonde hair extensions braided into her natural hair. Upon asking Rose out, Jack mentions that he finds Rose's hair 'gorgeous.' On their date, Rose is wearing a long almost white wig and again, Jack is 'all over it.' Rose's wigs are expensive and she takes pride in being careful about how she applies them, so that when Rose and Jack eventually have sex, her wig stays put. Sometime later, though, Jack sees Rose without her wig and realizes that one of the main things he had liked about her appearance was not real. Things fizzled out soon after.

For the purpose of our discussion here, I will stipulate that Jack would not have had sex with Rose had he known that she wore wigs.²⁸ The sexual encounter that took place between Rose and Jack was nonconsensual because Jack did not intend to consent to wig wearing-Rose, but only intended to consent to natural hair-Rose. People have widely varying intuitions about whether or not Rose should have disclosed to Jack that she wears wigs; the consensus in the online forum on which it was posted is that she did not have a duty to disclose this. However, having presented this case to many people in conversation, not everyone agrees. According to the relevant

alternatives framework, we must ask: did Rose have a justified belief that Jack would consent to the sexual encounter given all of the features that it actually had?

To answer this question, we can refer to our six rules. Was Rose improperly ignoring the possibility of a hair-related dealbreaker? It doesn't strike me that hair-related dealbreakers are common enough that she ought antecedently to have had high enough confidence in this possibility to invoke the rule of belief. However, as described, Rose's hair was the feature on which Jack focused the most: he called it 'gorgeous' and was 'all over it.' Given the rule of attention, then, the possibility that Jack had a hair-related dealbreaker should not be ignored. So, until Rose ruled out this possibility by gathering more evidence (she could mention to Jack that she wears a wig and see his reaction), Rose cannot justifiably believe that Jack would consent to sex given that it has this feature.

If we consider the argument for the other side, we can see that this reasoning better captures what we should say about this case. Someone might argue that Rose *did* have a justified belief that Jack would consent to the sexual encounter given all the features that it actually has because having a hair-related dealbreaker is sufficiently uncommon and because Jack did not explicitly make his dealbreaker known to her before they had sex. Such a person might say that the context had not explicitly shifted enough to invoke the rule of attention; they might say something like 'well, if it is *that* important to Jack that she have natural hair, then he should have said something explicit'; this is a common refrain.

This reasoning, I argue, fails to engage seriously with why it is morally important for an agent to have a justified belief that their prospective partner would consent to the sexual encounter given all the features that it actually has. Given the importance of consent in the sexual domain, Guerrero points out that when an agent fails to have a justified belief in this proposition,

they are taking an objectionable moral risk with respect to another agent's autonomy. That is, "acting in a case where one takes an objectionable moral risk regarding another's consent is a way of disrespecting that person, and acting without sufficient regard for that person's standing as a moral agent".²⁹ Given the complexity of why people prefer and act as they do in the sexual domain, to respect someone's standing as a moral agent in the sexual domain requires grace and compassion. The sexual domain is a morally fraught place, and it involves emotions and intimacy that demand care and consideration. Rose owes it to Jack, as a prospective sexual partner, to pay attention to the context of their interactions. She should pay attention to the fact that Jack has drawn attention to her hair and be compassionate in her assessment of why.

To conclude this section, the main point I want to emphasize is that *context is key*; this means that open and honest communication with prospective sexual partners is profoundly important. Often in the sexual domain, people are afraid of open and honest communication before sex for fear that too much, too soon will scare their prospective partner away. This fear is misplaced: while it might be easier in the moment to ignore the question of whether Jack's interest in Rose's hair might be the seeds of a dealbreaker it often leads to sexual encounters in which one party, or both, feel badly.

IV. Objections

In this section, I consider and respond to three objections to my arguments in this paper.

A. *Why relevant alternatives?*

It may be objected to my project in this paper that by invoking Lewis' relevant alternatives framework, I am complicating matters unnecessarily. We can get the same result, my interlocutor might say, by adopting something like the following principle: an agent obtaining consent to sex has fulfilled her duties of disclosure only if she has disclosed everything she reasonably believes

might make her partner dissent.³⁰ Then we can do away with the complexities of the relevant alternatives framework.

In response, I argue that since Lewis' articulation of the relevant alternatives on knowledge is already worked out in the epistemic literature, it is useful to bring this framework to bear on problems outside of traditional epistemology. We have a lot to learn from the intersection of epistemology and ethics. In this instance, we have an ethical problem, but there is no need to reinvent the wheel to provide a plausible solution – a good solution already exists in a different body of literature. Bringing epistemic theories to bear on applied ethical issues is a fruitful endeavor insofar as it can help clarify ethical problems with approaches that are already well-worked out. Furthermore, it is interesting in and of itself to establish that these tools from epistemology can be applied in real-world situations. The fact that different pieces of the philosophical puzzle actually fit well together is interesting.

B. Why should convention matter?

It may be objected to my framework that due to the rule of belief, *convention* plays too large a role in determining what alternatives are and are not properly ignored. Why should this be so? Obviously, mere conventions can be deeply problematic. To clarify: even if feature X is not a conventional dealbreaker, if the profferer of consent draws attention to the fact that feature X is a dealbreaker for them, then in that context the possibility that feature X is a dealbreaker is no longer properly ignored. The rules of conservatism and belief are defeasible.

My interlocutor might still be concerned, though, that convention is only useful insofar as it is a heuristic for what people actually want. I agree that I invoke convention in my argument as a useful heuristic, but it is more than just that. Invoking convention is a way to ensure that in the sexual domain, people are not taking objectionable moral risks with respect to whether their

prospective partner has given morally valid consent. That is, tying our duties of disclosure to convention helps to ensure that agents respect what dealbreakers individuals are actually likely to have. Even if we might hope that certain dealbreakers become less common, or disappear entirely – such as racist or homophobic dealbreakers, that does not change the fact that people are in fact likely to have certain dealbreakers over others. Convention does not exhaust the relevant considerations, though, so the framework still ensures that people are treated as individuals.

Furthermore, invoking convention has the benefit of forcing people to consider what conventions actually apply in particular contexts. The sexual domain is exceedingly complex and difficult to navigate without getting hurt. Explicitly drawing on convention has the positive effect of forcing people to consider and communicate what their antecedent expectations are for a sexual or romantic relationship. Is it conventional to date, and have sex with, multiple people until exclusivity is explicitly agreed upon? Or is it conventional to expect that upon having sex, two people are exclusive unless stated otherwise? Thinking about these questions in general helps to facilitate open and honest communication, which is essential to ensuring that people truly have robust sexual autonomy.

C. Privacy

Finally, it might be objected to my view that it entails that dealbreakers that stem from prejudice prevalent in the relevant context are not properly ignored. For example, there is currently widespread prejudice against trans people in the United States. As a result of this prejudice, at least some people in the US today have a dealbreaker of not wanting to engage in sexual contact with someone who is trans. Does the framework I defend here place an undue burden on trans people to disclose private information about their sexuality and gender in order to discharge their

duties of disclosure? This seems especially problematic in virtue of the fact that trans people already face undue burdens as a result of prejudice.

I must admit that I am troubled by this implication of my view. It is extremely upsetting that the trans community continues to suffer as a result of the prejudice that plagues US society. And the trans community is not the only one who might face privacy concerns as a result of my view; insofar as people still harbor prejudiced ideas about any number of features, my view will give rise to a privacy concern. Unfortunately, I think that this consequence is one that we must accept if we are to allow individuals robust autonomy over their sexual choices. Individuals and institutions have a responsibility to work to overcome prejudiced views of trans and other groups of people. This is the level at which change must take place, not at the level of sexual choice and preference. That is, once we have done more to eradicate prejudice against trans people at the individual and institutional level, the number of people who hold this kind of prejudice based dealbreaker will be lower and this possibility will become less relevant.

VI. Conclusion

In this paper, I have argued that we can determine the scope of our duties of disclosure in the sexual domain by figuring out the conditions under which an individual has a justified belief that their partner would consent to the sexual encounter given all the features that it has. I maintain that an agent can have a justified belief in this proposition when their evidence eliminates all possibilities in which the profferer would not consent, except those possibilities that are being properly ignored. I borrowed six rules from Lewis – the rules of belief, attention, resemblance, reliability, method, and conservatism – that together provide a framework to determine when alternatives are properly ignored. These rules tell us what *particular features* individuals must disclose, while alternative accounts fruitlessly tell individuals to search for more information.

The elusive consent framework provides a principled way of establishing the scope of our epistemic duties of disclosure in the sexual domain, in light of the fact that deception, even about seemingly trivial features, can invalidate consent to sex.

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Notes:

¹ Hurd, "The Moral Magic of Consent", 123.

² Guerrero, "The Epistemology of Consent," 11.

³ See Falk, "Rape by fraud and rape by coercion," 1998, for an overview of the relationship between rape and fraud or coercion.

⁴ See Conly, “Seduction, Rape and Coercion,” 2004 for a discussion of seduction as coercion.

⁵ See Dougherty, “Sex, Lies and Consent,” 2013.

⁶ See Matey, “Sexual Consent and Lying About Oneself,” 2019 for an account of deception and consent that is even stronger than Dougherty’s account.

⁷ Dougherty, “Sex, Lies and Consent,” 719.

⁸ Not everyone agrees with Dougherty’s argument for how and why deception can invalidate consent. See the following responses to and engagements with Dougherty’s 2013 paper: Liberto, “Intention and sexual consent,” 2017; Manson, “How not to think about the ethics of deceiving into sex,” 2017; Jubb, “Consent and Deception,” 2017; Lazenby & Gabriel, “Permissible Secrets,” 2018; Brown, “Sex crimes and misdemeanors,” 2019.

⁹ This concern is raised in Bromwich & Millum, “Lies, Control, and Consent: A Response to Dougherty and Manson,” 2018.

¹⁰ See Lucinda Vandervort, “HIV, Fraud, Non-Disclosure, Consent and a Stark Choice: *Mabior* or Sexual Autonomy?” 2013.

¹¹ This hypothetical dealbreaker is discussed by Dougherty, “Sex, Lies and Consent,” footnote 52.

¹² That Dougherty endorses this consequence of his view is evident in his hypothetical *Antique Skis*. He considers a case in which Candace asks Courtney to store antique skis in her basement. Courtney agrees. Neither Candace nor Courtney know that the skis were once owned by Josef Stalin. Had Courtney known this, she would never have given her consent to store the skis. Dougherty maintains that in this case, Courtney’s consent is invalid because: “whether Courtney validly consents depends on facts about Courtney – it depends on the nature of her mental attitudes or utterances. Whether Courtney validly consents does not depend on Candace’s epistemic state” (Dougherty, “Sex, Lies and Consent,” 738).

¹³ This is so even if there is a very low risk of transmission to their partner; in that sense, the risk of physical harm is not the reason why disclosure of STI status is important.

¹⁵ Dougherty, “Affirmative Consent and Due Diligence,” 101.

¹⁶ Guerrero, “The Epistemology of Consent,” 15.

¹⁷ Throughout this paper, I sidestep the question of whether all instances of nonconsensual sex count as rape. Catharine MacKinnon, “Toward Feminist Jurisprudence,” 1982, argues that rape is forced sex, while others like Susan Estrich, “Rape,” 1986, and David Archard, “The Wrong of Rape,” 2007, argue that the absence of consent is what defines rape. Like Dougherty, “Sex, Lies and Consent,” 721), I leave this terminological question to the reader.

¹⁸ What kind of justification an agent must have for a proposition in order to discharge their duties of disclosure? Epistemologists distinguish between *propositional* and *doxastic* justification. An agent has propositional justification for a belief when they have good reason to believe the proposition; an agent has doxastic justification for a belief when their belief is *based on* the good reasons they have to believe the proposition. In that sense, what distinguishes these two kinds of justification is a basing relation. A helpful way to put the difference between these two kinds of justification is in terms of ‘being in a position to believe’ for propositional justification versus ‘justifiably believing’ for doxastic justification (from Turri, “On the relationship between propositional and doxastic justification,” 312). In this paper, I mean *propositional* as opposed to *doxastic* justification when I say justified belief. That is, agents should have reasons to believe that a prospective partner would consent to the sexual encounter given all the features that it actually has in order to discharge their duty of disclosure. To require doxastic justification in this circumstance would be overly demanding. Thanks to an anonymous referee for suggesting that I clarify this point.

¹⁹ This account of moral encroachment is from Rima Basu, “Radical Moral Encroachment,” 2019, among some of her other work.

²⁰ A similar view is also defended by Moss, “A Knowledge Account of Legal Proof,” forthcoming. Thanks to an anonymous reviewer for pushing me to address the relationship between my view and moral encroachment.

²¹ Guerrero, “The Epistemology of Consent,” 23.

²² See Moss, “A Knowledge Account of Legal Proof,” forthcoming.

²³ Lewis, “Elusive Knowledge,” 554.

²⁴ Moss, “A Knowledge Account of Legal Proof,” 9.

²⁵ All from Lewis, “Elusive Knowledge,” 1996.

²⁶ Thank you to an anonymous reviewer for pressing me to address this point.

²⁷ This case is modeled on a question posed to the r/AmItheAsshole subreddit. I did not change any of the details presented by the author of the question because I want my analysis to represent how my framework will work with regards to real world cases and all of their nuance and detail. Link to the original question:

www.reddit.com/r/AmItheAsshole/comments/crrkap/aita_for_deceiving_my_date_because_i_wear_wigs/

²⁸ See Brown, “Sex crimes and misdemeanors,” 2019 for an interesting discussion and formalization of the *strength* of different dealbreakers. I suspect that part of what generates confusion about Dougherty’s argument is that people mistake preferences for dealbreakers. On Dougherty’s account, for a dealbreaker to invalidate consent it really must be the case that the person is all things considered unwilling to engage in the sexual encounter given that it has this feature. It cannot merely be something that the agent would prefer the sexual encounter to have, but would still give consent if it doesn’t have that feature.

²⁹ Guerrero, “The Epistemology of Consent,” 2.

³⁰ Thanks to Eric Chwang for suggesting this objection.