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## PERMISSIBLE SECRETS

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*This article offers an account of the information condition on morally valid consent in the context of sexual relations. The account is grounded in rights. It holds that a person has a sufficient amount of information to give morally valid consent if, and only if, she has all the information to which she has a claim-right. A person has a claim-right to a piece of information if, and only if, a. it concerns a deal-breaker for her; b. it does not concern something that her partner has a strong interest in protecting from scrutiny, sufficient to generate a privilege-right; c.i. her partner is aware of the information to which her deal-breaker applies; or c.ii. her partner ought to be held responsible for the fact that he is not aware of the information to which her deal-breaker applies; and finally, d. she has not waived or forfeited her claim-right. Although we present this account in the context of sexual relations, we believe a virtue of the account is that it can be easily translated into other contexts.*

**Keywords:** consent, rights, privacy.

Romantic relationships are full of secrets. These secrets may include a person's true feelings, parts of their personal history, or even their sexual health. Sometimes these secrets constitute deal-breakers in sexual relations: one person sleeps with another but would not have if they had known the truth. How should we view sleeping with a person while keeping such secrets? Is it a serious wrong, a minor wrong, or not wrong at all? Does the content of the secret make a difference and, if so, how? The pertinence of these questions becomes clear when they are connected to the issue of consent. For consent to be valid, it must be properly informed. If we keep some things to ourselves, our partners may not have sufficient information to give valid consent. But then, sex without valid consent is non-consensual sex. On some definitions it is rape.<sup>1</sup>

Existing accounts of the information condition on valid consent diverge over two key criteria. The first is whether some further action or omission with

<sup>1</sup> There is disagreement about whether rape should be defined as non-consensual sex or non-consensual sex plus force. The majority position is that rape should be defined simply as non-consensual sex. For debate see, Archard (2007), Estrich (1986: esp. pp. 1095–96, 1132–33), Mackinnon (1982: p. 650, p. 655), McGregor (2005).

respect to a piece of potentially consent-invalidating information is necessary to invalidate consent. Three answers are available: (1) deception is necessary (2) non-disclosure is necessary (3) no action or omission is necessary—the mere presence of consent-invalidating information is sufficient to invalidate consent. The majority of accounts defend the proposal that only deception concerning consent-invalidating information will invalidate consent to sexual relations.<sup>2</sup> This is puzzling since in other areas, such as medicine and contract law, non-disclosure is the standard.<sup>3</sup> The second criterion concerns which kinds of information may invalidate consent. For example, Joel Feinberg defends the *fraud in factum/fraud in inducement* distinction according to which it is only information about the nature of the act, such as whether it is a medical procedure rather than sex, which can invalidate consent. By contrast, Tom Dougherty has defended the view suggested in the introduction: it is *deal-breakers* that may invalidate consent.<sup>4</sup> A deal-breaker is any piece of information about the encounter to which a person's will is opposed, such that it would lead them to refrain from sex if they were aware of it, and where 'about the encounter' may include not just the nature of the act but also the identities of the individuals involved.

In this article, we give an account of the information condition on morally valid consent. Our account is grounded in rights. In our view, the validity of a person's consent depends upon whether she has all of the information about her partner to which she has a claim-right. Exactly which pieces of information a person has a claim-right to is restricted by a number of factors.

The first is that the information must concern a deal-breaker.<sup>5</sup> Restricting claim-rights to deal-breakers has at least two important justifications. First, it prevents the proliferation of claim-rights, ensuring that consent is not contingent upon one having all possible information, or even having all of the information that one wants. Either of those possibilities would lead to implausibly demanding requirements for informed consent. Secondly, by construing the information condition in terms of what is material to a person's decision, it connects an account of consent to a particular understanding of the value of

<sup>2</sup> For discussion of the deception-based view see, Dougherty (2013), Feinberg (1986: p. 300), Wertheimer (2003: pp. 193-215).

<sup>3</sup> For discussion of consent in medical ethics see Meisel and Roth (1981). For an example of a disclosure-based principle in contract in the United Kingdom, see Rehabilitation of Offenders Act 1974 C 53.

<sup>4</sup> It is crucial that this condition is understood in terms of a person's will, rather than as a strictly counterfactual analysis. To see how the two come apart suppose that a person has a phobia of spiders that they do not identify with and wish they did not have. Their prospective partner, who has a spider tattoo on their back, knows this and conceals it with make-up. Here, the person would not, as a counterfactual matter, have sex with their prospective partner if they were aware of the spider tattoo, since they would be too afraid, but the person's will is not opposed to the sex or the concealment, since they wish they did not have the phobia.

<sup>5</sup> This idea is borrowed from Tom Dougherty (Dougherty 2013: p. 719).

autonomy.<sup>6</sup> On this understanding, it is valuable that one chooses in a way that is consistent with one's will, so that one would not repudiate one's choice given more, or even full, information. It is an understanding that can be grounded in the practical value of living the life that one would choose if one knew the whole truth, but which does not require the whole truth.

The second restriction is that certain important pieces of information about a person do not count for determining the validity of consent. More precisely, there is some information that we have a special interest in protecting from scrutiny, sufficient to generate a privilege-right. Where a privilege-right exists our partners have no claim-right. The information then does not count for determining the validity of consent even if it is a deal-breaker. Whether a claim-right or a privilege-right applies to a piece of information is determined by the correct balancing of our interest in sexual autonomy and our other interests.

The third restriction follows from the fact that we hold the duties that correlate with a person's claim-rights to be duties of disclosure. In particular, we hold that for a person to have a duty of disclosure she must either have the information or, if she does not have it, it must be appropriate to hold her responsible for not having it. This correspondingly limits claim-rights—a person has a claim-right only if her partner has the information or only if her partner may be held responsible for not having the information.

The final restriction is that for a claim-right to exist it must not have been waived. Claim-rights may be waived either explicitly or tacitly. We argue that many but not all claim-rights are waived tacitly through the act of not asking questions. This explains how consensual sex may occur with no questions asked even when certain deal-breakers are present. Exactly which rights are waived through the act of not asking questions is determined by what our partners could reasonably be expected to anticipate as important for our decision to have sex given the evidence available to them.

More formally, the position we defend is the following:

X has a sufficient amount of information to give morally valid consent to Y if, and only if, X has all the information to which he or she has a claim-right.

X has a claim-right to information if, and only if:

- a. It concerns a deal-breaker for X.
- b. It does not concern something that Y has a strong interest in protecting from scrutiny, sufficient to generate a privilege-right.
- c.
  - i. Y is aware of the information to which X's deal-breaker applies, or
  - ii. Y ought to be held responsible for the fact that he is not aware of the information to which X's deal-breaker applies.

<sup>6</sup> The idea of autonomy we are appealing to is visible in existing literature. See Christman (1991), Clayton (2012).

d. X has not waived or forfeited his or her claim-right to that information.

Of all of these conditions, it is only *a.* for which we will not provide further argument. We take that argument to have been forcefully provided elsewhere.<sup>7</sup>

Before we continue, it is important to clarify one nuance that exists with regard to the duties correlative with our partner's claim-rights. We have already spoken of 'duties of disclosure', but there is a sense in which this is misleading. Our primary duties are duties not to engage in sexual relations in the presence of an undisclosed deal-breaker. The claim-right does not attach to the disclosure of the information as such. It attaches to sexual relations in the presence of that information, if undisclosed. It is a negative right against a certain kind of contact rather than a positive right to information. However, given that a person will often be uncertain which deal-breakers her partner has, the primary duty not to engage in sexual relations in the presence of an undisclosed deal-breaker will lead to derivative duties of disclosure to *avoid the risk* that a deal-breaker is present and so the sex is non-consensual. For example, a person has a derivative duty to disclose to her new partner that she is already married even if, as it turns out, her being married is not a deal-breaker for her new partner.

This article has five sections. Section 1 examines what we call the 'Unrestricted View'. This is the view that all deal-breakers count for the purpose of determining valid consent. We aim to show three types of case where the Unrestricted View generates false positives, identifying serious wrongdoing where there is none. Section 2 provides a diagnosis of these cases, arguing that the false positives arise because the account of rights underlying the Unrestricted View is too uncompromising and one-sided, built only from our interest in sexual autonomy. We propose an alternative account of rights that balances our interests in sexual autonomy against our other interests, such as our interest in privacy. Section 3 presents our understanding of the duties that correlate with claim-rights. It argues against the proposals that deception is necessary to invalidate consent and that the mere presence of information is sufficient to invalidate consent. Section 4 examines what a person tacitly consents to when she does not ask questions. It argues that when a person does not ask questions, she waives her rights to what her partner could not reasonably be expected to anticipate as important to her decision to have sex. Section 5 concludes.

## I. FALSE POSITIVES

In this section, we examine the Unrestricted View. This is the view that all deal-breaking information should count as consent-invalidating. Our

<sup>7</sup> Dougherty (2013).

argument will be that this view creates false positives in three important types of cases: Thoughts and Dreams, Painful Disclosure and Exposure to Injustice. In examining the Unrestricted View, we will assume that it is the non-disclosure of deal-breaking information that will invalidate consent. However, it is important to be clear that we take our argument to generalize. That is, even if claim-rights correlate with the mere presence of information or duties of non-deception, we still believe that there are certain kinds of information to which our partners have no claim. If, for example, you are already persuaded that claim-rights correlate with duties of non-deception you may adjust the examples in your mind so that they involve deception rather than non-disclosure. We hope you will still find reason to believe that consent is not invalidated.

### *1.1. Thoughts and dreams*

All human beings have a capacity for imagination, but we are not always able to control what we imagine. Sometimes darker aspects of our unconscious take over and we have thoughts that are disturbing or even abhorrent. The freedom to live this kind of mental life is a central part of what it means to be a person, providing us with a way to process harms and explore new possibilities. It is important that we are able to think and feel freely, without immediately being exposed to the judgement of others, including those with whom we are intimate. The Unrestricted View accords little room to this fact. Consider the following:

*Dream.* Joanna is in a committed relationship. One night she has a dream about engaging in sexual acts that her partner would find morally abhorrent. She continues to have sexual relations with her partner, not disclosing the contents of her dream.

In this case, the Unrestricted View suggests that Joanna acts wrongly: she continues to have sexual relations while withholding information about the content of her dream that, if known, would be a deal-breaker for her partner. But this seems mistaken. Surely, Joanna should be able to proceed as normal without having to disclose the content of her dreams even when they include potentially deal-breaking facts. The contrary claim would place her relationship under constant threat. Given that she lacks control over the content of her dreams, it would make a central life activity, namely sexual intimacy, and her related projects, acutely vulnerable to the contingencies of chance. We would all have reason to worry about the content of our dreams before going to sleep each night because dreaming the wrong dreams could ruin something that we hold dear.

The same insight applies to other thoughts. Suppose you believe that the person you are dating is less physically attractive than a previous sexual partner, or that someone who you have been with for a while has gained weight. Of course, these things don't matter very much to you; they are certainly not

things that make you want to refrain from sex with that person altogether. But the fact that you feel this way may matter to your partner. According to the Unrestricted View, the mere fact that you have had these thoughts and have not disclosed them may mean that you have seriously wronged your partner, engaging in non-consensual sex.<sup>8</sup>

Finally, consider the realm of fantasy. Assuming that we have some measure of control over what we fantasize about, and that the disclosure of these fantasies would bear upon a person's willingness to sleep with us, we need to know whether failure to disclose the content of our fantasies invalidates consent. Here, too, it seems unlikely. Our innermost thoughts and desires are things that we need space to explore. The decision to consent to sex is one that can be made even in the absence of total transparency about the content of another person's mind.

The contrary view gains whatever force it has from the further assumption that our thoughts, dreams and fantasies reveal additional information about our character or sexual orientation that might invalidate consent if it were concealed. However, the claim that they do so is contingent. A person who dreams about murder does not necessarily harbour murderous tendencies. More importantly, knowledge about the content of dreams and fantasies is not doing any work here. If dreams do reveal some other morally relevant feature to the dreamer, then this person may have a duty not to engage in sexual relations with their partner, but dreams alone do not invalidate consent.<sup>9</sup>

## 1.2. *Painful disclosure*

A second category of difficult cases involve features of a person's history that it would be painful for her to disclose. Consider the following:

*Trauma.* Emma was the victim of violent non-consensual sex when she was a teenager. While she has learned to cope with the trauma and leads a full and flourishing life, she

<sup>8</sup> In 2015, a survey estimated that 46% of women and 42% of men think of other people during sex. No doubt, many of these instances would be deal-breakers were they to be disclosed. 'Is your female colleague fantasising about you?', <http://www.dailymail.co.uk/femail/article-3108984/Is-female-colleague-fantasising-Half-women-think-people-sex-partner.html> (accessed 26 April 2016).

<sup>9</sup> This raises the important question of which mental processes are protected. As will become clear, our position is that the kind of mental states that are protected by privilege-rights can only be determined at a general level once we have balanced the competing interests at stake. A set of claims and privileges that left us vulnerable to the exigencies of certain thoughts, including how attractive our partner is relative to other people, might limit our ability to develop romantic relationships. In contrast, a privilege that prevented our intentions from being known would not do so, and may even support these practices. This suggests that the former information will be protected while the latter will not, but we will not make further comment on which processes are likely to fall on either side of the cut. Our thanks to an anonymous reviewer for raising this point.

finds speaking about what happened extremely painful and distressing. Emma does not disclose her past to prospective partners before having sex with them.

Sadly, the fact that Emma has been a victim of rape will act as a deal-breaker with respect to sexual relations for some people. They may assume that the fact that Emma has been the victim of rape means that she will have issues around sex, or that she will be especially fragile, or some other such generalization.

If we accept the Unrestricted View her partner's consent may be invalidated if she has kept her history a secret. This seems wrong by itself. But, more than this, notice that if we accept the Unrestricted View, and Emma is uncertain about her future partners' deal-breakers, she will always be under a derivative duty to disclose the information in order to avoid the risk that they hold this deal-breaker and so that their consent is invalid.<sup>10</sup> It is highly implausible that she has such a duty. It would be unreasonably demanding. It would force her to confront the event again and again. Indeed, she would never be allowed to move on. She would be forced to bring something up which should not make a difference as if it *did* make a difference. Such a duty would quite plausibly have a very damaging effect on her sex (and love) life; even if a prospective partner did not make the assumptions mentioned above, the extra pressure the disclosure would create might well lead her to avoid sexual relations entirely. Surely, rather than a duty to disclose this information, Emma has a right to withhold it and proceed as normal.<sup>11</sup>

There are other cases within this category apart from traumas. Suppose there is an episode of your life that you feel deep embarrassment about even though you are blameless for it. It may be acutely painful for you to disclose facts about what happened. You should be allowed to distance yourself from it. You must be allowed some degree of separation from your past if you are to flourish in the present. Within certain parameters, we must all be allowed to define ourselves as we now are, and not as we once were. A duty of disclosure that may encompass any part of our history steals from us an open future.

### 1.3. *Exposure to injustice*

Consider a third case where the presence of a deal-breaker does not lead to a serious wrong:

<sup>10</sup> Here, we assume there is a stringent duty not to risk committing serious wrongs, such as rape and murder. Dougherty does not give a full account of our duties, except to say that he favours deception over disclosure. He intimates that he expects these duties to be stringent, or as he puts it 'strenuous'. He states, 'given the seriousness of the moral wrong, I suspect that we will often judge that people have strenuous duties to reduce the risk of deceiving another into sex.' Dougherty (2013: 741).

<sup>11</sup> Given the strength of Emma's interest in being able to move on we also believe that she would have this right if the trauma has had a lasting effect that will play out in her future relationships.

*Discrimination.* Joseph is a mixed race man living in the United States in 1900. He has successfully ‘passed’ and presents himself as white, even though this meant leaving his family and upbringing behind. He now works as an employee of the U.S. postal service, an environment in which he meets and sleeps with Harriet. Harriet would not have slept with him had she been aware of his racial identity.

Clearly, there is much seriously wrong with this situation. It is seriously wrong that Joseph must abandon his past to avoid unjust discrimination. It is also seriously wrong that many people of his race cannot escape it. But it is not seriously wrong that Joseph conceals his identity. If that were true it would put Joseph in an impossible position. He would either have to risk public exposure, the loss of his job and the possibility of violent reprisal, or he would have to abstain from sex completely. After all, if he had sex with members of his ethnic group this would ‘out’ him. It cannot be that morality requires Joseph to expose himself to prejudice and injustice or else miss out on other parts of a good life altogether.<sup>12</sup>

Concerns about exposure to injustice extend beyond cases involving race. Consider the case of a woman who lost her virginity to an older man, at a young age, in a society where this is considered highly shameful. Disclosure of this information to prospective partners would deter them, preventing her from getting married and having a family. It would also be shared among the community, allowing stigma around her to spread widely. Finally, deprived of the opportunity to marry, and given the patriarchal nature of society she is in, this person would also be condemned to a life of poverty and dependence. In this case, it is clear that she has a right to conceal the information and proceed as if it had not happened. Our prospective sexual partners have certain rights against us, but they cannot demand that we expose ourselves to this kind of peril.

We have now presented three kinds of case where the Unrestricted View generates false positives. It is important to be clear that false positives do not only harm the alleged perpetrators. They also harm the alleged victims. It is a horrible thing to be told that you have been sexually violated when this is not the case. It can cause pain, confusion and shame. Moreover, false positives will distort the moral goals and judgement of society at large. Endorsing this view risks leaving actual cases of sexual wrongdoing unpunished. In focusing on these things, attention and resources would have to be reallocated from

<sup>12</sup> Some will hold that the judgement can be explained directly with reference to the objectionable moral character of Harriet’s preferences. While plausible, that is not our view. In a society where a person is able to advance their positive interest in sexual autonomy in a number of ways, race may be a legitimate deal-breaker, regardless of how we evaluate these preferences. It is important that people maintain a significant degree of control over whom they have intercourse with, even if their beliefs are morally questionable or mistaken. Our thanks to an anonymous reviewer for pressing us on this point.

things that actually matter. If we are to avoid these pitfalls we must find a more nuanced theory.

## II. RIGHTS, SEX AND PRIVACY

Why do we have the false positives identified above? Is there anything that unifies and explains them? We believe that there is. Specifically, we believe that all of the false positives arise because the Unrestricted View is grounded in an account of our rights that is too uncompromising and one-sided. More precisely, the active account of rights is drawn only from one (admittedly weighty) consideration: the importance of sexual autonomy. Our proposal is that there are other considerations, such as our interests in privacy, which play a role in structuring our rights. In this section, we elaborate those considerations and how they structure an account of rights.

The idea that there are competing considerations that must be weighed in order to determine the structure of our rights may be fleshed out from the perspective of interests (i.e. there are other interests that compete with our interest in a certain kind of sexual autonomy). Or it may be fleshed out from the perspective of autonomy itself (i.e. there are other aspects of our freedom, like freedom of thought, that compete with our freedom to control our bodies). We will take the perspective of interests because there is already a developed literature on the idea of an interest in privacy and this seems a natural way of expressing the conflict with sexual autonomy.<sup>13</sup> But we believe the same arguments could be made in the language of autonomy.

To make our case for the importance of privacy, consider Andrei Marmor's definition of the right and its grounds:

‘[The] right to privacy [is] grounded in people’s interest in having a reasonable measure of control over the ways in which they can present themselves (and what is theirs) to others.’<sup>14</sup>

According to this view, we have a right to privacy because we have an interest in being able to control, and sometimes restrict, what we present of ourselves and our possessions to others. To elaborate, notice that our ability to keep things private performs an important social function. As James Rachels observes, ‘there is a close connection between our ability to control who has

<sup>13</sup> Some authors take the right to privacy to be a distinct right. Other authors have argued that the right to privacy is derivative of other rights, such as our self-ownership and property rights. There is no need to settle this dispute here. What should be clear is that our general interest in privacy is supported by a number of further considerations. For an argument that there is no distinct right to privacy see Jarvis Thomson (1975). For a defence of privacy as a distinct right see Marmor (2015) and Rachels (1975).

<sup>14</sup> Marmor (2015: 3-4).

access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people'.<sup>15</sup> For example, there are things we will say to our friends that we would not say to our parents, there are things we would say to our parents that we would not say to our work colleagues, and there are things that we would say to our long-term partners that we would not say to anybody else. If we were not able to make these sorts of distinctions we would end up giving away information that people would find hurtful or offensive. We would stretch the formality on which many working relationships survive. A second and related point is that being able to withhold information prevents us from taking on too much responsibility for others, or forcing too much responsibility on them. If I am too honest with you (a recent acquaintance), divulging deeply personal information that one would normally only share with a long-term friend, you may find this information a burden. You may feel that by being told this information you have an obligation to divulge information yourself, or at least to treat me differently—as closer to you than I am. I will have forced you to skip the normal stages of the growth of a friendship, denying you the opportunity to get out before too much was already invested.

It should be plain that each of the reasons we have for privacy applies with respect to our sex lives. Just as too much information may derail working relationships, so it may derail sexual relationships, especially in the early stages. If upon meeting a new partner you divulge all of your deepest secrets you will contravene established rules of courting and may scare them off or, worse, create in them an expectation that the relationship is more serious than you intend it to be. Further, when we tell others personal and intimate facts about ourselves we place responsibilities on them. This was clear in the earlier case of *Trauma*. We do not always want others to have to bear that responsibility, and we do not always want others to put that responsibility on us. Indeed, all three examples discussed earlier show why protection from the scrutiny of others is important. We must preserve a degree of private space in order that we may think freely, leave our past behind us, and avoid unjust discrimination.

The point to draw from this discussion is that our interests can pull in different directions. Our interest in sexual autonomy requires that we have access to all deal-breaking information about our partners. However, we are also the prospective sexual partners of other people. In the latter capacity, we have an interest in control over the personal information we disclose. An adequate account of sexual morality will be sensitive to both kinds of consideration. Indeed, we propose it will recognize two distinct, but intersecting, rights held by those who enter sexual relationships. On one hand, a person has a claim-right against sexual contact in the presence of certain pieces of undisclosed deal-breaking information. Their partners have a corresponding duty

<sup>15</sup> Rachels (1975: 326).

not to engage in that sexual contact. On the other hand, their partners have a privilege-right so that they have no duty not to engage in sexual contact in the presence of other pieces of undisclosed deal-breaking information. A person has no claim-right against that kind of contact.<sup>16</sup> The boundary between these rights is determined by the correct balance of our underlying interests. When the interest in sexual autonomy is sufficiently strong to outweigh the interest in privacy, the claim-right and corresponding duty applies. Where the interest in privacy is sufficiently strong, the privilege-right and corresponding no-claim applies.

To show further how the relevant interests serve to structure rights on our account we will provide three elaborations. First, we hope our account is compatible with many different understanding of rights. However, to avoid confusion, we should be explicit that the conception of rights we are employing is one of rights as *compossible*.<sup>17</sup> We do not understand privilege-rights and claim-rights to be overlapping, with one right outweighing the other from case to case. Rather, on our view one person's claim-right ends where another person's privilege-right begins. This cuts up the moral landscape without any logical contradiction in terms of what is permissible. Interests overlap. Rights do not.

The second elaboration concerns when, if ever, the strength of an interest in privacy may justify a right to deceive rather than merely not disclose. Our answer is that deception will not invalidate consent on those occasions where a privilege-right exists and simple non-disclosure would *in practice* result in disclosure, so that the only way to protect the information from scrutiny is to deceive. Such occasions are probably not uncommon. Suppose you and I are in a relationship. You know me well. So well that if, after asking what I am thinking about, I should remain tight-lipped, you will become suspicious and correctly infer that I am remembering a previous partner. Now the only way I can protect the information will be to deceive, and I may do so without risking your consent. But still, the extent of my deception is limited by what is required to protect the information. I may reply, 'nothing in particular' to stymie your curiosity. But I may not make up an elaborate story. I may not tell you that I am thinking about how much I love you, that I am thinking about marrying you, describing an imagined possible future, and so forth. That would go well beyond what is required to protect the interest my right serves. In themselves, these deceptions may only constitute minor wrongs, but they also risk a serious wrong in so far as they may constitute deal-breakers.

<sup>16</sup> To clarify, there are of course other conditions that must also be satisfied. There must be a 'Yes' of some form, there must be competence and no coercion and perhaps other conditions as well. Our point is only that a person has no claim against any contact in virtue of it having that feature.

<sup>17</sup> Steiner (1977).

The third elaboration is most clear as a response to a question: Why, in any of the previous examples, should the relevant parties not simply refrain from having sex? After all, this would serve to perfectly protect any privacy interests in question. The answer must be that the interests that underlie our privilege-rights are not limited to our interests in privacy. They also include our positive interest in sexual autonomy. On our account, then, the possibility of sexual relations is a vital human interest. It is this interest that must be made *compatible* with our interests in privacy. The privilege-right to not disclose certain pieces of information is designed to achieve that compatibility. Clearly, this is not in any way the same as saying that any person has a right to sexual relations with any other person, or even a right to sexual relations in general. It is to say that there are certain circumstances in which we should be able to *pursue* the possibility of sexual relations while maintaining a degree of privacy.<sup>18</sup> The plausibility of this claim increases further when we analogize with other contexts. Imagine the same question of consent in contract: why should a person selling a house not have to disclose deeply personal facts about the activities they undertook in the house? Or imagine the same question in the context of medicine: why should a homosexual surgeon not avoid practicing in a homophobic community? The obvious answer in each case is that the individual has an important interest at stake and this should be compatible with their other interests in privacy. The house buyers have no right to make decisions on that basis and nor do the surgeon's patients.

So much for the structure of rights. What about their content? Which particular interests are sufficient to generate rights? So far we have only gestured at the idea that interests must be balanced in some way to generate rights. A full account of consent in sexual rights requires endorsing a particular method of how to undertake this balancing. There are many such methods. We might assign rights so as to try and maximize the overall satisfaction of persons' interests. Or we might weigh our competing interests by appealing to some hypothetical procedure. For example, perhaps the rights governing sexual relationships are those we would chose given ignorance about our own personal circumstances. We want to remain neutral over which method is correct. This is partly because we do not want to tie the correctness of our argument to any controversial method. It is also because we do not believe that any method, considered in the abstract, will produce a definitive list of which items should be protected. As we have made clear, exactly which things we have an interest in protecting from scrutiny will differ from society to society: what is shameful in Atlanta or Beijing may not be shameful in Cape Town or Donetsk. There is no

<sup>18</sup> This suggests that when the composition of the general population is such that we are sufficiently able to realize our positive interest in sexual autonomy—we have a sufficient possibility of sexual relations—without the need for privacy, we may lose our privilege-rights.

complete, fixed list of which things to which claim-rights and privilege-rights apply in all contexts.<sup>19</sup>

### III. NON-DISCLOSURE, DECEPTION AND MERE PRESENCE

In this section, we argue that the non-disclosure of deal-breaking information is necessary for consent to be invalidated. We also argue against the alternative proposals that deception is necessary and that the mere presence of deal-breaking information is sufficient. First, though, we explain how we understand non-disclosure.

A piece of information will count as undisclosed if, and only if, one of two conditions is satisfied: (1) if the individual has the information, where ‘to have’ the information is to be aware of the information, (2) if the individual does not have the information but bears responsibility for not having the information. The latter may happen in cases of negligence. To illustrate the idea, consider the following case:

*Negligent:* Nigel meets Mary at a dating event. She agrees to have sex with him on the condition that he wears effective protection. Nigel uses a condom, but he neglects to inspect it and it is out of date. The latex is no longer effective.

Here Nigel is not aware that the condom is out of date. However, he should have investigated the age of the condom. That he did not and the condom had perished has invalidated Mary’s consent.

The question of exactly what a person should be held responsible for is beyond the scope of this paper and so the precise character of this feature of our view will remain underspecified in the same way that other features have. We can say that certain factors will be relevant to determining moral responsibility in cases of negligence.<sup>20</sup> Most obviously, the event must have been *foreseeable*, in some sense of that term. In law, the kind of foreseeability necessary for responsibility is typically characterized in terms of whether a *reasonable person* would ‘foresee at  $t_1$  (to some degree), that the event would occur at  $t_2$ ’.<sup>21</sup> While the idea of a reasonable person may be appropriate at the legal level, when applied to the moral level it risks being inappropriate because

<sup>19</sup> One interesting issue is whether when determining if a piece of information is protected or not, we should think only about the strength of the particular person’s interests in receiving or concealing this information, or about the strength of these interests in general. We speculate that the latter view is likely to be correct. Consider this example: A cares about B’s sexual history, B1 is embarrassed about his history whereas B2 is not. Does A have a claim against B2 that she does not have against B1? This strikes us as implausible. Either there is a claim in both cases, or there is no claim in both cases. Our thanks to an anonymous reviewer for raising this point.

<sup>20</sup> Obviously, the precise character of negligence and moral responsibility is deeply contested. Here we follow Michael Zimmerman’s position. Zimmerman (1986).

<sup>21</sup> Zimmerman (1986: 207).

it will hold those who lack the capacity of a reasonable person responsible for too much and hold those who have more than the capacity of a reasonable person responsible for too little. Instead, then, at the moral level it seems we may want a condition that is relative to the capacities of the individual in question. We will say that whether Nigel may bear responsibility for some failure of disclosure depends on whether Nigel, given his capacities, could reasonably have been expected to ‘foresee at t<sub>1</sub> (to some degree), that the event would occur at t<sub>2</sub>’.<sup>22</sup> Of course, this leaves a great deal open, but further elaboration is not required to show that the non-disclosure view has significant benefits over both of the alternative views.

The deception view is popular in legal contexts. For example, English law has stayed close to the *fraud in factum* condition, which is to say that only deception about whether the act is in fact sex or not invalidates consent.<sup>23</sup> In other jurisdictions, such as Israel, deception about other facts in sexual relations may also constitute a serious crime.<sup>24</sup> If we accept that law is in some sense intended to track morality, then the fact that law concerns itself only with deception, and not mere non-disclosure, gives us *prima facie* reason to believe that morality, too, is concerned only with deception. However, as we have just intimated, it would be a mistake to conflate law and morality entirely. The best available law will be structured by many competing considerations, including whether it can be effectively enforced and prosecuted, not solely whether something is right or wrong. We should, then, take this data point with a large pinch of salt.

There are also good reasons for believing that morality ought to track non-disclosure rather than deception.<sup>25</sup> First, there are cases where non-disclosure without deception seems to involve a serious wrong, meaning that focusing on deception will capture too little.<sup>26</sup> Consider, the following example:

*Foreknowledge:* Ikuyo is courting Jean-Luc. Ikuyo and Jean-Luc share a mutual friend, Hugh. Hugh tells Ikuyo that Jean-Luc has a false belief about Ikuyo, namely that she is a Mormon. Further, Hugh says that he has good reason to believe that this would be a deal-breaker for Jean-Luc: his will is opposed to having sex with non-Mormons. That night Jean-Luc arrives and he and Ikuyo have sex. Jean-Luc does not ask about whether she is a Mormon. Ikuyo does not disclose the information.

Here Ikuyo has not deceived Jean-Luc. She was not, we can assume, in any way responsible for his acquiring the false belief. And yet Jean-Luc would

<sup>22</sup> Zimmerman (1986: 207).

<sup>23</sup> For a landmark case see, *R. v. Linekar*, Court of Appeal, Criminal Division, 3 All ER 69 (1995), quoting *J. Stephen in Rv. Clarence*, 22 QBD 13 (1886–90) All ER 133.

<sup>24</sup> See, *Selimann v. State of Israel*, CrimA 2358/06 (2008).

<sup>25</sup> Note also that since deception requires an intention to mislead, deception views will fail to capture cases where a person has no intention to mislead.

<sup>26</sup> For related examples see Wertheimer (2003: pp. 194–195)

be rightly indignant (and perhaps much more) were he to discover that Ikuyo had known in advance about his deal-breaker. He would rightly claim that she ought to have told him, and that she seriously wronged him by failing to make the disclosure. The deception view fails to capture this judgement. Note, second, that our reasons for favouring the deception view fade when we remember the existence of privilege-rights. The deception view seems attractive because of the worry that the alternative of non-disclosure will require people to disclose information that they have strong interest in protecting from scrutiny. As privilege-rights prevent this, the comparative appeal of the deception view is lessened.

The mere presence view also initially seems attractive. It accords most closely with the ideal of autonomy described earlier in so far as it sets itself relative to all deal-breaking facts and not only a subset (those possessed by our partners). However, the view also faces a serious problem. It captures too much. Consider the following case:

*Fertile:* Doctors have informed Erik that he is infertile and will never be able to have children. He is in a relationship with Frida. In a medical anomaly, the source of Erik's infertility repairs itself and he becomes fertile. Erik has sex with Frida. The possibility of conception would have been a deal-breaker for Frida.

If we interpret the information condition on consent to depend merely on whether deal-breaking facts exist we must say that Erik committed a serious wrong. But this judgement is deeply counter-intuitive. That he did not know, and indeed could not have been aware of the possibility that he was fertile suggests he did not commit a serious wrong.

Defenders of the view may claim that Erik has committed a serious wrong and that the intuition to the contrary merely reflects the fact that he is *blameless* for his wrongdoing. But note that there are other counterintuitive implications that arise with this view that cannot be solved by separating wrongdoing and blameworthiness. For example, a person may be unaware of things about herself that bear on her willingness to have sex, for example, that she has an STD. Since deal-breakers may include any feature of the encounter, the mere presence view will judge that *her* consent to sleep with others will not be valid if she has sex while carrying the STD. We would then have to say that her partner wrongs her albeit blamelessly, but the obvious judgement is that she is not wronged.<sup>27</sup>

We have offered some counter-examples designed to show that the deception view and the mere presence view capture too little and too much, respectively, relative to the non-disclosure view. Now allow us to offer a general explanation. Our claim-rights are held against duty-bearers. The correct account of rights must be properly sensitive to how demanding it is for

<sup>27</sup> This case is adapted from Rubenfeld (2013: p. 1413).

duty-bearers. After all, we will all be duty-bearers as well as rights-holders. If an account of rights is too demanding, we will be responsible for too much, as would happen if we imagine that everyone had a very stringent right against bodily contact, including even inadvertent contact in crowded spaces. If an account of rights is not demanding enough, we will risk others being responsible for too little, as would happen if we imagine that there were no rights against bodily contact. The mere presence view of our claim-rights is the most demanding of all the accounts. Because it does not set the validity of consent relative to non-disclosure or deception, our duty not to engage in non-consensual sex will be derelict every time a relevant fact exists. But this is implausibly demanding. We should not have to worry about unknowable deal-breakers. It places too much responsibility on us. It implies that to avoid risking serious wronging we ought, where possible, to refrain from sexual relations. The converse is true of the view that the claim-right applies only to deception. In the case of Ikuyo and Jean-Luc, it is too permissive. It does not hold Ikuyo properly responsible for her omissions, given that these seriously damage Jean-Luc's autonomy. In short, the non-disclosure-based view captures the best available account of our rights and duties, cutting a path between these two extremes. It is the best cutting up of responsibility in a situation characterized by asymmetric information.

#### IV. NO FURTHER QUESTIONS AND TACIT CONSENT

Let us take stock. We have proposed that a person's consent will not be morally valid if she does not possess all the information to which she has a claim-right.<sup>28</sup> We have argued that a person has a claim-right to information

<sup>28</sup> The phrase 'has all of the information' is ambiguous between whether the information must be made available to the consenter or whether the consenter must have the information in the stronger sense of understanding it and believing it. According to our view the duties correlative to a person's claim-rights have been discharged when she has taken all reasonable steps to inform her partner about information to which he has a claim. What is required is a reasonable communication of the facts, where this includes presentation with the correct 'illocutionary force' (i.e. excluding sarcastic or excessively complicated representations of the information). It stops short of requiring that this information has been correctly understood or believed. Consider for example the statement 'I do not love you' which her partner pretends to accept but does not really believe (although the fact of the matter concerns deal-breaking information). In this case the presentation of the facts is sufficient to guard against non-consensual sex.

Why do our duties not extend so far as to guarantee that we have been correctly understood? Primarily, because this duty threatens to be excessively burdensome and may not, ultimately, be one that anyone can successfully discharge (given concerns about knowing the content of other minds). More broadly, we understand consent-giving in the context of sexual relations as part of a social practice designed to advance and respect important human interests. Note, however, that there is also a distinct competency condition for valid consent, which is not addressed in this article, but is relevant for those who are unable to understand information presented to them. Our thanks to an anonymous referee for pressing us on this point.

if, and only if, it concerns a deal-breaker for her, it is not the subject of a particularly strong interest, sufficient to generate a privilege-right, and her partner has the information or ought to be held responsible for not having it. But now consider a problem. Although the presence of privilege-rights hives off some information, there is still a great amount of potentially deal-breaking information that a person has, but which he has no important interest in protecting from scrutiny, and so to which his partner has a claim-right if it constitutes a deal-breaker for her decision to have sex. Given this fact, how is consensual sex ever possible? Why do we not have to go through very long lists of possible deal-breakers each time we engage in sexual relations? It is surely not because people explicitly waive their rights to this large set of potential deal-breakers. When about to engage in intercourse, people do not often say, 'X, Y and Z are my deal-breakers. I do not need to know anything else.' Instead, two people may go to bed together, with no further questions asked, and the sex may be entirely consensual.

The answer must lie in tacit consent. When we do not ask questions, we are making a kind of statement. We are saying that some things do not matter to us or, if they do matter, that we do not want to know about them. We are acting to waive our rights to certain pieces of information. But notice that when we do not ask questions we are not waiving our rights to all pieces of information. That was clear in the earlier case of *foreknowledge*. Jean-Luc asked no questions, but he did not waive his claim-right to whether or not Ikuyo was a Mormon and consent was invalidated. The question now, then, is what claim-rights, exactly, do we waive when we do not ask questions?

Our view is that when a person does not ask questions, she tacitly waives her rights to the set of information her partner could not reasonably be expected to anticipate as important for her decision to have sex.<sup>29</sup> On this view, a person waives his rights *to* his partner, in the sense that the exact content of the rights he waives is defined by facts about her beliefs and capacities of which he may be unaware. In *foreknowledge*, Ikuyo did not have Jean-Luc's consent because, given her beliefs and capacities, and in particular her belief that he was under the false impression she was a Mormon, she could reasonably have been expected to anticipate her non-Mormonism as important for his decision to have sex with her.

What, then, can a person reasonably be expected to anticipate? Part of the answer to that question was clear from the case of *foreknowledge*: a person

<sup>29</sup> Since a person waives their right to the set, a person may waive a right to a particular piece of information *without intending* to waive a right to that piece of information. In practice, this is not uncommon. Imagine I give a bag of clothes to a charity store who then sell it on. I have accidentally included my favourite jacket. Although I did not intend to affect my rights over my jacket, there should be no doubt that I have. This feature of our view makes it importantly different to other prominent views that take the content of act of waiving a right to be fixed entirely by the particular descriptions held in the mind of the person waiving the right. See, for example, Hurd (1996). Our thanks to an anonymous referee for forcing us to clarify this point.

should anticipate things that she *already knows* are important for her partner's decision to have sex. Yet this will not capture all that a person can reasonably be expected to anticipate. Consider,

*Private school.* Liam has been privately educated. He meets Miranda. Miranda does not ask Liam any questions. Liam does not tell Miranda that he has been privately educated. Miranda has sex with Liam but would not have done so if she had known the truth.

*Relationship.* Julia is in a long-term committed marriage. She meets Katie. Julia does not mention her relationship status and Katie does not ask her any questions. Katie has sex with Julia but would not have done had she known the truth.

There is an obvious difference between the cases. Liam has not wronged Miranda, but Julia has wronged Katie. The difference cannot be explained by what Liam and Julia already know about their particular partners since we are stipulating that neither has any such special advanced knowledge. Instead, to explain this difference according to what the actors could reasonably be expected to anticipate, we need to appeal to the expectations that structure the interaction. The key thought is that our interactions with others happen against a particular social background. This background includes a set of widely shared ideas about what is and what is not significant for the decision to have sex. Having grown up in a given social context and interacted with other members of the community we are familiar with these ideas even if we are rarely explicit about what they are. For example, we all know some things, including whether you are in a relationship or have an STD, are the kinds of things one is expected to disclose. By contrast, we recognize Miranda's preference in Private School as idiosyncratic. A person's education is not something that one would usually expect to bear upon another person's decision to have sex.<sup>30</sup> This fact—that there is a body of social norms and expectations regarding

<sup>30</sup> Here is a difficult case for our view,

*Twins.* Amy is married to Brian. Brian has a twin, Calvin. One night Calvin impersonates Brian and gets into bed with Amy. The two have sex. Amy has always hoped to have sex with Calvin. None of his actions are deal-breakers.

Our view appears to get the case wrong as it would suggest that since there were no deal-breakers, Calvin has not violated Amy's rights. Our response is that, indeed, on fuller description Amy is not wronged, although Calvin is seriously blameworthy. To make sense of this we need to make some further stipulations about the case. In order for there really to be no deal-breakers present it must be the case that *none* of what Calvin does would be against Amy's will. She wills the sex with him. She wills the fact that he deceives her into it. She wills the fact that it happens at the particular moment and place in which he happens. This is surely a difficult case to imagine, but it is not impossible. Now our view says that Calvin has failed in his derivative duty to avoid the risk of non-consensual sex. He is blameworthy when he does not disclose his true identity. He just got very lucky and there was no wrong. In a sense it should be surprising that no right has been violated. On the interest theory of rights, interests are a necessary condition for rights. And there is no interest here. Amy wants all those things to happen. If we take the will theory of rights, rights are designed to protect our autonomous wills, but Amy's will has not been violated.

what matters when it comes to sex—helps establish the limits of what a person could reasonably be expected to anticipate for another’s decision to have sex.<sup>31</sup> A person should anticipate those things that within the body of norms and expectations are generally taken to be important for another’s decision to have sex as potentially important for *her* partner’s decision to have sex. Of course, the precise expectations will vary with context. A chance meeting at an airport comes with very few expectations, only that a person is disease-free. A meeting at a singles event or a church brings a thicker set.

More generally, we hold that what one may reasonably be expected to anticipate is a condition set relative to three criteria. First, it is an epistemological condition set relative to the total evidence available to the agent. In our previous discussion, the particular information a person had about their partner, combined with the evidence available from the social background, constituted two sources of evidence. Second, it is a condition on moral responsibility set relative to the capacities of the person. That is, what it is reasonable for a person to anticipate will depend upon that person’s intellectual capacities to assimilate and process the relevant evidence. Third, it does not include things which might be important for their partner’s decision but which they have a strong interest in protecting from scrutiny, sufficient to generate a privilege-right for them. A person does not waive rights that she does not possess.

Now an addition. We have presented the background expectations as if they are always clearly understood by both parties. This will not always be the case. Within a society, expectations may sometimes be ambiguous, as when a particular set of conventions are being undermined or a new practice is emerging. Interactions between people from different societies are even more fraught. Given their different backgrounds, people may enter into sexual contact with significantly different expectations about the precise nature of the act and one another’s intentions. This may threaten the idea that the waiving of rights should be set relative to what one’s partner could reasonably be expected to anticipate. Note, though, that these uncertainties also typically represent a kind of evidence. When a practice is emerging, or when we are interacting with others, we have evidence that their deal-breakers may not be what we would normally expect. Given this knowledge, it is reasonable for us to be more explicit about potential deal-breakers. We should infer that the fact that a person comes from a different place will bring with it different expectations and so, to ensure that we are on the same page, we need to take extra care, undertaking a fuller than normal disclosure.

Stipulating that Amy had a right even though the action did not contravene her will nor attach to any interest would be superfluous. Such a right would have *no function*.

<sup>31</sup>The idea that the operative background gives communicative significance to particular actions, both spoken and unspoken, is endorsed by Manson and O’Neill (2007: p. 65).

## V. CONCLUSION

In closing, it is worth clarifying a couple of the practical implications of our view. Most importantly, it holds that you are under a (derivative) duty to disclose information that the evidence suggests may be important to your partner's decision to have sex with you, at least when that information is not something you have a sufficiently strong interest in protecting from scrutiny. We take it that this conforms perfectly to ordinary practice. We have duties to disclose many things to our partners that we expect to be relevant to their decision. But we do not have to disclose that, for example, we have been the victims of a prior sexual assault even if we know that would make a difference to many or even most people. Secondly, we have taken no position on whether it is better to disclose certain things to our partners even when we have the privilege to hide them. Of course honesty will often be the best policy when developing meaningful sexual and emotional relationships. Our point only regards the question of rights. When we engage in sexual relations while withhold certain things from our partners we may not do what is best, but what we do is often permissible.<sup>32</sup>

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