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Does 'No, Not without a Condom' Mean 'Yes, Even Without a Condom?': The Fallout from *R v Hutchinson*

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Abstract

In *R v Kirkpatrick*, the Court of Appeal for British Columbia held that consent to sexual activity cannot be established where a man proceeds with unprotected vaginal intercourse when his sexual partner has insisted on a condom. While this finding should be uncontroversial, it is in fact contrary to the Supreme Court of Canada ruling in *R v Hutchinson*. In this comment we argue that the approach taken in *Kirkpatrick* is correct and consistent with the landmark decision in *R v Ewanchuk*. We urge the Supreme Court of Canada to reconsider its majority judgment in *Hutchinson* in order to fully recognize the central role that a condom plays in whether a woman agrees to participate in sexual activity.

*Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force.*¹

Introduction

Condom sabotage and non-consensual condom removal are coercive sexual practices that undermine women's sexual autonomy, bodily integrity, and their right to decide in what sexual activity they are willing to participate. It is deeply troubling that in 2020 we are still trying to sort out the role of these practices in establishing consent to sexual activity. The majority decision of the Court of Appeal for British Columbia in *R v Kirkpatrick*² constitutes an important step towards

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¹ *R v Ewanchuk*, [1999] 1 SCR 330 at para 28, 131 CCC (3d) 481 [*Ewanchuk*].

² 2020 BCCA 136 [*Kirkpatrick*]. The quotation in our title is taken from the Crown factum in the Court of Appeal, *R v Kirkpatrick*, 2020 BCCA 136 (Factum of the Appellant at para 1).

rectifying the damage done on this issue by the Supreme Court of Canada in *R v Hutchinson*.³ The majority in *Hutchinson* is widely understood to have rejected condom use as integral to consent.⁴ In *Kirkpatrick*, the majority found that taking *Hutchinson* at face value “would leave the law of Canada seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy.”⁵ The majority judgment of Justice Groberman is a compelling takedown of the majority judgment in *Hutchinson*, but it is phrased in the language of “they couldn’t possibly have intended to say” what they did in fact say. The accused’s lawyer has indicated that he intends to seek leave to appeal and thus *Kirkpatrick* presents the Supreme Court of Canada with a unique opportunity to rethink one of its most flawed sexual assault decisions in recent decades.⁶ The decision in *Hutchinson* is fundamentally at odds with the landmark decision in *Ewanchuk*, which defined the purpose of sexual assault law as protecting the “dignity and autonomy” of complainants by providing control over “who touches one’s body, and *how*.”⁷

³ 2014 SCC 19 [*Hutchinson*].

⁴ See eg Isabel Grant, “The Complex Legacy of *R v Cuerrier*: HIV Nondisclosure Prosecutions and their Impact on Sexual Assault Law” (2020) 58:1 *Alta L Rev* [forthcoming] [Grant, “The Impact of *Cuerrier* on Sexual Assault Law”]; Lise Gotell, “Thinly Construing the Nature of the Act Legally Consented To: The Corrosive Impact of *R v Hutchinson* on the Law of Consent” (2020) 53:1 *UBC L Rev* 53; *R v Kirkpatrick*, Surrey Docket No 223696-1 [*Kirkpatrick BCPC*]; Benjamin Snow, “*Hutchinson*: Redefining Sexual Consent and the Limits of Criminality” (2014) 8 *CR* (7th) 291; Henry S Brown, “Criminal Appeals in the Supreme Court of Canada and Federal Criminal Law Amendments” (2014) 60:4 *Crim LQ* 472 at 473; Joshua Sealy-Harrington, “A Pricked Condom: Fraudulently Obtained Consent or No Consent in the First Place?” (9 April 2014), online (blog): *ABlawg* <ablawg.ca/2014/04/09/a-pricked-condom-fraudulently-obtained-consent-or-no-consent-in-the-first-place/> [<https://perma.cc/MV92-DDGE>]; Katarina Daniels, “What *R v Hutchinson* Means for Consent: An Examination of the Majority and Minority Opinions”, Case Comment, (15 July 2014), online (blog): *McGill Journal of Law and Health*: <mjlh.mcgill.ca/2014/07/15/what-r-v-hutchinson-means-for-consent-an-examination-of-the-majority-and-minority-opinions/> [<https://perma.cc/27NU-ZELS>].

⁵ *Kirkpatrick*, *supra* note 2 at para 3.

⁶ See Jason Proctor, “Sex with Condom is Legally Different from Sex Without, BC Court Rules in Consent-Case Appeal,” (19 May 2020), online: *CBC News* <cbc.ca/news/canada/british-columbia/sex-condom-consent-court-1.5572724> [<https://perma.cc/TA8D-NUEX>]. It is notable that both authors of the majority judgment in *Hutchinson* have since retired from the Court (Chief Justice McLachlin and Justice Cromwell) and the authors of the minority, Justices Abella and Moldaver, are close to retirement.

⁷ *Ewanchuk*, *supra* note 1 at para 28 [emphasis added].

In this comment we argue that the Supreme Court of Canada decision in *Hutchinson* has led to uncertainty regarding the role of condom use in consent to sexual activity. While the majority judgment in *Kirkpatrick* takes an important step in moving away from *Hutchinson*, it is based on making implausible distinctions between the facts in *Kirkpatrick* and those in *Hutchinson*. We can only hope that the Supreme Court of Canada, when confronted with the confusing case law *Hutchinson* has left in its wake, will uphold the decision of Justice Groberman and retreat from its narrow four to three majority decision in *Hutchinson*.

This comment begins with a review of the decisions in *Kirkpatrick* and *Hutchinson*. Section II then considers how lower courts have struggled with the impact of *Hutchinson*. In section III we briefly review some of the social science evidence that demonstrates that condom sabotage and non-consensual condom removal are much more widespread and pressing social concerns than the Court acknowledged in *Hutchinson*. Finally, we conclude by arguing that there should be no difference between tricking someone into believing a condom is being used and simply disregarding a woman's express requirement that a condom be used. Canadian criminal law must recognize that when a person insists on condom use for sexual activity, that condom is a fundamental component of the "sexual activity in question."

I. *Kirkpatrick and Hutchinson*

1. *R v Kirkpatrick*

The facts in *Kirkpatrick* are unremarkable. The accused and the complainant met online and then had one face-to-face meeting where the complainant set out her "sexual boundaries,"⁸ which included that she would not consent to intercourse without a condom. While the complainant

⁸ *Kirkpatrick*, *supra* note 2 at para 55, Justice Bennett.

testified that the accused had agreed with her requirement, the accused denied that this discussion took place.⁹ A few days later, as they were engaging in sexual activity, she asked the accused if he had a condom and indicated that she had one if he did not. He reached into his side table, took out a condom, put it on, and the two then had vaginal intercourse. She told him not to ejaculate inside her vagina and he did not. Demonstrating her careful vigilance, she later asked to see the condom to ensure one had been used and the accused showed it to her.¹⁰ At some point during the night, the complainant awoke and realized that the accused was sexually aroused. She pushed him away and he “rolled over to the same bedside table he had rolled to in order to put on a condom.”¹¹ The complainant testified that she did not hear him open the package or put on a condom, but that she did not repeat her demand because she assumed that he would wear a condom given their discussions and given that he had done so during intercourse earlier that night. She also testified that “she would never have consented to having sexual intercourse if she had known he was not wearing a condom.”¹² The two had intercourse again and, after he ejaculated, she realized that he had not been wearing a condom. During an argument ensuing from this realization, Kirkpatrick told her he had been “too excited to wear a condom”¹³ and that if she got pregnant she could have an abortion.¹⁴ The complainant went to the emergency room and was put on HIV prophylactics for 28 days “from which she suffered serious side effects.”¹⁵ The accused later sent her links to pornography entitled “OMG Daddy came inside me” and other texts described by Justice Bennett as “abusive.”¹⁶

⁹ See *ibid* at para 11.

¹⁰ See *ibid* at paras 55–58.

¹¹ *Ibid* at para 60.

¹² *Ibid* at para 62.

¹³ *Ibid* at para 10.

¹⁴ See *ibid* at para 61.

¹⁵ *Ibid* at para 64.

¹⁶ *Ibid* at para 63.

There were two potential routes by which Kirkpatrick could have been convicted of sexual assault. First, following *Hutchinson*, the trial judge could have found that he deceived the complainant about condom use and thus that any consent she gave was vitiated by fraud because there was a significant risk of serious bodily harm through an increased risk of pregnancy for the complainant.¹⁷ Second, in an approach most legal commentators thought had been ruled out by *Hutchinson*,¹⁸ the judge could have held that the complainant did not agree to the sexual activity in question—intercourse without a condom—and hence that there was no consent.

The difficulty with the fraud route was that the evidence was unclear as to whether the accused had actually deceived the complainant into thinking he was using a condom or whether he just proceeded, not caring that the complainant had insisted on condom use. If the latter, it is difficult to conceptualize the accused's actions as fraud vitiating consent because there was no dishonesty as is required by fraud. The trial judge found that there was no deception and that the accused had not tried to trick the complainant into believing he was using a condom.

The accused did nothing to hide or deceive the complainant that he did not put on a condom. Within a minute of the commencement of [the second incident of] intercourse, the accused asked her if it felt better this way. She unfortunately mistook the inference that the accused was making, and said yes.

Also, he asked her to guide his penis into her vagina at one point, which strongly suggests that he was not hiding the fact that he was not wearing a condom.

Accordingly, I am unable to find any evidence of dishonesty on the part of the accused that could result in a conviction.¹⁹

¹⁷ See *Hutchinson*, *supra* note 3 (concluding that when a complainant does not desire to become pregnant, exposure to an increased risk of pregnancy constitutes a “sufficiently serious deprivation for the purposes of fraud vitiating consent” at para 71).

¹⁸ See e.g. Grant, “The Impact of *Cuerrier* on Sexual Assault Law”, *supra* note 4; Gotell, *supra* note 4; Snow, *supra* note 4; Brown, *supra* note 4; Sealy-Harrington, *supra* note 4; Daniels, *supra* note 4.

¹⁹ *Kirkpatrick*, *supra* note 2 at para 13, citing *Kirkpatrick BCPC* *supra* note 4 at paras 31–33.

After finding no deception, the trial judge, following *Hutchinson*, concluded that the failure to wear a condom did not negate consent to the sexual activity in question. As a result, the trial judge granted the no evidence motion brought by the defence and acquitted the accused. The Court of Appeal unanimously set aside the acquittal and remitted the matter back to provincial court for a new trial. While the judges were unanimous that the trial judge erred in granting the no evidence motion, they were divided, as in *Hutchinson*, about the appropriate route to that conviction.

2. *R v Hutchinson*

In order to understand *Kirkpatrick*, it is necessary to describe in some detail the Supreme Court of Canada's decision in *Hutchinson*. In that case, despite the complainant's repeated insistence that her then boyfriend wear condoms, he deliberately cut holes in them for the purpose of impregnating her against her wishes; the complainant became pregnant, had an abortion, and suffered significant complications.²⁰ The Court was unanimous that this behaviour constituted sexual assault, but was deeply divided on the means for arriving at that conclusion. That division is precisely what led to the disagreement in *Kirkpatrick*.

Consent in the *Criminal Code* is defined as “the voluntary agreement of the complainant to engage in the sexual activity in question.”²¹ As in *Kirkpatrick*, there were two possible routes to criminal liability for *Hutchinson* depending on the meaning the Court gave to the words “the sexual activity in question.”²² If the sexual activity to which the complainant must consent is sex with a sabotaged condom or, effectively, with no condom, then the *Hutchinson* complainant never agreed to “the sexual activity in question”²³ and there was no consent to sexual activity. However, if the sexual

²⁰ See *Hutchinson*, *supra* note 3 at para 2; *R v Hutchinson*, 2013 NSCA 1 at para 8; *R v Hutchinson*, 2009 NSSC 51 at para 10.

²¹ *Criminal Code*, RSC 1985, c C-46, s 273.1(1).

²² *Ibid.*

²³ *Ibid.*

activity in question is defined simply as vaginal intercourse, regardless of whether a condom is used, then the accused's behaviour did not negate the complainant's voluntary agreement. In that scenario, the accused could be convicted only through the doctrine of fraud vitiating an otherwise valid consent because he deceived the complainant about the condom and that led to a significant risk of serious bodily harm, in her case unwanted pregnancy.

The majority judgment, written by Chief Justice McLachlin and Justice Cromwell, held that the meaning of "sexual activity in question" does *not* include whether a condom is used; this is a collateral condition that does not go to the initial inquiry of whether the complainant voluntarily agreed to the sexual activity. The majority held that for the purposes of defining whether a woman consented, agreement to intercourse with a condom is no different than agreement to condom-less intercourse, irrespective of the complainant's clear insistence on protected sex. In other words, a woman consents to engaging in vaginal intercourse and not to *how* that vaginal intercourse is carried out. The following passage is critical for understanding the majority judgment:

We conclude that Farrar J.A. was correct to interpret the "sexual activity in question" in s. 273.1(1) to refer simply to the physical sex act itself (for example, kissing, petting, oral sex, intercourse, or the use of sex toys). The complainant must agree to the *specific* physical sex act. For example, as our colleagues correctly note, agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching.

The "sexual activity in question" does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases. Thus, at the first stage of the consent analysis, the Crown must prove a lack of subjective voluntary agreement to the specific physical sex act. Deceptions about conditions or qualities of the physical act may vitiate consent under s. 265(3)(c) of the *Criminal Code*, if the elements for fraud are met.²⁴

²⁴ *Hutchinson*, *supra* note 3 at paras 54–55 [emphasis in original].

The *Hutchinson* majority set out a two-step approach to consent. The first step is to determine whether consent to the sexual activity in question has been given. This inquiry is limited to three factors: the complainant must consent to the touching, the sexual nature of the act, and she must know the identity of the person with whom she is engaging in the activity. *How* the sexual act is performed, the circumstances around it, and the risks that attend it are not included within this first step. If one of these three limited factors is not present, there is no consent. If they are all present, consent can still be vitiated by fraud—considered in the second step—in cases where the deception by the accused creates a significant risk of serious bodily harm. Because the majority took the fraud route, it was necessary to find a significant risk of serious bodily harm in order for consent to be vitiated, and it held that increasing the risk of an unwanted pregnancy met that threshold.²⁵ Drawing on the doctrine of fraud established in the context of HIV nondisclosure, the judgment endorsed a concept of sexual fraud that is focused on the risk of physical harm, thus occluding the dignitary harms that result from being penetrated with a penis sheathed in a condom that has been deliberately sabotaged. In this way, deception, and the harm of sexual assault more generally, is mischaracterized as purely physical, rather than a violation of sexual autonomy.

Hutchinson appears to have been motivated by the majority’s concern about overextending HIV nondisclosure criminalization beyond that prescribed by the Supreme Court of Canada in *R v Cuerrier*²⁶ and *R v Mabior*.²⁷ HIV groups intervened in coalition in *Hutchinson* to argue that liability needed to be limited to the doctrine of fraud vitiating consent to avoid the possibility of expanding the scope of HIV nondisclosure prosecutions.²⁸ If voluntary agreement to “the sexual

²⁵ See *ibid* at para 70.

²⁶ [1998] 2 SCR 371, 127 CCC (3d) 1.

²⁷ *R v Mabior*, 2012 SCC 47.

²⁸ See *Hutchinson*, *supra* note 3 (Factum of the Canadian HIV/AIDS Legal Network & HIV & AIDS Legal Clinic Ontario at para 2).

activity in question” could be negated by failure to wear a condom, the concern was that it could also be negated by other collateral conditions such as the failure to disclose one’s HIV status. This would allow for conviction for HIV nondisclosure even where there was no significant risk of bodily harm, the limit placed on fraud in *Cuerrier* to prevent prosecuting nondisclosure where there is no significant risk of HIV transmission. The majority explicitly equated the facts in *Hutchinson* with the facts in *Cuerrier*, a case involving a man who failed to disclose his HIV status to two of his sexual partners.²⁹ After rejecting that condom use went to the essence of consent, the *Hutchinson* majority went on to hold that the complainant’s consent was vitiated through fraud because the accused deceived her, she would not have consented had he not deceived her, and there was a significant risk of serious bodily harm, which in this case actually materialized.

The minority judgment, penned by Justices Abella and Moldaver, by contrast held that “the sexual activity in question” must include how that sexual activity is carried out, such as with the use of a condom, and thus held that there had been no consent to the sexual activity in question.³⁰ The heart of the disagreement between the minority and majority judgments was “whether the use of a condom is included in the manner in which the sexual activity is carried out.”³¹ The significance of the majority judgment was not lost on the minority:

The right to determine *how* sexual touching is to occur clearly encompasses a person’s right to determine where one’s body is touched and by what means. At its core, this case concerns the right recognized in *Ewanchuk* to determine how sexual touching will take place.³²

²⁹ See *Hutchinson*, *supra* note 3 at para 38.

³⁰ See *ibid* at para 79.

³¹ *Ibid* at para 97.

³² *Ibid* at para 83.

The minority concluded that “without voluntary agreement as to the ‘how’—the manner in which the sexual activity in question occurred—there is no consent within the meaning of s. 273.1(1).”³³

The minority did limit its judgment, however, so that consent includes only how the sexual touching is carried out and does not include other conditions that the complainant might put on her consent:

A person consents to *how* she will be touched, and she is entitled to decide what sexual activity she agrees to engage in for whatever reason she wishes. The fact that some of the consequences of her motives are more serious than others, such as pregnancy, does not in the slightest undermine her right to decide the manner of the sexual activity she wants to engage in. . . . [Consent] does not, however, require consent to the consequences of that touching, or the characteristics of the sexual partner, such as age, wealth, marital status, or health. These consequences or characteristics, while potentially significant, are not part of the actual physical activity that is agreed to. If we included them in the meaning of the sexual activity in question under s. 273.1(1), we would be criminalizing activity that thwarts the *motives* of a complainant, instead of focusing on the unwanted physical activity that actually took place.³⁴

The majority judgment in *Hutchinson* is deeply problematic. We have already seen it extended to justify a narrow scope to capacity to consent in *R v Al-Rawi*.³⁵ In *R v Barton*,³⁶ the Criminal Lawyers’ Association of Ontario argued in the Supreme Court of Canada that, following *Hutchinson*, consent does not include agreement to the amount of force used to carry out the sexual activity in question.³⁷ A finding that force is not a component of subjective consent would seriously threaten women’s dignity, bodily integrity and, as we saw in *Barton*, their lives.

³³ *Ibid* at para 85.

³⁴ *Ibid* at para 88 [emphasis in original].

³⁵ 2018 NSCA 10.

³⁶ 2019 SCC 33.

³⁷ See *ibid* (Factum of The Criminal Lawyers’ Association of Ontario at para 13).

3. *Distinguishing Hutchinson in R v Kirkpatrick*

This takes us back to the Court of Appeal decision in *Kirkpatrick*. The logic of the *Kirkpatrick* majority appears to be that the majority decision in *Hutchinson* was so deeply flawed that the majority could not possibly have intended to say what it did actually say. As the majority in *Kirkpatrick* writes, the application of this approach to the facts of *Kirkpatrick* would completely fail to protect sexual autonomy.³⁸ Justice Groberman held that the complainant here did not consent to sex without a condom and therefore the accused could have been convicted of sexual assault without the doctrine of fraud. The majority doubled down on its commitment to following *Hutchinson* by stating, in our view incorrectly, that “[n]othing in [the majority judgment in *Hutchinson*] suggests that there was an intention ... to specifically exclude from the definition of ‘the sexual activity in question’ physical aspects of sexual activity adopted for birth control or disease prevention purposes”³⁹ and that “there is nothing in the majority judgment that expressly disagrees with the common-sense proposition that sexual intercourse with a condom is a different sexual activity from sexual intercourse without a condom.”⁴⁰ With respect, this was precisely what differentiated the majority judgment from the minority judgment in *Hutchinson*. Justice Groberman is correct that this interpretation by the majority is fundamentally flawed, or in his words, “perverse”⁴¹ because it “prevent[s] a person from limiting their consent in a manner that is intimately related to their personal autonomy and the public interest.”⁴² But this is exactly what

³⁸ *Kirkpatrick*, *supra* note 2 at para 3.

³⁹ *Ibid* at para 27.

⁴⁰ *Ibid* at para 32. Courts in other jurisdictions have endorsed this common-sense proposition. See eg *Assange v Swedish Prosecution Authority*, [2011] EWHC 2849 (Admin) (UK) (the High Court of Justice found that a man who has sexual intercourse without a condom, when his partner has made clear she will only consent to sexual intercourse if he uses one, commits the offence of rape); *R(F) v DPP*, [2013] EWHC 945 (Admin) (UK) (the High Court of Justice determined that where a victim had consented to sexual intercourse if the defendant did not ejaculate inside her vagina, and the defendant deliberately ignored the basis of her consent and failed to withdraw, the complainant’s consent is negated).

⁴¹ *Kirkpatrick*, *supra* note 2 at para 28.

⁴² *Ibid*.

the Court decided in *Hutchinson* and this is specifically what triggered the minority to write separate reasons including *how* that sexual activity is carried out within “the sexual activity in question”.

The majority in *Kirkpatrick* differentiated between a man who tricks his partner into thinking they are having sex with a condom by cutting holes in it, knowing she would not consent otherwise, and a man who just does not care that his partner insisted on condom use. The former scenario (*Hutchinson*) does not go to the essence of voluntary agreement to engage in the sexual activity in question while the latter (*Kirkpatrick*) does:

This is not a case, like *Hutchinson*, where the physical act (sexual intercourse with a condom) was consented to, and the only issue was the state of the condom, something that would have been imperceptible, except on close examination using an instrument such as a magnifying glass or microscope. Nor is this a case where the relevant condition is unconnected with the physical acts (for example, the question of whether a party has a sexually transmissible infection, is sterile, or has a particular social standing). Rather, this is a case about the sexual activity that the complainant consented to. On her evidence, she did not consent to the accused penetrating her with his unsheathed penis.⁴³

Justice Groberman went on to reject fraud in this case because fraud requires deception and there was no evidence of deception here. He acknowledged that fraud can be passive or active, and that deliberately remaining silent or taking no action can constitute fraud.⁴⁴ But a failure on the part of the accused to keep a promise—that he would use a condom—is not in and of itself fraudulent.⁴⁵ He ended with the following caution:

While the fraud provisions of the *Code* are adequate to deal with situations in which a person deceives a sexual partner by providing them with false information, they offer

⁴³ *Ibid* at para 36.

⁴⁴ See *ibid* at para 39.

⁴⁵ See *ibid* at para 41.

no protection to a person who sets limits on the conditions of sexual activity if their partner simply chooses to ignore those limits.⁴⁶

If this is correct, then the precise limits imposed by the *Hutchinson* judgment become more important. *Hutchinson* limited consent by excluding condom use and other components of how the sexual activity takes place from the scope of consent. *Kirkpatrick* attempted to reinvigorate consent but also to limit the doctrine of fraud, an approach with which we agree. Some clarity on the proper relationship between these concepts is important, especially because, as we discuss below, the failure to comply with a complainant's insistence on condom use can be either deceptive or overt.

The minority judgment of Justice Bennett in *Kirkpatrick* started from the premise that “it is abundantly clear that Canadian law permits a person to limit their consent to intercourse by insisting a condom be used,”⁴⁷ a statement that is not entirely correct after *Hutchinson*.⁴⁸ She was, however, deeply critical of the majority's approach to consent because it “fails to apply binding Supreme Court of Canada authority”⁴⁹ from *Hutchinson*. Justice Bennett clearly believed that the acquittal needed to be quashed, but she did so by maintaining the narrow version of the scope of consent from *Hutchinson* but, correspondingly, expanding the doctrine of fraud. She first made the case that the *Hutchinson* majority did not intend for condom use to be part of the consent inquiry, citing the following statement from the majority judgment in *Hutchinson* : “[o]n the approach we propose, the ‘sexual activity in question’ was the sexual intercourse that took place in this case. Effective condom use is a method of contraception and protection against sexually transmitted

⁴⁶ *Ibid* at para 43.

⁴⁷ *Ibid* at para 45.

⁴⁸ After *Hutchinson*, a person who is incapable of becoming pregnant, engaging in intercourse with a man who does not have an STI, has no right to insist on a condom. See e.g. *Hutchinson supra* note 3 at para 98.

⁴⁹ *Kirkpatrick, supra* note 2 at para 45.

disease; it is not a sex act.”⁵⁰ According to Justice Bennett, accepting the judgment of Justice Groberman would mean either that the majority did not think condom use is a method of contraception, or, quite implausibly, that the minority in *Hutchinson* did not understand the reasoning of the majority. Further, she held that the majority had explicitly rejected the “essential features” approach to sexual activity whereby using a condom would be an essential feature of the sexual activity to which a complainant must consent. Putting these three reasons together, she concluded that there was no plausible reading of *Hutchinson* other than that condom use was not intended to be part of the first step of the consent inquiry.⁵¹

She went on to hold, however, that the trial judge had erred in requiring evidence of overt dishonesty to meet the evidentiary threshold for fraud vitiating consent⁵² when “[t]here was ample evidence that [the complainant] would not consent to sexual intercourse without a condom and, on her evidence, Mr. Kirkpatrick was well aware of this, yet he failed to disclose that he was not wearing one.”⁵³ This was enough to send it back for a new trial.

Justice Saunders broke the tie in this case. He agreed with Justice Groberman that *Hutchinson* allowed for a conviction on the basis that the complainant did not consent to unprotected sex, and with Justice Bennett that, if that was wrong, there was sufficient evidence for a trier of fact to consider fraud vitiating consent.⁵⁴

⁵⁰ *Ibid* at para 47 [emphasis added by Bennett JA], citing *Hutchinson*, *supra* note 3 at para 64.

⁵¹ See *Kirkpatrick*, *supra* note 2 at para 51.

⁵² See *ibid* at para 114.

⁵³ *Ibid* at para 115.

⁵⁴ See *ibid* at paras 123–124.

II. *The case law on condom use*

We have both argued elsewhere that the majority judgment in *Hutchinson* was profoundly flawed in principle and undermines complainant autonomy and equality in serious ways.⁵⁵ We now turn to a brief review of the case law following *Hutchinson* to demonstrate that the Court in *Kirkpatrick* is not alone in struggling with how to follow the Supreme Court's guidance while still doing justice in the case before it.

Crown counsel has tried to argue that a woman's consent to sexual intercourse was premised on their sexual partner's use of a condom in three cases since *Hutchinson*. As in *Kirkpatrick*, these cases show judges struggling to understand whether and how *Hutchinson* applies to the facts, sometimes squeezing allegations that do not involve deception into the fraud analysis established by the Supreme Court. Convictions seem to be more likely when there is an evidentiary foundation to ground a finding of a significant risk of unwanted pregnancy or a sexually transmitted infection.

*R v Dadmand*⁵⁶ is a disturbing case that involved both an elaborate sexual scam, as well as an instance of what has come to be referred to as "stealthing"—the surreptitious removal of a condom during sexual activity.⁵⁷ Posing as a modelling agent, the accused had concocted a highly orchestrated scheme to induce young women to participate in sexual acts with him on video.⁵⁸ At trial, he was convicted of numerous counts of sexual assault against seven complainants. The video evidence showed him engaging in sexual activity with complainants who were verbally protesting and asking him to stop. In two of these counts, he sexually assaulted complainants who were unconscious. All of these complainants shared marginalized social locations. According to the

⁵⁵ See Gotell, *supra* note 4 at 98; Grant, "The Impact of *Cuerrier* on Sexual Assault Law," *supra* note 4.

⁵⁶ 2016 BCSC 1565 [*Dadmand*].

⁵⁷ See Konrad Czechowski et al, "'That's Not What Was Originally Agreed To': Perceptions, Outcomes, and Legal Contextualization of Non-Consensual Condom Removal in a Canadian Sample" (2019) 14:7 PloS One 1 at 2.

⁵⁸ See *Dadmand*, *supra* note 56 at paras 3–5.

judge revoking the accused's bail, Dadmand targeted "young women made vulnerable by their hopes for success through an industry targeting their physical appearance."⁵⁹

Dadmand was shown engaging in non-consensual condom removal over the objections of one of the complainants:

He directs her to assume various physical positions and perform various sex acts. At one point, S.T. says "I hope we are almost done." When the accused prepares to have intercourse from behind her the second time, she says "We already did this." She requests the accused to put on a condom. After he does so, he removes it when he is behind her. S.T. later observes the accused is not wearing the condom, and comments "The condom is not even on." S.T. puts the condom on again, and then the accused removes it when S.T. turns her back to him.⁶⁰

The Crown was constrained by *Hutchinson* on this count and ultimately argued no consent because the complainant did not know the true identity of the accused and would never have consented had she known he was not a modelling agent. Justice Pearlman rejected this argument stating, "S.T. was not deceived as to the identity in the narrow sense",⁶¹ and acquitted Dadmand on this count of sexual assault.⁶²

The legal response to non-consensual condom removal in *Dadmand* appears pre-determined by the narrow definition of the "sexual activity in question" offered by the majority in *Hutchinson*. Justice Pearlman's discussion of *Hutchinson* at the outset of the decision emphasized how "the need for restraint and certainty has influenced the law's approach to consent, particularly where

⁵⁹ *R v Dadmand*, 2018 BCSC 729 at para 256, citing *R v Novid Stefano Dadmand* (18 August 2015), Richmond 59010-2A, 59010-3A, Vancouver 239220-2A (BCPC) at para 11. Deceptive practices around condom use are likely to disproportionately impact marginalized women, such as those in violent relationships, who face challenges in negotiating condom use.

⁶⁰ *Dadmand*, *supra* note 56 at para 99.

⁶¹ *Ibid* at para 101 (the Crown relied on *Hutchinson* to argue that identity fraud is narrowly defined as the impersonation of a sexual partner at para 19).

⁶² See *ibid* at paras 99–101.

consent has been obtained by deception”.⁶³ Therefore, deception capable of vitiating consent (through the doctrine of fraud) must “carry with it the risk of serious harm.”⁶⁴ As Justice Pearlman stressed, the Crown failed to lead any evidence to support the existence of a “significant risk” sufficient to ground the invalidation of consent by fraud.⁶⁵ Here, unlike in *Hutchinson*, there was no evidence presented that the complainant was at increased risk of unwanted pregnancy, nor did she have a significant risk of contracting a sexually transmitted infection.. Justice Pearlman offered no specific analysis of the condom removal. Despite the fact that Dadmand could be observed on video twice removing the condom over the complainant’s verbal objection, the decision appears to assume her voluntary agreement, failing to even consider whether she was consenting to the sexual activity in question. In this decision, then, an act of non-consensual condom removal, as well as the accused’s sexual scamming, are placed beyond the scope of criminal law through reliance on *Hutchinson*.

In two recent Ontario cases, the accused’s condom removal was more directly considered, though much like *Kirkpatrick*, both decisions demonstrate significant judicial confusion about the application of the *Hutchinson* test. This confusion can be seen in the different approaches taken at trial and on appeal in *R v Lupi*.⁶⁶ The facts of *Lupi* are similar to those in *Kirkpatrick*. The accused and the complainant were casual acquaintances, having met on an internet dating site and having shared lunch and several texts.⁶⁷ On the evening of the sexual assault, they went for dinner and returned to Mr. Lupi’s apartment. The accused admitted to being aware that the complainant had consented to penetrative sex with a condom only:

⁶³ *Ibid* at para 33.

⁶⁴ *Ibid* at para 36, citing *Hutchinson*, *supra* note 3 at para 34 [emphasis in original].

⁶⁵ See *Dadmand*, *supra* note 56 at para 168.

⁶⁶ 2019 ONSC 3713 [*Lupi*].

⁶⁷ See *ibid* at para 1.

At one point, after I said no [to whether he had a condom] and she reaches for her clothes and she makes her way to get...dressed again, it's absolutely clear that the sex is not happening without a condom. That is when I realized the condom is clearly a deal breaker.⁶⁸

The trial judge accepted the complainant's evidence that, once they had begun penetrative sex, she heard a "'snap' like a rubber band after they changed sexual positions, and Mr. Lupi moved behind her."⁶⁹ As she claimed, "Mr. Lupi continued to penetrate her for about 5 seconds before she figured out that Mr. Lupi had removed the condom."⁷⁰

On the basis of these facts, the trial judge convicted the accused. Like the majority in *Kirkpatrick*, he distinguished these facts from those in *Hutchinson*. While the *Kirkpatrick* majority decision rests on a distinction between condom sabotage and condom removal, the trial judge in *Lupi* held that, unlike in *Hutchinson*, there was clearly "no consent to penetration without [a] condom at the time of the sexual intercourse."⁷¹ Non-consensual condom removal was thus treated as constituting a lack of voluntary agreement to the sexual activity in question, because the complainant had never agreed to engage in unprotected intercourse. Significantly, this analytic approach enables recognition of harms posed by condom removal as a violation of the complainant's consent. The trial judge emphasized the important constitutional values at stake when someone removes a condom without the consent of the complainant: "Mr. Lupi's actions fundamentally affected Ms. V's consent. . . . [They] deprived her of control over her sexual activity" and "flew in the face of

⁶⁸ *Ibid* at para 25.

⁶⁹ *Ibid* at para 1.

⁷⁰ *Ibid*.

⁷¹ *Ibid* at para 3.

the *Charter* values of equality and autonomy.”⁷² If he was wrong in his approach, and *Hutchinson* was not distinguishable, then the trial judge found that consent had been vitiated by fraud.⁷³

On appeal, the accused argued that the trial judge had misapprehended evidence suggesting inconsistencies in the complainant’s statements and, critically, that *Hutchinson* was not distinguishable from the facts of this case.⁷⁴ Even if he was found to have engaged in unprotected penetrative intercourse, the appellant argued that the Crown had not proven beyond a reasonable doubt that this vitiated an otherwise valid consent.⁷⁵ In the Ontario Superior Court, Justice Roberts rejected the Crown’s interpretation of “the sexual activity in question” on the basis that “[t]he circumstances of this case appear to fall squarely within the *Hutchinson* paradigm.”⁷⁶ Against the complainant’s clear insistence that she had not subjectively consented to sexual activity without a condom, Justice Roberts nevertheless concluded the only route to sexual assault was if her consent was vitiated by fraud.⁷⁷ Aside from the obvious paternalism of the law determining that a woman has consented when she says she did not, and she is believed, the decision’s restricted definition of the act legally consented to shows how *Hutchinson* has led to a radical narrowing of the scope of consent, framing condom use as a collateral condition to the sexual activity in question.⁷⁸

In analyzing whether the accused’s actions constituted fraud that invalidated the complainant’s purported consent, Justice Roberts first found that the accused’s actions were dishonest on the basis that they occurred behind the complainant.⁷⁹ Second, following *Hutchinson*, the decision analyzes whether this dishonesty constituted a serious risk of harm. Importantly, Justice Roberts

⁷² *Ibid* at para 35 (quoting the trial judge).

⁷³ See *ibid* at para 3.

⁷⁴ See *ibid* at paras 4–5.

⁷⁵ See *ibid* at para 28.

⁷⁶ *Ibid* at para 31.

⁷⁷ See *ibid* at para 31.

⁷⁸ See *ibid* at para 30, citing *Hutchinson*, *supra* note 3 at para 55.

⁷⁹ See *Lupi*, *supra* note 66 at para 34.

suggested that the harms contemplated by *Hutchinson* as being capable of vitiating consent need not be restricted to bodily harm and can include psychological harms.⁸⁰ The decision recounts the complainant’s clear trauma, emphasizing how she “cried every day [*sic*] for two months”⁸¹ and how she sometimes feels “like [she is] not even in [her] body. Like [she] feel[s] faint and it’s hard to focus.”⁸² Nevertheless, in analyzing the serious risk produced by the accused’s actions, the decision focuses on evidence of physical harm. Unlike the majority in *Kirkpatrick*, Justice Roberts insisted that condom sabotage and condom removal are analogous and that both “could give rise to the risk of serious bodily harm”⁸³ because the complainant had gone for prophylactic treatment for pregnancy and STDs, including HIV,⁸⁴ and thus had clearly experienced a risk of unwanted pregnancy.⁸⁵ In upholding the conviction, Justice Roberts concluded that the accused’s deception had vitiated the complainant’s consent. Here, he emphasizes the primary significance of physical and bodily harm:

In sum, it was readily apparent from the record that the harm here went well-beyond “financial deprivations or mere sadness or stress from being lied to” [quoting from *Hutchinson*] and extended to serious bodily harm, or the risk of serious bodily harm, both by substantially interfering with Ms. V’s well-being, and exposing her to the risk of an unwanted pregnancy.⁸⁶

This case highlights the problems with the fraud analysis. On the one hand, the complainant’s emotional and dignitary harms are minimized, constructed as “mere sadness” while, on the other hand, if psychological harms are sufficient to ground fraud, then all of the efforts to limit HIV nondisclosure prosecutions to cases where there is a significant risk of transmission are

⁸⁰ See *ibid* at para 36.

⁸¹ *Ibid* at para 37.

⁸² *Ibid*.

⁸³ *Ibid* at para 39.

⁸⁴ See *ibid* at para 37.

⁸⁵ See *ibid* at para 38.

⁸⁶ *Ibid* at para 40.

undermined. In other words, the narrow construction of “sexual activity in question,” motivated in *Hutchinson* by the desire to limit HIV nondisclosure prosecutions, has led courts to expand fraud which in turn has the potential to expand HIV nondisclosure prosecutions precisely in the way the *Hutchinson* Court sought to prevent.

The decision in *R v Rivera*⁸⁷ rests on an almost identical set of facts as *Lupi* and *Kirkpatrick*. The complainant and the accused had met on an online dating website. Prior to meeting in person, they exchanged messages in which the complainant made it crystal clear that her consent was limited to sex with a condom. The complainant had texted the accused that she had two rules: “condoms were a must and ‘no means no.’”⁸⁸

When the accused arrived at the complainant’s residence, they engaged in consensual kissing and foreplay.⁸⁹ While the accounts provided by the accused and the complainant diverged on the events that followed, Judge Champagne preferred the testimony of the complainant. The fact that the complainant went to the hospital the next day for a pregnancy test, sexually transmitted infection testing, and a sexual assault kit was cited as weighing in favour of her credibility.⁹⁰ Judge Champagne also found significant inconsistencies and misleading statements in the accused’s testimony.⁹¹

While this case was presented in the media as a case about surreptitious condom removal,⁹² the facts are clear that the accused deliberately ignored the complainant’s verbal consent to vaginal

⁸⁷ 2019 ONSC 3918 [*Rivera*].

⁸⁸ *Ibid* at para 5.

⁸⁹ See *ibid* at para 6.

⁹⁰ See *ibid* at para 21.

⁹¹ See *ibid* at para 18.

⁹² See eg Paola Loriggio, “Refusing to Wear a Condom after Agreeing to Is Sexual Assault, Ontario Judge Rules,” (last modified 3 July 2019), online: *National Post* <nationalpost.com/news/canada/mans-refusal-to-wear-condom-after-agreeing-to-cancels-out-consent-judge/wcm/db977ceb-0c7c-4f18-bbc2-4435bf6cec98/> [<https://perma.cc/HS75-TE7P>].

intercourse with a condom only. The complainant testified that when the accused penetrated her without a condom she froze and “laid there limp.”⁹³ On the face of it, this a clear description of non-consent, of a lack of voluntary agreement to the sexual activity in question. The complainant’s testimony, accepted as credible by the trial judge, was that she was never in a state of voluntary agreement to the penetrative sexual intercourse at the time it was occurring. The Supreme Court in *Ewanchuk* made clear that silence and ambiguity do not constitute consent.⁹⁴ As the trial judge concluded without the complainant’s agreement, failure to use a condom is a violation of her sexual autonomy:

In my view, sex without a condom is a qualitatively different act than sex with a condom and the complainant’s consent was withdrawn when Mr. Rivera penetrated her without a condom without her overt agreement. When a condom is used as a form of birth control or to prevent sexually transmitted infections, its use provides participants with a sense of security. The non-use of a condom against a participant’s wishes not only usurps that individuals sexual autonomy and right to make decisions about how she/he/they engage in sexual activity, it is an activity against that person’s will, fraught with the gamit [sic] of emotions resulting from an assault.⁹⁵

In emphasizing the violation of the complainant’s autonomy, the trial judge followed an approach like the one advanced by the concurring minority judgment in *Hutchinson*. She held that intercourse with a condom is a different sexual activity then intercourse without a condom.⁹⁶ As in the trial decision in *Lupi*, this framing provided scope for acknowledging the dignitary harms of non-consensual condom removal. Judge Champagne, perhaps anticipating appeal, offered an alternate path to conviction: “If there is any doubt that sex without a condom amounts to sexual assault in these circumstances, I find that the complainant’s consent was vitiated by fraud (s.265(3))

⁹³ *Rivera*, *supra* note 87 at para 7.

⁹⁴ See *Ewanchuk*, *supra* note 1 at para 51.

⁹⁵ *Rivera*, *supra* note 87 at para 24.

⁹⁶ See *ibid* at para 24.

Criminal Code).”⁹⁷ However, this unnecessarily stretches the concept of fraud because there was no deception whatsoever in this case; the accused simply disregarded the complainant’s wishes. As noted by the majority in *Kirkpatrick*, this broad interpretation of deception conflates the failure to keep a promise with fraud.⁹⁸

Like the Court of Appeal in *Kirkpatrick*, the judge in *Rivera* was pushing back against the majority judgment in *Hutchinson* because, if its logic were applied to the facts of this case, the coercive actions of the accused and the resulting violation of the complainant’s sexual autonomy and agency would escape legal recognition as sexual assault. Since there was no effort in *Rivera* to deceive the complainant, following the two-step analysis established by *Hutchinson* would have led to the same result as in the trial decision in *Kirkpatrick* – an acquittal for the accused.⁹⁹

Reading *Dadmand*, *Lupi* and *Rivera* together with *Kirkpatrick* underscores the troubling jurisprudential legacy of the *Hutchinson* majority’s approach to allegations involving non-consensual condom removal. After all, what really distinguishes the circumstances of these cases? Why is it that a brief moment during which someone does not yet realize that the condom has been removed may be enough to render one form of condom removal sexual assault, while those who accomplish condom-less sex through undisguised coercion, such as the accused in *Rivera*, would be viewed as less blameworthy? As we contend, there is no principled approach for distinguishing

⁹⁷ *Ibid* at para 25.

⁹⁸ See *Kirkpatrick*, *supra* note 2 at para 41.

⁹⁹ A recent case from Ontario saw another trial judge pushing against the *Hutchinson* majority judgment. Justice Greene held that, had she been able to conclude that the accused deliberately removed the condom, she would have found the accused guilty of sexual assault. However, she had a reasonable doubt that the condom might, as stated in the accused’s testimony, have fallen off. She did not cite *Hutchinson* in her decision. She stated that “[i]f S.Y. intentionally removed the condom and then continued to have sexual intercourse with A.C., I am satisfied that the offence of sexual assault would have been made out.”: *R v SY*, 2017 ONCJ 798 at para 92.

these situations, particularly when both rest upon the objectification of the complainant and the erasure of her sexual agency.

Comparing the decision in *Dadmand* with those in *Lupi* and *Rivera* suggests that non-consensual condom removal may be more likely to result in a conviction for sexual assault when complainants undergo pregnancy and/or sexually transmitted infection testing and treatment. In this way, the harms of either failing to wear or removing a condom are defined as being primarily physical, erasing the serious violations of sexual autonomy and equality that occur when a woman's explicit consent to sex only with a condom is overridden.

III. *The realities of non-consensual condom removal*

The egregious actions of the accused in *Hutchinson*—tampering with condoms to render his sexual partner pregnant in hopes of trapping her in a failing relationship—falls within a category of behaviours labelled “reproductive coercion.”¹⁰⁰ Reproductive coercion undermines the sexual and reproductive autonomy of women and disproportionately affects those who are experiencing intimate partner violence.¹⁰¹ As many as 15 per cent of women report having experienced contraceptive sabotage.¹⁰² Neither the scope of the problem nor any of this literature was considered when the Supreme Court decided *Hutchinson*. As *Kirkpatrick* and the other decisions reviewed here suggest, the Court also appears to have not appreciated the full range of consent

¹⁰⁰ See Ruth E Fleury-Steiner & Susan L Miller, “Reproductive Coercion and Perceptions of Future Violence” (2019) 26:10 *Violence Against Women* 1228 at 1229 (for a brief summary of the definitions and tactics associated with reproductive coercion in recent social science literature); Elizabeth Miller & Jay G Silverman, “Reproductive Coercion and Partner Violence: Implications for Clinical Assessment of Unintended Pregnancy” (2010) 5:5 *Expert Rev Obstet Gynecol* 511 (noting that “[m]ale partner reproductive coercion . . . is defined as male partners’ attempts to promote pregnancy. . . [and] direct interference with contraception. . . . Abusive male partners have been found to actively promote pregnancy via. . . condom manipulation” at 512).

¹⁰¹ See Karen Trister Grace & Jocelyn C Anderson, “Reproductive Coercion: A Systemic Review” (2018) 19:4 *Trauma, Violence & Abuse* 371 at 380–381.

¹⁰² See Elizabeth Miller et al, “Pregnancy Coercion, Intimate Partner Violence, and Unintended Pregnancy” (2010) 81:4 *Contraception* 316 at 316.

violations involving condom use. Social science research demonstrates that non-consensual condom removal in its diverse forms constitutes a widespread form of gender-based violence located at the juncture between sexual autonomy, consent, and sexual violence.

In 2017, Alexandra Brodsky published a widely-cited commentary on this issue in which she reviewed the legal complexities of surreptitious condom removal within the context of American law.¹⁰³ Her analysis of stealthing as a consent violation and as a form of gender-based violence sparked a widespread public conversation¹⁰⁴ and drew attention to the motivations of those who perpetrate it. Brodsky described the online communities where men share their experiences and techniques, and where stealthing is justified through misogynist discourses, exemplified by one man's assertion of his right to "spread [his] seed."¹⁰⁵ Drawing on qualitative interviews with a small number of survivors, she also interrogated how women understand the harms they experienced. While all of these survivors feared the consequences of deceptive condom removal (unwanted pregnancy and sexually transmitted infections),¹⁰⁶ Brodsky emphasized how they viewed stealthing as a "disempowering, demeaning violation of a sexual agreement."¹⁰⁷ These survivors, like the women in the cases discussed, felt their agency was removed, and conceptualized stealthing as an act of control.

¹⁰³ See Alexandra Brodsky, "'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal" (2017) 32:2 Colum J Gender & L 183.

¹⁰⁴ A Google search ("Alexandra Brodsky" AND "stealthing") performed on June 15, 2020 found that her article has been discussed in 380 news articles. See eg Malone Mullin, "'Stealthing' Could Be Considered Assault Say Experts about Secret Removal of Condom during Sex," (last modified 3 May 2017), online: *CBC News* <cbc.ca/news/health/stealthing-condoms-legal-concerns-1.4088491> [<https://perma.cc/8SKM-R7YW>]; Sophie Maullin, "'Stealthing Isn't a 'Sex Trend'. It's Sexual Assault – and It Happened to Me,'" (22 May 2017), online: *The Guardian* <theguardian.com/commentisfree/2017/may/22/stealthing-sex-trend-sexual-assault-crime> [<https://perma.cc/Q4XP-NU6R>]; Michael Needleman, "Some Call it 'Stealthing,' Others Call It Sexual Assault," (last modified 28 April 2017), online: *CNN* <www.cnn.com/2017/04/27/health/stealthing-sexual-assault-condoms/index.html> [<https://perma.cc/5QKC-8SMX>].

¹⁰⁵ Brodsky, *supra* note 103 at 189.

¹⁰⁶ See *ibid* at 186.

¹⁰⁷ *Ibid*.

Brodsky's article was extensively shared and discussed in the media, not because, as some suggested, it identified a new phenomenon, but instead because it allowed women to label an unnamed, yet widespread experience. There is burgeoning social science literature on "condom use resistance," which refers to attempts to engage in unprotected sexual intercourse with a partner who wants to use a condom. One frequently cited empirical study found that 80 per cent of young heterosexual men surveyed had used at least one condom use resistance strategy since adolescence.¹⁰⁸ The uses of coercion and deception to avoid wearing a condom are not uncommon. A nationwide American survey of young heterosexual men found that 35 percent reported having used physical force, manipulation, threats, and deception to obtain unprotected sex with a partner who wanted to use a condom, with 31 per cent of the sample reporting having successfully used these tactics on more than one occasion.¹⁰⁹ In an effort to determine the factors associated with non-consensual condom removal, Davis et al concluded that having a sexual assault perpetration history is predictive of an intention to engage in this practice, and that men who hold misogynist beliefs have a much higher likelihood of committing it.¹¹⁰

Recent empirical research is also documenting how widespread this experience is among both women and men who have penetrative sex with men. Two recent studies examined the prevalence and impacts of non-consensual condom removal.¹¹¹ These studies sought to capture a full range of non-consensual condom removal experiences, including both deceptive and non-deceptive forms (condom removal without permission with the sex continuing unwillingly, condom removal

¹⁰⁸ See Kelly Cue Davis et al, "Young Men's Condom Use Resistance Tactics: A Latent Profile Analysis" (2014) 51:4 J Sex Research 454 at 459.

¹⁰⁹ See Kelly Cue Davis & Patricia Logan-Greene, "Young Men's Aggressive Tactics to Avoid Condom Use: A Test of a Theoretical Model" (2012) 36:3 Social Work Research 223 at 226.

¹¹⁰ See Kelly Cue Davis, "'Stealthing': Factors Associated with Young Men's Nonconsensual Condom Removal" (2019) 38:11 Health Psychology 997 at 998-99.

¹¹¹ See Rosie L Latimer et al, "Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia" (2018) 13:12 PLoS One 1; Czechowski et al, *supra* note 57.

without permission with the sex discontinued, condom removal during sex with the survivor only realizing afterwards, and a condom never put on despite being requested). This empirical research points to extremely high rates of non-consensual condom removal, with approximately one-third of women and one-fifth of men in both studies reporting having been violated in this manner.¹¹² Like the women interviewed by Brodsky, *many* participants in a Canadian study surveying undergraduate students cited the risk of physical consequences (unwanted pregnancies and sexually transmitted infections) in their explanations of why they viewed non-consensual condom removal as wrong.¹¹³ However, *most* viewed it negatively specifically because of a lack of consent.¹¹⁴ In open-ended responses, 61 per cent of women participants described non-consensual condom removal as a violation of consent, 15 per cent saw it as a betrayal of trust, and 5 per cent labelled it as sexual violence.¹¹⁵

Control over women's sexuality and reproduction has long been a fundamental component of their systemic inequality. Non-consensual condom removal denies the survivor the specificity of her own being, constructing her sexuality as a means to the perpetrator's ends. This objectification reinforces male-dominated heterosexuality and women's inequality more generally, by denying women's status as sexual subjects, equally deserving of the ability to control their own sexuality. By restrictively defining "sexual activity in question" in a manner that excludes condom use, the *Hutchinson* framework assumes consent, intensifying this denial of women's personhood. And by focusing the law's gaze myopically on deception that creates a risk of bodily harm, not only are non-deceptive forms of non-consensual condom removal placed beyond the reach of sexual assault

¹¹² See Latimer et al, *supra* note 111 at 11 (on the basis of a questionnaire administered to those attending a sexual health clinic). See also Czechowski et al, *supra* note 57 at 16 (who found that 18.7% of their total sample of undergraduate students reported experiencing non-consensual condom removal).

¹¹³ See Czechowski et al, *supra* note 57 at 12.

¹¹⁴ See *ibid* at 11–12.

¹¹⁵ See *ibid* at 11.

law, the dignitary violations and inequality-reinforcing impacts of these practices are also obscured. The right to insist on a condom should not be limited to women who are capable of becoming pregnant or to situations where a sexual partner has an STI. The exercise of sexual autonomy surely must include the right to choose whether or not one is willing to participate in condom-less sex. The choice around whether to use a condom is fundamentally connected to the degree of intimacy one is willing to share with a particular sexual partner.

Conclusion

The majority judgment in *Kirkpatrick* premised its analysis on the idea that there is a fundamental difference between a man who ignores a woman's insistence on condom use and a man who instead sabotages a condom such that effectively no condom is being used. In our view, both scenarios undermine the fundamental choice that the law guarantees to all Canadians to decide how and when they are willing to engage in sexual activity.

The complainants in *Hutchinson* and *Kirkpatrick* consented only to sex with a condom. Both women wrongly believed they were having sex with a condom. Neither woman had the protection offered by a condom, and neither was able to set limits on the level of sexual intimacy in which she was willing to engage. The only difference between these cases is that in *Hutchinson* the accused knowingly used a condom he had sabotaged, and in *Kirkpatrick* the accused penetrated the complainant without a condom. This factual distinction should be legally insignificant. All of the cases discussed in this comment demonstrate how the complainants' wishes to engage in sexual activity only if a condom was used were flatly ignored by the men in question. Condom use was a fundamental component of the consent that all of these women provided and, without it, be that by deception or by willful disregard, the sexual activity was non-consensual. The use of a condom was not, somehow, collateral to these

complainants' consent. To situate condom use as separate from, or inessential to, decision-making about the "sexual activity in question" is artificial. Such a constrained interpretation of the scope of consent ignores the subjective experience of complainants, which is doctrinally at the heart of the consent inquiry.

The Supreme Court of Canada in *Ewanchuk* made clear that consent is assessed from the perspective of the complainant and whether she wants the sexual activity to take place.¹¹⁶ None of these women wanted the sexual activity that happened to take place. All of these women went to police to report having been sexually assaulted. Condom use, just like the degree of force involved in sexual activity, is so fundamental to whether a woman wants the sexual activity to take place that it simply cannot be divorced from it. To treat condom use as being outside the scope of the consent inquiry narrows the meaning of consent to sexual activity, with serious consequences for women's sexual autonomy, dignity, and equality.

The reader might wonder why it matters which route we take so long as fraud can get us to conviction for sexual assault. It matters in the narrow context because fraud only leads to a conviction where there is a deception and a significant risk of serious bodily harm. Because *Kirkpatrick* was an appeal from a no evidence motion, the minority judgment of Justice Bennett had to determine only that there was some evidence of a deception that could lead to a fraud analysis. She concluded that there was some evidence of deception on the weak basis that the complainant testified that before initiating intercourse, the accused rolled over towards the cabinet beside his bed where he had obtained a condom earlier that night. There was more evidence that the accused simply did not care that the complainant had insisted on a condom. However, Justice

¹¹⁶ See *Ewanchuk*, *supra* note 1 at para 27.

Bennett did not need to go on to examine the risk of serious bodily harm. If that risk were satisfied because of an increased risk of pregnancy, then only those who are capable of becoming pregnant are entitled to insist on a condom. A woman who is already pregnant or unable to get pregnant, or a man having sex with a man, has no right to insist on condom use unless the partner has an STI. If the risk of serious bodily harm was the fact that the complainant had to take HIV prophylactics and suffered serious side effects, that approach would undermine the whole point of *Cuerrier* and *Hutchinson*, which together limit prosecutions for HIV nondisclosure to cases where there is a significant risk of actual transmission of HIV.

In the bigger picture, the meaning of consent matters. As Lise Gotell has argued elsewhere, the result of *Hutchinson* is not simply to insulate trivial lies or insignificant collateral conditions from criminal responsibility. Instead, “a narrow scope of consent focused on categories of physical sexual acts, combined with the concept of fraud conflated with bodily harm, works against the legal recognition of serious (and ‘reprehensible’) acts of male sexual predation.”¹¹⁷

We understand that, if an appeal is brought, the Supreme Court of Canada will be reluctant to overrule a case that was decided less than a decade ago, even though the justices were deeply divided and did not have the benefit of any feminist interveners or the above-cited social science evidence before them. The simplest option would be to uphold the majority decision of *Kirkpatrick* which distinguishes between deceptive non-condom use and the deliberate disregard of a partner’s insistence on condom use. The preferable approach would be a strong retreat from *Hutchinson* and, at the least, support for the minority judgment in *Hutchinson* which recognized that how a man penetrates a woman is highly relevant to whether she wants

¹¹⁷ Gotell, *supra* note 4 at 98. The reference to “reprehensible” here is a reference to the language of the *Hutchinson* majority which talks about differentiating unethical conduct from conduct that is sufficiently reprehensible to warrant criminal sanction. See *Hutchinson*, *supra* note 3 at para 18.

that sexual activity to take place. As the minority insisted, everyone has the right to decide what sexual activity they wish to engage in, including the specific form of sexual touching and *how* it will occur. Sexual intercourse with a condom is a different form of sexual activity than being touched by an unsheathed penis. The majority judgment in *Kirkpatrick* must be upheld. To decide otherwise, by narrowly defining the sexual activity in question, radically undermines Canada’s affirmative consent standard.

We also recognize that a broader approach to “the sexual activity in question” runs the risk of expanding the scope of HIV nondisclosure prosecutions to cases where there is no realistic possibility of transmission. This was the very fear that motivated the *Hutchinson* majority from the outset. As we have argued elsewhere, the problem here stems from HIV nondisclosure prosecutions being inappropriately subsumed under the crime of sexual assault. This relatively small number of prosecutions have twisted and distorted our understanding of consent, fraud, and even capacity.¹¹⁸ There are legitimate policy reasons to exercise restraint in prosecuting HIV nondisclosure.¹¹⁹ The way to exercise that restraint is to remove what is a relatively small

¹¹⁸ See Grant, “The Impact of *Cuerrier* on Sexual Assault Law,” *supra* note 4.

¹¹⁹ See *ibid.* See also Isabel Grant, “The Prosecution of Non-Disclosure of HIV in Canada: Time to Rethink *Cuerrier*” (2011) 5:1 MJLH 7 at 59; Isabel Grant, “The Boundaries of Criminal Law: The Criminalization of the Nondisclosure of HIV” (2008) 31 Dal LJ 123 at 177–78; Davinder Singh & Karen Busby, “Criminalizing HIV Non-Disclosure: Using Public Health to Inform Criminal Law” (2019) 42:3 Man LJ 89 at 120; Martha Shaffer, “Sex, Lies, and HIV: *Mabior* and the Concept of Sexual Fraud” (2013) 63:3 UTLJ 466 at 469–70; Alison Symington, “Injustice Amplified by HIV Non-Disclosure Ruling” (2013) 63:3 UTLJ 485 at 485–86; Colin Hastings, Cecile Kazatchkine & Eric Mykhalovskiy, “HIV Criminalization in Canada: Key Trends and Patterns” (2017) at 1, online (pdf): *Canadian HIV/AIDS Legal Network* <aidslaw.ca/site/hiv-criminalization-in-canada-key-trends-and-patterns/?lang=en>; Eric Mykhalovskiy & Glenn Betteridge, “Who? What? Where? When? And with What Consequences? An Analysis of Criminal Cases of HIV Non-Disclosure in Canada” (2012) 27:1 CJLS 31 at 51. Both authors of this comment were part of a working group that drafted the Women’s Legal Education and Action Fund’s position, recommending that HIV non-disclosure be removed from sexual offences and that a new summary conviction offence be created that would restrict criminalization to intentional or reckless transmission. See “A Feminist Approach to Law Reform on HIV Non-Disclosure” (January 2019), online (pdf): *LEAF* <leaf.ca/wp-content/uploads/2019/01/2019-01-08-LEAF-HIV-ND-Position-Paper-FINAL.pdf>.

number of HIV nondisclosure cases from sexual assault altogether, not to distort sexual assault law generally in ways that deny the law's protection to tens of thousands of Canadian women.