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Non-consensual Condom Removal in Canadian Law Before and After *R. v. Hutchinson*

Lise Gotell* and Isabel Grant**

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It is true that dignitary harms, because immaterial, are ephemeral to the legal mind.”¹

This paper examines the phenomenon of nonconsensual condom removal (NCCR) and its relationship to sexual assault in Canada. Using empirical studies and the insights of feminist theory, we explore the nature of the harms caused by NCCR and contend that this pervasive practice constitutes sexual assault. We then critique the decision of *R v Hutchinson*, which held that condom sabotage does not negate subjective consent, ignoring the dignitary harms of NCCR. While lower court decisions before *Hutchinson* recognized that consent to sex with a condom does not include consent to sex without, courts after *Hutchinson* have struggled to distinguish the decision in ways that lack coherence or have simply ignored the decision altogether. After briefly examining legislative amendments in other jurisdictions, we argue for a return to the fundamental finding in *R v Ewanchuk* that *how* sexual activity is carried out, including whether a condom is used, must be part of the subjective consent inquiry.

Introduction

Nonconsensual condom removal (NCCR)—the removal of a condom before or during sexual intercourse without one’s partner’s consent—is located at the intersections of sexual autonomy, sexual consent and sexual violence.² NCCR can occur either through deception, when a sexual partner is tricked into believing her partner is wearing a condom, through condom tampering, or through outright refusal to wear a condom despite a partner’s expressed wishes.

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¹ Catharine A MacKinnon, *Toward a Feminist Theory of the State*, 1st ed (Cambridge: Harvard University Press, 1989) at 173.

² See generally Sumayya Ebrahim, “I’m Not Sure This Is Rape, But: An Exposition of the Stealthing Trend” (2019) 9:2 SAGE Open 1; Alexandra Brodsky, “Rape-adjacent: Imagining Legal Responses to Non-consensual Condom Removal” (2017) 32:2 Colum J Gender & L 183.

NCCR is a pervasive practice that undermines women’s reproductive rights, sexual agency and equality.³

The Supreme Court of Canada in *R v Hutchinson*⁴ held that condom deception could constitute fraud under section 265(3)(c) vitiating an otherwise valid consent but only where there was a significant risk of serious bodily harm. The accused in *Hutchinson* had poked holes in condoms in order to impregnate his sexual partner against her wishes.⁵ The majority decision in *Hutchinson* is about the definition of “sexual activity in question” under section 273.1 of the *Criminal Code*:⁶ that is, about exactly what one consents to in consenting to sex.⁷ While upholding the accused’s conviction for sexual assault, the majority decision constructed condom-use as “collateral” to the consent inquiry,⁸ determining that where NCCR involves a deception, it can be criminalized through fraud vitiating an otherwise valid consent.

It is important to distinguish between factors that negate consent directly and factors that only vitiate an otherwise valid consent. By including condom deception within the doctrine of fraud vitiating consent, the Court maintained that condom use does not go to the definition of consent itself but simply vitiates it for public policy reasons. This distinction between negating consent and vitiation is important because where there is no deception or no significant risk of serious bodily harm, both required to establish fraud vitiating consent, there will be no path to establishing sexual assault. As we demonstrate, a large majority of reported cases involve condom refusal, not condom deception. The issue of NCCR involving condom refusal will be

³ 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 21.

⁴ 2014 SCC 19 [*Hutchinson* SCC].

⁵ See *ibid* at para 2.

⁶ RSC 1985, c C-46 [*Criminal Code*].

⁷ See *supra* note 1 at paras 14–15.

⁸ *Ibid* at paras 27–28.

before the Supreme Court of Canada in November 2021 in *R v Kirkpatrick*.⁹ Interveners are asking the Court to retreat from its position in *Hutchinson* that condom use is collateral to consent.¹⁰

In this paper, we argue that NCCR, whether deceptive or overt, must be understood as directly negating subjective consent to sexual intercourse. Our case law analysis reveals that prior to *Hutchinson*, courts took this approach and understood NCCR as negating subjective consent. Since *Hutchinson*, however, the case law has been contradictory—some courts squeeze NCCR into the sexual fraud framework, while others struggle to differentiate *Hutchinson*, and still others ignore the decision altogether. By narrowly constructing the harm of NCCR as its “physical” or “bodily” consequences, the *Hutchinson* majority approach inhibits legal recognition of how NCCR is experienced as harmful and degrading because it transgresses the limits of consent to the sexual activity in question. Agreeing to sex with a condom is a specific form of sexual activity and consenting to protected sex should never be viewed as implying agreement to unprotected penetration. As we emphasize, whether a condom is used is a vital part of how the sexual activity is carried out and insistence on condom use is a mechanism of setting limits on the degree of intimacy of a sexual encounter.

In the first section of this paper, we respond to recent claims in the literature that NCCR is nothing more than a media-generated moral panic. Using empirical studies and the insights of feminist theory, we explore the harms caused by NCCR and contend that this pervasive practice demands legal regulation. As we emphasize, the transgression of sexual boundaries becomes

⁹ SCC File No 39287.

¹⁰ See e.g. SCC File No 39287 (Factum of the Intervener, Barbra Schlifer Commemorative Clinic) at para 2, online (pdf): <https://scc-csc.ca/WebDocuments-DocumentsWeb/39287/FM090_Intervener_Barbra-Schlifer-Commemorative-Clinic.pdf>.. This was also the position taken in Lise Gotell & Isabel Grant, “Does ‘No, Not Without a Condom’ Mean ‘Yes, Even Without a Condom’?: The Fallout from *R v Hutchinson*” (2020) 43:2 Dal LJ 767, commenting on *R v Kirkpatrick*, 2020 BCCA 136 [*Kirkpatrick*].

eroticized through NCCR, survivors are objectified and degraded, and this in turn reinforces systemic inequality. We then set out the legal landscape on consent and interrogate the Supreme Court of Canada decision in *Hutchinson*, and discuss why the majority, influenced by case law on HIV nondisclosure, might have taken such a narrow approach. Next, we examine cases decided both before and after *Hutchinson* in which complainants consented to sexual penetration with a condom, but not without, in order to illustrate the confusing legacy left by the *Hutchinson* decision. Many of these cases demonstrate the power and abuse inherent in removing a condom against the wishes of a sexual partner. While most judges appear to intuitively recognize the criminality in NCCR, some struggle with the doctrinal distinctions left by *Hutchinson* that suggest that only deceptive forms of condom removal that raise a significant risk of serious bodily harm will constitute sexual assault. Finally, we conclude with some thoughts on law reform and on how, as feminist legal scholars committed to substantive equality, we need to take up the challenge of forging a more principled basis for defining the scope of consent to sexual activity in a manner that includes *how* the sexual activity is carried out.¹¹

Non-consensual Condom Removal: Undermining of Women’s Sexual Agency

The issue of NCCR entered popular culture with the publication of Alexandra Brodsky’s widely-cited 2017 article on “stealthing” in which she considered legal responses to deceptive condom removal during intercourse.¹² Brodsky’s interrogation of stealthing as a consent violation and as an expression of gender-based violence has generated intense scholarly interest on the question of whether NCCR should be subject to legal regulation. Academic responses

¹¹ This paper does not address other birth-control deceptions that are not directly part of how the sexual activity takes place. Lying about a vasectomy, for example, might constitute fraud negating an otherwise valid consent where there is a significant risk of serious bodily harm (such as an unwanted pregnancy), but does not go directly to how the sexual activity is carried out.

¹² See generally Brodsky, *supra* note 2.

have varied widely, with some scholars seeing the potential criminalization of NCCR as nothing more than a moral panic that demonstrates the dangerous excesses of “carceral feminism,” while others see the violation of condom use as negating consent and therefore as rape or sexual assault.¹³ Aya Gruber, in a book that charts how feminist-inspired criminal law reforms have fueled American mass incarceration, sees the recent focus on NCCR as part of an effort to “close loopholes in feminist crime control regimes.”¹⁴ Masculinities scholar Ashley Thomson goes further, insisting the “meteoric rise of interest around stealthing” is nothing more than media-generated panic that bolsters a neoliberal agenda focused on punishment.¹⁵ In a more journalistic account, Judith Levine responds to recent law reform efforts in several US states, asserting that the impetus to criminalize NCCR stokes the “sex offender regime” that drives the prison-industrial-complex.¹⁶

This moral panic position rests upon an insistence that claims about NCCR have been grossly exaggerated. Addressing the rising concern about deceptive forms of condom removal, Thomson contends that there is no “objective social reality to speak of in the stealthing panic,” arguing that Brodsky offers no empirical support for her conclusions about the ubiquity of this practice or the men perpetrating it.¹⁷ She is particularly critical of how Brodsky based her conclusions on qualitative interviews with a small number of women, and how the problem of stealthing has, in turn, been spun by journalists and bloggers intent on increasing their own media presence.

¹³ See e.g. Amanda Clough, “Conditional Consent and Purposeful Deception” (2018) 82:2 J Crim L 178; Joseph J Fischel, *Screw Consent: A Better Politics of Sexual Justice*, 1st ed (Berkeley: University of California Press, 2019).

¹⁴ Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration*, 1st ed (Oakland: University of California Press, 2020) at 170.

¹⁵ Ashley Thomson, “The Stealthing Panic: Gendered Neoliberalism in Online Media” (2019) 64 Austl Humanities Rev 24 at 26.

¹⁶ See Judith Levine, “Is Stealthing a Sex Crime?” (21 June 2017), online: *Boston Review* <bostonreview.net/gender-sexuality/judith-levine-stealthing-sex-crime>.

¹⁷ Thomson, *supra* note 15 at 30.

In arguing that its prevalence has been inflated by feminists, Thomson ignores a robust empirical literature on NCCR. Kelly Cue Davis and her colleagues have been engaged in quantitative analysis of the phenomenon of coercive condom use resistance for the past decade.¹⁸ Their work, involving large scale surveys, focus groups, as well as experimental research, has found that nearly a third of young men who primarily date women admitted to engaging in condom removal without their partner's consent, either through coercion, deception or aggression.¹⁹ Rosie L Latimer et al administered a questionnaire to more than 1000 people attending a sexual health clinic in Melbourne and found that 1/3 of women and 1/5 of men who had had penetrative sex with men reported experiencing NCCR (defined in this study as "the removal of a condom during sex by a sexual partner when consent has been given for sex with a condom only").²⁰ Allira Boadle et al conducted an online survey of young Australian women who had had sex with men and found that nearly 10% had experienced "a partner removing a condom during sex without their knowledge or consent."²¹ Konrad Czechowski et al administered a survey to nearly 600 Canadian university students and found that of the 334

¹⁸ *Condom use resistance* includes what researchers label as non-coercive tactics (including seduction, physical sensation arguments, emotional manipulation, relationship-based reasoning, risk reassurance and sex withholding), as well as coercive tactics (condom sabotage, deception and physical threats or force). As Davis and her colleagues have found, condom use resistance is widespread among young men, with almost 80% reporting that they engage in some form of condom use resistance. See e.g. Kelly Cue Davis et al, "A Qualitative Examination of Men's Condom Use Attitudes and Resistance: 'It's Just Part of the Game'" (2014) 43:3 Archives of Sexual Behaviour 631 [Cue Davis et al, "A Qualitative Examination"]; Kelly Cue Davis et al, "Men's Coercive Condom Use Resistance: The Roles of Sexual Aggression History, Alcohol Intoxication, and Partner Condom Negotiation" (2018) 24:11 Violence Against Women 1349; Kelly Cue Davis et al, "Young Women's Experiences with Coercive and Noncoercive Condom Use Resistance: Examination of an Understudied Sexual Risk Behaviour" (2019) 29:3 Women's Health Issues 231 [Cue Davis et al, "Young Women's Experiences"]; Kelly Cue Davis, "'Stealthling': Factors Associated with Young Men's Nonconsensual Condom Removal" (2019) 38:11 Health Psychology 997 [Cue Davis, "Stealthling: Factors Associated"].

¹⁹ See Cue Davis et al, "A Qualitative Examination", *supra* note 18 at 633; Kelly Cue Davis & Patricia Logan-Greene, "Young Men's Aggressive Tactics to Avoid Condom Use" (2012) 36:4 Social Work Research 223 at 228.

²⁰ 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 at 1.

²¹ Allira Boadle, Catherine Gierner & Simone Buzwell, "Young Women Subjected to Nonconsensual Condom Removal: Prevalence, Risk Factors, and Sexual Self-Perceptions" (2020) 27:10 Violence Against Women 1696 at 1706.

participants who had had penetrative sex with men, 32% of women and 19% of men had experienced the removal of a condom before or during sexual intercourse either without their consent or without their knowledge.²² A growing body of empirical research, then, clearly points to the pervasiveness of NCCR.²³ Brodsky's work on deceptive forms of NCCR may well have gone viral because it helped women put a name to a widespread experience.

Just as the moral panic position ignores empirical evidence about the widespread nature of NCCR, so too does it minimize the connections between this set of practices and gender inequality. In part, this is accomplished by reducing the complex dynamics involved in NCCR to the realm of the physical. There is a tendency to view motivations of perpetrators as narrowly tied to the pursuit of sexual pleasure, while ignoring the complex subjective and collective harms caused by NCCR that include but extend beyond the physical risks of pregnancy or sexually transmitted infections. This restricted definition of harm weaves through the arguments of the proponents of the moral panic thesis, just as it defines the Canadian legal approach to NCCR post-*Hutchinson*. As Levine asks, for example, is the "usurpation of consent" involved in NCCR enough to warrant legal intervention when "no sexually transmitted infection is contracted, and no one gets pregnant"?²⁴

It is critical to displace this myopic emphasis on physical pleasure and bodily harm, and to instead focus on the connections between power, control, and the contravention of sexual boundaries on the one hand, and NCCR on the other. By requiring that one's sexual partner wear a condom, a woman is not only seeking to protect herself from the physical consequences of sexual penetration, she is also setting limits on the intimacy of a sexual encounter—on *how* the

²² Czechowski et al, *supra* note 3 at 16.

²³ See also Ebrahim, *supra* note 2 at 3.

²⁴ Levine, *supra* note 16.

sexual activity occurs. In their study of women's negotiation of condom use with men, Nicola Gavey et al demonstrated how the insistence on condoms is a mechanism of controlling both the course and outcomes of heterosexual encounters.²⁵ Because NCCR represents a deliberate transgression of women's sexual boundaries, it should be understood as a practice of masculine dominance over female sexuality and reproduction.²⁶ As Davis underscores, hegemonic gender norms—including an emphasis on dominance, power, and control—can socialize men in ways that increase their risk of perpetrating NCCR.²⁷ Easy access to pornography, where NCCR is portrayed as a tactic of male conquest, has also been found to be a contributing factor.²⁸ Having a sexual assault perpetration history is also predictive of an intention to engage in NCCR, and men who hold misogynist beliefs have much higher likelihoods of engaging in it.²⁹

Brodsky's work also draws attention to the motivations behind deceptive forms of NCCR, describing online communities where men share their stealthing practices and rationalize their behaviour through misogynist discourses, like their "right to spread their seed."³⁰ Brodsky highlights the close connections between online stealthing proponents and the pickup artist community, a subgroup of the men's rights movement advocating sexual conquest through strategies such as deception and manipulation. This seduction paradigm is rooted in an increasingly dominant form of heterosexual masculinity in which masculine status is based upon "getting" women and being "chosen" for sex.³¹ Overcoming women's resistance through

²⁵ See Nicola Gavey, Kathryn McPhillips & Marion Doherty, "If It's Not On, It's Not On': Or Is It? Discursive Constraints on Women's Condom Use" (2001) 15:6 *Gender & Society* 917 at 931.

²⁶ See generally Ebrahim, *supra* note 2; Brodsky, *supra* note 2; Cue Davis et al, "Young Women's Experiences", *supra* note 18; Boadle, Gierner & Buzwell, *supra* note 21.

²⁷ See Cue Davis, "Stealthing: Factors Associated", *supra* note 18 at 997.

²⁸ See e.g. Marwa Ahmad, "'You Do It without Their Knowledge.' Assessing Knowledge and Perception of *Stealthing* Among College Students" (2020) 17:10 *Intl J Environ Res Public Health* at 6.

²⁹ See Cue Davis, "Stealthing: Factors Associated", *supra* note 18 at 997.

³⁰ Brodsky, *supra* note 2 at 189. See also Gotell & Grant, *supra* note 10 at 787.

³¹ See Ben A McJunkin, "Deconstructing Rape by Fraud" (2014) 28:1 *Colum J Gender & L* 1 at 26.

manipulation and deception is made into a contest of masculinity. It is not simply that men who engage in NCCR disregard their victims' reproductive rights and sexual agency, but they may in fact be aroused by it.³² Exemplifying Catharine MacKinnon's theoretical arguments about the eroticization of domination, it is the transgression of boundaries through NCCR that makes perpetrators feel aroused, powerful, and masculine.³³

Dominant discourses of heterosexual masculinity—emphasizing power, control, and objectification—are also in evidence in how women subjectively experience NCCR, as well as the systemic, collective implications of this set of practices. Czechowski et al asked their survey participants a series of open-ended questions about whether they felt NCCR was wrong, and on what basis. Nearly all of the 432 women participants felt it was wrong. While many women participants described the harms in terms of potential outcomes, such as the physical risks of pregnancy (36.6%) or STIs (35%), the majority conceptualized NCCR as a consent violation (61.3%) (“participants expressed that consent to sex with a condom is separate from consent without a condom,” since “[their] answer to having sex could change whether or not [there] is protection”).³⁴ A minority (15.3%) also saw it as a betrayal of trust, and some (5.5%) explicitly labelled it “sexual violence.”³⁵ The women in Brodsky's article experienced deceptive condom removal as a “disempowering, demeaning violation of a sexual agreement” and conceptualized NCCR as an act of control.³⁶ Boadle et al found that NCCR undermines women's sexual agency; survivors were less confident to refuse sexual advances and felt less in control of themselves sexually. As they contend, “women who experienced NCCR developed negative self-perceptions

³² See Ebrahim, *supra* note 2 at 6.

³³ See generally MacKinnon, *supra* note 1.

³⁴ Czechowski et al, *supra* note 3 at 11–12.

³⁵ *Ibid* at 11–13.

³⁶ Brodsky, *supra* note 2 at 186.

about their sexual agency after being exposed to a sexual encounter that violated their bodily autonomy.”³⁷ As these studies emphasize, women view NCCR as a violation of sexual boundaries that negates their consent, causing complex forms of harm, whether or not their partners use deception, and whether or not they experience a risk of pregnancy or STIs.

These damaging experiences of disempowerment and violation are reinforced by the uncertainty regarding the legality of what has occurred. Even as attitudes around sexual assault shift in the #MeToo era, the myth of “real rape” as violent stranger rape continues to hold sway, shaping perceptions of experiences of NCCR, as well as the responses of criminal justice actors.³⁸ There are very high rates of “unacknowledged rape” in circumstances that depart from this stereotype.³⁹ As Breanna Chesser and April Zahra have argued in their discussion of legal responses to NCCR, “where a complainant’s account deviates from the stereotypical incidence of sexual assault, offences are left largely unreported.”⁴⁰ The lack of clarity in the law about whether condom refusal, removal, deception, and sabotage negate consent to the sexual activity in question no doubt deters survivors from coming forward to make police reports.⁴¹ Just as

³⁷ Boadle, Gierner & Buzwell, *supra* note 21 at 1708.

³⁸ See generally Elaine Craig, “Feminism, Public Dialogue and Sexual Assault Law” in Fiona MacDonald & Alexandra Dobrowolsky, eds, *Turbulent Times, Transformational Possibilities?: Gender and Politics Today and Tomorrow* (Toronto: University of Toronto Press, 2020) 100.

³⁹ See Holly Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 613 at 613; Sylvie Lévesque & Catherine Rousseau, “Young Women’s Acknowledgment of Reproductive Coercion: A Qualitative Analysis” (2021) 36:15-16 *Journal of Interpersonal Violence* NP8200 at NP8204.

⁴⁰ Brianna Chesser & April Zahra, “Stealth: A Criminal Offence?” (2019) 31:2 *Current Issues in Criminal Justice* 217 at 219.

⁴¹ As American researchers Laura C Wilson and Katherine E Miller have found in their metaanalysis of the prevalence of unacknowledged rape, as many as 60% of women who report having experiences that meet the legal definition of rape do not label their experiences as rape; they instead use more benign labels such as “bad sex” or “miscommunication”: Laura C Wilson & Katherine E Miller, “Meta-Analysis of the Prevalence of Unacknowledged Rape” (2016) 17:2 *Trauma, Violence & Abuse* 149 at 149. While most survivors describe that they experienced NCCR as non-consensual sex, many are reluctant to reach the logical conclusion that non-consensual sex is a form of “sexual assault” or “rape” because of the consequences of defining oneself as a victim and stereotypes around what is a “real” rape. In qualitative research with women who had experienced reproductive coercion and NCCR, Sylvie Lévesque and Catherine Rousseau found that survivors were reluctant to label their experiences as sexual aggression. A number of factors impeded this acknowledgement, including: assuming

concerning, and because law plays such a powerful role in shaping “attitudes, beliefs, and behaviour through its messages and lessons,” the uncertain legal status of NCCR represents a failure to harness law’s expressive role.⁴² As Danielle Citron argues, when public sentiment about a specific behaviour is unclear, the law can play a role in shifting behaviours, and by recognizing forms of harm, the law can ideally restore some of the agency that sexual victimization took away.⁴³

Because the purpose of sexual assault law is to protect sexual integrity, it is important for us to consider the harms of NCCR from the perspective of survivors. But it is also important to interrogate the obvious connections between individual violations and substantive inequality. A liberal, individualized conceptualization of autonomy can limit our ability to fully appreciate the harms of NCCR, or of sexual violence more generally.⁴⁴ Overriding a woman’s insistence on condom use reinforces sexual inequality at a systemic level. As Sharon Marcus contends, we need to pay attention to the interplay between social structures that inscribe “‘misogynistic inequalities’ upon gendered bodies in a manner that allows rape to occur.”⁴⁵ Despite increasing representations of women as sexually empowered, aggression and deception remain deeply entrenched in hetero-patriarchal sexual scripts, with normative hetero-sex still depicted as something that men do to women.⁴⁶ NCCR denies the survivor of her status as subject, constructing her sexuality as an instrument of the perpetrator’s purposes. The harms of NCCR

responsibility; downplaying the incident; being in an intimate relationship marked by violence; and having difficulty self-identifying as a victim. The women interviewed by Lévesque and Rousseau who had experienced NCCR blamed themselves, believing that “they should have made it clearer that they had not consented, even though they had repeatedly said that they wanted to use a condom.” Lévesque & Rousseau, *supra* note 39 at NP8213.

⁴² Danielle Keats Citron, “Sexual Privacy” (2019) 128:7 Yale LJ 1874 at 1945

⁴³ See generally *ibid.*

⁴⁴ See Ebrahim, *supra* note 2 at 4.

⁴⁵ Sharon Marcus, “Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention” in Judith Butler and Joan Wallach Scott, eds, *Feminists Theorize the Political* (New York: Routledge, 1992) 385 at 391.

⁴⁶ See e.g. Kristen N Jozkowski & Zoë D Peterson, “College Students and Sexual Consent: Unique Insights” (2013) 50:6 J Sex Research 517 at 519.

(like the harms of sexual assault more generally) are located in its particular violation of the subjective, bodily integrity of the survivor, whose personhood is denied, in addition to the increased risk to which she is subjected.⁴⁷ The objectification inherent in NCCR reinforces male-dominated heterosexuality by denying women their status as sexual subjects who can choose what sexual activity in which to engage. Individual experiences of NCCR shore up their social function and vice versa, as the two levels of effect are intricately related.

Those who advance the moral panic position ignore these systemic harms and obfuscate the connections between NCCR and women's inequality. While acknowledging that NCCR may be an ethical wrong, Thomson locates calls for legal regulation within the punitive logic of "gendered neoliberalism."⁴⁸ She castigates those feminists who insist upon the recognition of NCCR as a legal wrong as "carceral". Decrying feminist participation in punitive logics, Levine contends that sex is inevitably a "risky business" and implies that individual responsibility and risk-management should be the preferred responses of potential victims to the moral harms caused by NCCR.⁴⁹

Both Levine and Thomson are contributing to an important debate about the limits of criminalization, and the implications for stigmatized communities, such as people who are HIV positive. However, taken to their logical end, such critiques veer towards the decriminalization of sexual violence, because NCCR is no different than other consent violations. We do not require pregnancy or the transmission of an STI to recognize the harm of sexual assault or rape in other contexts. By trivializing the experience of NCCR, these critics embed a troubling form of sexual libertarianism that characterizes the critiques of the carceral feminism thesis more generally.

⁴⁷ See Ann J Cahill, *Rethinking Rape*, 1st ed (New York: Cornell University Press, 2001) at 142.

⁴⁸ See Thomson, *supra* note 15 at 25.

⁴⁹ See Levine, *supra* note 16.

This is a postfeminist form of anti-statism, in which state regulation of sexual harm is condemned as schoolmarmish.⁵⁰ The carceral feminism critique paints an inaccurate picture of the state as a monolithic instrument captured by governance feminists.⁵¹ Not only does this overstate the contemporary power of feminism in contexts of neoliberalism and rising right-wing populism, but this position also risks re-privatizing and depoliticizing the gendered problem of sexual violence. The carceral feminism critique also misrepresents the feminist criminal law reform agenda, an agenda that, at least in Canada, has never been primarily focused on punishment. Instead, as Lise Gotell has demonstrated, Canadian feminist engagement with criminal law has been largely directed at survivor-centered outcomes, including the extent to which law reflects and condemns women's experiences of sexual violence, while attempting to prevent legal revictimization of survivors.⁵²

Given its serious bodily, dignitary, and collective harms, there is a clear case for recognizing NCCR as sexual assault within Canadian law, whether or not there was a risk of unwanted pregnancy and whether or not the circumstances involved deception. The majority decision in *Hutchinson* works against this recognition by removing NCCR from the scope of consent and treating it instead as something that can vitiate an otherwise valid consent. NCCR will only be criminalized where there is deception and where complainants face a significant risk of unwanted pregnancy, thereby minimizing the non-bodily harms of condom sabotage and obscuring the serious impacts for women's agency, equality, and sense of safety in the world.

⁵⁰ See generally Lise Gotell, "Reassessing the Place of Criminal Law Reform in the Struggle Against Sexual Violence: Responding to the Critique of Carceral Feminism" in Anastasia Powell, Nicola Henry & Asher Flynn, eds, *Rape Justice Beyond the Realm of Law* (Basingstoke: Palgrave Macmillan) 53.

⁵¹ See *ibid.*

⁵² See *ibid.* See also Wendy Larcombe, "Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law" (2011) 19:1 *Feminist Legal Studies* 27.

The Canadian Legal Framework—*R v Hutchinson*: Limiting the Scope of Consent

By the end of the twentieth century, Canadian feminists could claim credit for fundamental changes to the *Criminal Code* provisions on sexual assault, with new evidentiary restrictions on sexual history (section 276), strict limitations on the disclosure of complainants' confidential records (section 278.1–.9) and most crucially, the codification of a strong framework for consent.⁵³ From the foundation established through these amendments, the starting point of sexual assault trials has shifted away from the assumption that women exist in a state of perpetual consent, towards the requirement that there be some positive evidence of agreement. Canada has moved further in the direction of an affirmative consent standard than many other jurisdictions.⁵⁴

In *R v Ewanchuk*,⁵⁵ the Supreme Court established a standard for consent that approaches “only yes means yes” by unanimously ruling consent cannot be implied, and that silence, passivity, or ambiguous conduct cannot be taken as indications of consent.⁵⁶ The Court defined the *actus reus* of sexual assault as non-consensual sexual touching, where consent is

⁵³ See *Criminal Code*, *supra* note 6, s 273.1(1). The enumerated examples where no consent is obtained can be found at section 273.1(2)(a)–(e):

No consent is obtained, for the purposes of [this section], where (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

Section 273.2 provides that

[i]t is not a defence ... that the accused believed that the complainant consented ... where (a) the accused's belief arose from the accused's: (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

Most recently, s 273.2(c) has limited the defence of honest mistaken belief in consent to circumstances where there is evidence “that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.”

⁵⁴ See Craig, *supra* note 38 at 102; Lise Gotell, “Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms” in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (London: Routledge-Cavendish, 2010) 209 at 209.

⁵⁵ 1999 1 SCR 330, 169 DLR (4th) 193 [*Ewanchuk* cited to SCR].

⁵⁶ See *ibid* at 356–57.

determined from the subjective perspective of the complainant at the time of the sexual contact and whether she wanted the sexual activity to take place.⁵⁷ Steps to re-establish agreement are needed after someone has withdrawn consent.⁵⁸ Subsequent decisions have reinforced an affirmative consent standard by requiring that consent must be specific to the sexual activity in question⁵⁹ and by holding that an accused must have taken active and positive steps to secure agreement in order to raise the defence of mistaken belief.⁶⁰ As the Supreme Court confirmed in *R v Goldfinch*, “[t]oday, not only does no mean no, but only yes means yes. Nothing less than positive affirmation is required.”⁶¹ In *R v JA*, the Court determined that there can be no advance consent to sexual contact that takes place during unconsciousness, emphasizing that consent must be ongoing during each moment of a sexual encounter, and “must be specifically directed to each and every sexual act...at the time it occurs.”⁶²

The majority decision in *Hutchinson*, which raises the fundamental question of *what* you consent to when you agree to engage in sexual activity, represents a significant retreat from these hard fought for advances in the law of consent and a retreat from a truly subjective approach to consent. Defence lawyers and some judges have voiced concerns that affirmative consent imposes unrealistic requirements on sexual interactions, reflecting underlying fears about over-criminalizing behaviours that were previously seen as merely immoral.⁶³ Such concerns about over-criminalization were at the heart of the *Hutchinson* appeal, which was decided under the

⁵⁷ See *ibid* at 355.

⁵⁸ See *ibid* at paras 357–59.

⁵⁹ See e.g. *R v Goldfinch*, 2019 SCC 39 [*Goldfinch*]; *R v JA*, 2011 SCC 28 [*JA*].

⁶⁰ See e.g. *R v Gagnon*, 2018 SCC 41; *R v Barton*, 2019 SCC 33 [*Barton*].

⁶¹ *Goldfinch*, *supra* note 59 at para 44.

⁶² *JA*, *supra* note 59 at para 34.

⁶³ See Lise Gotell, “Thinly Construing the Nature of the Act Legally Consented To: The Corrosive Implications of *R v Hutchinson* for the Law of Consent” (2020) 53:1 UBC L Rev 53 at 63–64. See also Craig, *supra* note 38.

shadow of the Supreme Court’s harshly punitive approach to HIV non-disclosure.⁶⁴ In *R v Cuerrier*,⁶⁵ a case that began at the height of the HIV/AIDS pandemic, the Court determined that HIV non-disclosure even without transmission could be prosecuted as a form of aggravated assault or aggravated sexual assault.⁶⁶ This decision extended the common law of fraud beyond deceptions about the sexual nature of the act and the identity of the sexual partner to include deceptions that create “a significant risk of serious bodily harm”, vitiating the complainant’s consent under section 265(3)(c) of the *Criminal Code*.⁶⁷ In an effort to clearly demarcate what deceptions should be subject to criminalization, the *Cuerrier* majority conflated sexual fraud with a *risk* of serious bodily harm. The legal approach set out in this decision has resulted in both the over-criminalization of HIV non-disclosure and a restricted interpretation of the doctrine of fraud vitiating consent in other circumstances.⁶⁸

⁶⁴ See 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* 45 at 63 [Grant, “The Complex Legacy”].

⁶⁵ 1998 2 SCR 371, 162 DLR (4th) 513 [*Cuerrier* cited to SCR].

⁶⁶ See *ibid* at 432.

⁶⁷ See *ibid* at 382–83. More recently in *R v Mabior*, 2012 SCC 47 [*Mabior*], the Court responded to criticisms of the overbreadth of the significant risk test, which has resulted in people with HIV being convicted of aggravated sexual assault in circumstances where possibilities of transmission were infinitesimal. In *Mabior*, the significant risk test was framed as requiring that the Crown establish a “realistic possibility of transmission.” This realistic possibility would be negated if the accused could establish they had a low viral load at the time in question and if a condom was used. Critics argue that the *Mabior* decision expanded the criminalization of people with HIV because it required both condom use and antiretroviral compliance in order to escape criminalization for HIV non-disclosure. See generally Isabel Grant, “The Over-Criminalization of Persons with HIV” (2013) 63:3 *UTLJ* 475.

Because of criticisms of this harshly punitive approach, the Director of Public Prosecutions has issued a prosecutorial directive restricting HIV prosecutions. See Public Prosecution Service of Canada, *Public Prosecution Service of Canada Deskbook* (Ottawa: Attorney General of Canada, 2018), part V, s 5.12. As Grant explains,

The directive indicates that federal prosecutions will not be initiated where the person living with HIV has maintained a suppressed viral load, and that prosecutors will “generally not prosecute” where a person used a condom, engaged only in oral sex, or was taking treatment as prescribed, unless other risk factors were present: Grant, “The Complex Legacy”, *supra* note 64 at 48.

It is noteworthy that the federal government only prosecutes *Criminal Code* offences in the Territories. See Grant, “The Complex Legacy”, *supra* note 64 at 48, nn 12–14.

The Women’s Legal Education and Action Fund (2019) has issued a position paper 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 LEAF (Women’s Legal Education and Action Fund), “A Feminist Approach to Law Reform on HIV Non-Disclosure” (January 2019), online (pdf): <leaf.ca/wp-content/uploads/2019/01/2019-01-08-LEAF-HIV-ND-Position-Paper-FINAL.pdf>.

⁶⁸ We believe this approach has resulted in over-criminalization because the law criminalizes people who do not disclose their HIV status even where they use a condom or have a low viral load. In other words, the law

Hutchinson raised the issue of sexual fraud outside of the HIV context for the first time at the Supreme Court and revealed the limits of the HIV-driven conception of fraud. The complainant in *Hutchinson* had been in a relationship with the accused, during which time she insisted that he wear condoms during intercourse.⁶⁹ The accused, who was trying to keep the complainant in a failing relationship, secretly poked holes in the condoms they were using. After discovering that she was pregnant, and after terminating the relationship, the complainant underwent an abortion and experienced a resulting infection.⁷⁰ She became aware that the accused had sabotaged the condoms only afterwards, through a series of harassing text messages and phone calls.⁷¹ Hutchinson’s act of condom sabotage is an example of reproductive coercion—restricting reproductive decision making through power and control tactics. Hutchinson believed he could maintain control over his sexual partner by forcing her to become pregnant. As a recent systematic review has found, reproductive coercion is strongly associated with domestic violence.⁷²

In the majority opinion in *Hutchinson*, these connections were completely absent in reasons that decontextualized the complainant’s choice to engage in sexual intercourse only with a condom, and that constructed her repeated refusals to participate in unprotected sex as irrelevant to the consent inquiry. The majority recognized that the risk of an unwanted pregnancy is a risk of bodily harm, yet it failed to link the deception to consent. This decontextualized framing fails to acknowledge the accused’s actions as intimate partner violence, constructing

criminalizes individuals where there is almost no risk of transmitting HIV. See Grant, “The Complex Legacy”, *supra* note 64 at 63.

⁶⁹ See *R v Hutchinson*, 2013 NSCA 1 at para 206 [*Hutchinson CA*].

⁷⁰ See *ibid* at para 6.

⁷¹ See *ibid*.

⁷² See Karen Trister Grace & Jocelyn C Anderson, “Reproductive Coercion: A Systematic Review” (2018) 19:4 Trauma Violence Abuse 371 at 383. See also Elizabeth Miller et al, “Reproductive Coercion: Connecting the Dots Between Partner Violence and Unintended Pregnancy” (2010) 81:6 Contraception 457; Leah A Plunkett, “Contraceptive Sabotage” (2014) 28:1 Colum J Gender & L 97.

sexual assault as nothing more than people deciding to start or stop sexual activity, informed by narrow liberal construction of sexual autonomy that is abstracted from conditions of inequality.⁷³ This framing obscures how the accused's abuse limited the complainant's choice to engage in the sexual activity in the first place.

The central issue in *Hutchinson* was how to define “voluntary agreement to the *sexual activity in question*” under section 273.1(1) of the *Criminal Code*. Was the “sexual activity in question” in *Hutchinson* simply vaginal intercourse, or was it vaginal intercourse with a condom? The majority, per Chief Justice McLachlin and Justice Cromwell, determined that the sexual activity in question does not include whether a condom was used, holding that the complainant had subjectively consented, but that her consent had been vitiated by fraud.⁷⁴ The concurring minority, per Justices Abella and Moldaver, concluded that the complainant had not consented to unprotected sex and there was no need to consider fraud vitiating consent.⁷⁵

The majority opinion was a clear departure from *Ewanchuk*, although purporting to uphold that decision. In *Ewanchuk*, the Court had emphasized that the objective of sexual assault law lies in “[h]aving control over who touches one’s body and how”, which “lies at the core of human dignity and autonomy”.⁷⁶ In *JA*, the majority used the example of condom use when arguing that “the unconscious partner cannot meaningfully control how her person is being touched, leaving her open to abuse.”⁷⁷ In *Hutchinson*, the majority removed the “how” of the sexual touching out of the consent inquiry.⁷⁸ As a result, the purpose of sexual assault law comes

⁷³ See further Janine Benedet, “Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice” (2013) 18:2 Rev Const Stud 161 at 174 (discussing a narrow liberal concept of autonomy).

⁷⁴ See *Hutchinson* SCC, *supra* note 4 at para 6.

⁷⁵ See *Hutchinson* SCC, *supra* note 4 at para 79.

⁷⁶ *Ewanchuk*, *supra* note 55 at 348 [emphasis added].

⁷⁷ *JA*, *supra* note 59 at para 60 [emphasis added].

⁷⁸ See further Grant, “The Complex Legacy”, *supra* note 64 at 69 (demonstrating that the *Hutchinson* majority actually took the word “how” out of its description of the passage from *Ewanchuk*).

to be defined through a superficial construction of sexual autonomy as the decision to engage in a type of sexual activity,⁷⁹ abstracted from the very real distinction between sex with a condom and without, all in the name of restraint in criminal law.⁸⁰ The doctrinal approach to HIV non-disclosure drove the majority's decision in *Hutchinson*, with the Court holding that consistency and certainty in the law required all deceptions to be treated in the same way under section 265(3)(c).⁸¹

The majority thus posited a two-step approach to consent with only agreement to the “physical sexual act” (divorced from its context), the sexual nature of the touching, and the identity of the person doing the touching being relevant to the consent inquiry.⁸² The sexual act is understood to encompass activities such as “kissing, petting, oral sex, intercourse, or the use of sex toys,” but to exclude “the conditions or qualities of the sexual act”.⁸³ Implausibly, for the many people who make condom use an integral part of their sexual practices, this restricted understanding of sexual activity means that the scope of consent includes agreeing to intercourse, but not agreeing only to intercourse with a condom. “Effective condom use,” according to the majority decision, “is a method of contraception and protection against sexually transmitted disease; it is not a sex act”.⁸⁴ The second step looks to factors that might vitiate an otherwise valid consent, which the Court describes in its later decision in *R v GF* as “policy considerations”.⁸⁵

⁷⁹ See *Hutchinson* SCC, *supra* note 4 at para 18.

⁸⁰ See *ibid* at para 19.

⁸¹ See *ibid* at para 38.

⁸² See *ibid* at para 54, affirming Farrar JA's interpretation of the “sexual activity in question” in *Hutchinson* CA, *supra* note 69.

⁸³ *Hutchinson* SCC, *supra* note 4 at paras 54–55.

⁸⁴ See *ibid* at para 64.

⁸⁵ *R v GF*, 2021 SCC 20 at para 34 [*GF*].

The majority decision rests on an impoverished conception of sexual autonomy divorced from any recognition of the inequality women have historically faced around control of their reproduction and sexuality. Women are made individually responsible for monitoring any risks or threats not encompassed within the narrow definition of “sexual activity in question”, as these are placed outside the scope of consent, and beyond criminal legal regulation when there is no deception or significant risk of serious bodily harm. By contrast, the concurring opinion in *Hutchison* characterized “the complainant’s right to determine how he or she is sexually touched” as a “hard-fought legislative protection,” in a manner that gestures towards the systemic consequences of NCCR for gender equality.⁸⁶ The majority’s approach is flawed, the minority contended, because it suggests that only condom sabotage that could result in pregnancy would constitute fraud vitiating consent, thereby failing to uphold a complainant’s “legal right” to insist on condom use for whatever reason she chooses.⁸⁷ Sexual assault must be defined as sexual touching in a manner that is contrary to the complainant’s wishes.⁸⁸ The minority stopped short of adopting a fully conditional concept of consent that would allow the complainant to put any conditions on her consent based on what matters to her, an approach that might include other aspects of a sexual agreement beyond how the sexual touching occurs.⁸⁹ Instead, the minority emphasized that the scope of consent must include the *how* of the sexual touching, and that being touched by a penis sheathed in a condom is a different sexual activity than being touched by an unsheathed penis.⁹⁰

⁸⁶ *Hutchinson SCC*, *supra* note 4 at para 102.

⁸⁷ See *ibid* at para 98.

⁸⁸ See *ibid* at para 102.

⁸⁹ See generally Clough, *supra* note 13; Fischel, *supra* note 13 (for a discussion of the conditional model of consent).

⁹⁰ The approach taken the minority is similar to the decision of the British High Court of Justice in *Assange v Swedish Prosecution Authority*, [2011] EWHC 2489 (finding an absence of consent as a result of the accused’s NCCR when the complainant had specified that she was only agreeing to protected intercourse).

By narrowing the scope of consent and reinforcing the myth of “real rape” as defined by physical violence, the *Hutchinson* majority decision represents a backwards shift in Canadian law.⁹¹ The effect of this decision is to shift the focus of NCCR cases from the analysis of subjective consent, where it belongs, to the analysis of vitiating factors. The Supreme Court of Canada has further complicated the relationship between fraud and consent in the 2021 decision in *GF*.⁹² There, the Court doubled down on the two-step approach to consent from *Hutchinson*. The first step is whether the complainant gave what is referred to in *GF* as to as “subjective consent”. The second step is whether that subjective consent is effective “as a matter of law” or whether it is vitiated for some policy reason.⁹³ This recent decision shows how *Hutchinson* has had the effect of shifting most of the conceptual limits on consent to the second step, suggesting that all the factors in section 273.1(2) that put constraints on consent act to vitiate consent rather than to negate it from the outset.⁹⁴

The *GF* Court limited *Hutchinson* by clarifying that capacity to consent in section 273.1(2) is a precondition to consent, not something that vitiates an otherwise valid consent:⁹⁵ no capacity, no consent. However, all the factors listed in section 265(3), including fraud and whether the complainant was faced with force or threats of force, only vitiate consent. In other

⁹¹ This artificially narrow conception of the scope of consent has even led the Criminal Lawyers’ Association of Ontario (CLA) to rely on *Hutchinson* to make the outlandish argument that the degree of force with which the sexual activity is accomplished is also not included within the definition of consent. While this argument was ultimately not addressed by the Supreme Court in *Barton*, one can see the dangerous potential of a position that lets men unilaterally decide how much force to use during sexual activity. See generally *Barton*, *supra* note 60. The CLA factum stated at para 8:

The Court of Appeal said the jury ought to have considered whether [the victim] subjectively consented to “sexual activity that involved the degree of force required” to cause her injuries. This reasoning is inconsistent with *Hutchinson*. Consent to the “sexual activity in question” under s. 273.1 only requires agreement to the basic physical act, not the precise manner in which the act is carried out: *R v Barton*, 2019 SCC 33 (Factum of the Criminal Lawyers’ Association of Ontario).

⁹² *Supra* note 85.

⁹³ See *ibid* at para 33.

⁹⁴ See *supra* footnote 46 for the relevant *Criminal Code* provisions.

⁹⁵ See *GF*, *supra* note 85 at para 43.

words, subjective consent is present and the threat of force is a policy reason for vitiating that subjective consent. Of the list of factors limiting consent in section 273.1(2), only the abuse of trust, power, or authority is said to vitiate consent rather than negating it from the outset. While this reasoning limits *Hutchinson* somewhat, it still narrows what is left of subjective consent. It is also incoherent. Someone who submits to sexual activity because of “threats or fear of the application of force to the complainant” (which the *GF* majority labelled as vitiating under section 265(3)(b)) is not subjectively consenting; she is acquiescing to protect herself from violence. *Ewanchuk* made clear that such submission is not consent. While the *GF* majority says that a complainant can refuse consent at step one “for whatever reason,”⁹⁶ in fact those reasons are limited to a narrow set of factors the Court has decided are valid reasons for refusing consent—and whether a condom is used is not one of them.

As we demonstrate below, the Court’s narrowing of the scope of subjective consent has left a confusing legacy for the analysis of whether condom use is within the scope of what a woman subjectively consents to when she consents to sexual activity. In our view, overriding someone’s insistence on condom use, whether through deceit or outright refusal, must be viewed as a violation of subjective consent. A conception of sexual autonomy tied to the value of equality demands nothing less.

Case Law Survey

We examined cases decided since 1999 (when *Ewanchuk* established an affirmative consent standard) in which complainants specifically agreed to sexual activity with a condom, but not without. We searched *LexisNexis Quicklaw*, and *CanLII* using the following terms:

⁹⁶ *Ibid* at para 33.

“condom” AND “consent” AND “sexual assault.”⁹⁷ This search produced a large number of results that did not involve NCCR because reference to condoms is ubiquitous in sexual assault decisions. The question of whether a condom was worn is frequently part of the narrative in sexual assault decisions involving penetrative sex. Judicial analysis of condom use and consent may also arise in cases around the assessment of DNA evidence and in other circumstances beyond the scope of our NCCR inquiry. For example, the search produced cases in which the complainant’s capacity to consent was at issue, and where her demand that the accused wear a condom was used to argue that she had an “appreciation of the nature and quality of the sexual activity and an understanding that she could agree or decline to engage in, or to continue, the sexual activity”.⁹⁸ Conversely, in some decisions, the complainant’s inability to assess the risk of sex without a condom was treated as evidence that she was incapable of consent.⁹⁹ Insistence on condom use might also be used to argue a mistaken belief in consent on the basis that the complainant had asked him to wear a condom in the course of a sexual assault. In *R v Terkelsen*, a conversation about condom use was portrayed as a marker of responsible sexual behaviour, not as an indicator of agreement to the sexual activity that followed:

I must recognize that in our modern society the fact that a young woman asks or asked about condoms is perfectly normal behaviour...[It] displays a mature approach to the prospect of intimate contact between two strangers. Any number of public health advertisements would counsel the same approach. Safe sex practices are taught in school. There is really nothing significant about the complainant initiating this discussion or addressing the subject.¹⁰⁰

⁹⁷ Narrower searches, for example, <“conditional consent” AND condom AND “sexual assault,”> or <“condom removal” AND “sexual assault”> failed to identify decisions that involved circumstances of NCCR.

⁹⁸ See *R v Percy*, 2018 NSPC 57 at para 106 [*Percy*].

⁹⁹ See *R v Cubillan*, 2015 ONSC 969 at para 36 [*Cubillon*].

¹⁰⁰ *R v Terkelsen*, 2016 ONCJ 702 at 36.

HIV nondisclosure prosecutions also consider whether a condom was used because of the impact on risk.¹⁰¹ Finally, the failure to wear a condom in the course of a sexual assault frequently appears in sentencing decisions where it is treated as an aggravating factor.¹⁰²

Considerations of condom use outside of the specific circumstances of NCCR strongly suggest that Canadian judges appreciate differences between sex with a condom and sex without a condom. These differences are viewed as being consequential to the riskiness of sex, and unprotected penetration is understood as intensifying the harmfulness of sexual assault. Judicial recognition of a distinction between protected and unprotected sex sits at odds with the majority decision in *Hutchinson*, which positioned condom use as outside the scope of consent to sexual activity.

As our case law review demonstrates, prior to *Hutchinson*, judges were clear that whether a condom was used was relevant to consent. After *Hutchinson*, there are conflicting decisions. Several judges have actively resisted following *Hutchinson* either by simply not citing it or attempting to distinguish it. *Hutchinson*, which positioned condom use as collateral to consent to sexual activity, is the outlier.

We found only 19 reported sexual assault cases in which a complainant claimed that her consent to sexual activity was premised on condom use (although in some of these cases there was a basis to find no consent even with a condom).¹⁰³ A large majority of these cases were

¹⁰¹ See e.g. *R v NG*, 2020 ONCA 494. See also Grant, “The Complex Legacy”, *supra* note 64 at 57–58, 62.

¹⁰² See e.g. *R v Owolabi Adejojo*, 2019 QCCQ 1555 at para 120; *R v Bohorquez and Siddiqi*, 2019 ONSC 1643 at para 97; *R v BZ*, 2019 ONSC 2375 at para 25; *R v Ignacio*, 2019 ONSC 2832 at 23; *R v McCaw*, 2019 ONSC 3906 at para 58; *R v Razak*, 2019 BCSC 1677 at para 77; *R v Russ*, 2019 BCSC 229 at para 32; *R v Solorzano Sanclemente*, 2019 ONSC 695 at para 49.

¹⁰³ The pre-*Hutchinson* cases are as follows: *R v Watson*, 2007 CanLII 26 (Ont SC) [*Watson*]; *R v Perkins*, 2007 ONCA 585 [*Perkins*]; *R v Changoo*, 2009 ONCJ 220 [*Changoo*]; *R v Poirier*, [2014] ABCA 59 [*Poirier*]. The post-*Hutchinson* cases are: *R v Dadmand*, 2016 BCSC 1565 [*Dadmand*]; *R v SY*, 2017 ONCJ 798 [*SY*]; *R v DG*, 2018 ONCJ 727 [*DG*]; *R v Landry*, 2019 ONSC 3700 [*Landry*]; *R v BL*, 2021 ONCA 373 [*BL*]; *R v Lupi*, 2019 ONSC 3713 [*Lupi*]; *R v Rivera*, 2019 ONSC 3918; *R v Ukepor*, 2019 ABQB 261 [*Ukepor*]; *R v Ljiljanic*, 2019 ONSC 6316; *R v BAS*, 2020 BCSC 657; *R v Ma*, 2020 ONCA 358 [*Ma*]; *R v Tso*, 2020 BCCA 358 [*Tso*]; *Kirkpatrick*,

decided post-*Hutchinson* (15), with most decided after 2016. While the empirical research demonstrates that NCCR is also experienced by men who have penetrative sex with men,¹⁰⁴ none of the reported cases involved male complainants. All of the accused were men, and all of the complainants were women. Young women, in particular, are known to be at greater risk of NCCR,¹⁰⁵ and where age is reported in the decisions (13 cases), all but one of the complainants and accused were under 30. The largest group of cases (seven) involved people intentionally meeting up for casual sexual encounters, often (five) after connecting on internet dating apps. As Boadle et al found, participating in casual sex or what is known as “hookup culture” appears to be a “risk factor” for NCCR.¹⁰⁶ Two cases involved complainants who agreed to exchange sex for money but only if a condom was worn.¹⁰⁷ While NCCR includes deceptive and overt tactics, a large majority of these cases (15) did not involve “stealth,” but instead the overt refusal to wear a condom.¹⁰⁸

That there are so few cases, despite empirical research showing the prevalence of NCCR, is not surprising. As we have emphasized, the lack of clarity around the legal status of NCCR is likely to result in low police reporting rates. The uncertainty about whether condom removal, refusal, or sabotage constitutes an absence of consent under section 273 may mean that even when survivors report to police, charges are unlikely to be laid. A recent British Columbia case

supra note 10; *R v Kraft*, 2021 ONSC 1970; *R v IAD*, 2021 ONCA 110. While these cases involve NCCR, they were not all decided on this basis. *Watson* involved an unsuccessful defence application to exclude evidence on the basis of unreasonable search and seizure in the context of a man charged with sexual assault causing bodily harm. The complainant was involved in the sex trade and refused consent when the accused refused to wear a condom. *DG* and *Ukepbor* were decided on the basis of credibility and failure to prove the allegations beyond a reasonable doubt. *Landry* was decided on the basis of no consent to intercourse.

¹⁰⁴ See e.g. Czeckowski et al, *supra* note 3 at 2; Latimer et al, *supra* note 20 at 5.

¹⁰⁵ See Boadle, Gierer & Buzwell, *supra* note 21 at 1697.

¹⁰⁶ See *ibid* at 1699.

¹⁰⁷ See *Watson*, *supra* note 103; *Ma*, *supra* note 103.

¹⁰⁸ Cases can be difficult to characterize where the complainant alleges that the accused refused to wear a condom, but the accused testifies at trial that the condom accidentally fell off. See e.g. *Perkins*, *supra* note 103; *SY* *supra* note 103.

demonstrates this confusion. A woman who reported an incident of stealthing to the RCMP was told by the investigating officer: “Well, you know, you consented to sex, so there’s no rape or crime.”¹⁰⁹ The complainant had to show extraordinary fortitude and speak to seven different officers before the accused was finally arrested and charged several weeks later.

Pre-*Hutchinson* decisions involving NCCR

In the four decisions rendered before *Hutchinson*, judges assessed allegations of NCCR within the scope of the consent inquiry, recognizing that consent to protected sex is a different sexual activity than consent to unprotected sex.

In *R v Perkins*,¹¹⁰ according to the accused’s testimony, he had worn a condom during consensual sex, but it fell off when he lost his erection. The complainant testified that the accused raped her without a condom. The Court of Appeal for Ontario made it clear that consent to sex with a condom is different than consent to sex without:

It was common ground between [the complainant] and the appellant that he was not wearing a condom when he ejaculated. Even on the appellant’s evidence, [the complainant] would not have consented to unprotected sex. It therefore became important to determine whether the appellant was wearing a condom that came off during the sexual activity, or whether the appellant was never wearing one as alleged by the Crown.¹¹¹

The Court of Appeal ultimately ordered a new trial partly on the basis that the trial judge erred in concluding that “a virile young man” would not lose his erection in the circumstances.¹¹²

¹⁰⁹ Catharine Tunney, “BC Woman Says Mounties Need Better Training on Investigating Condom-Free ‘Stealthing’ Assaults,” *CBC News* (21 June 2021), online: <cbc.ca/news/politics/rcmp-stealthing-sexual-assault-1.6062324>.

¹¹⁰ *Supra* note 103.

¹¹¹ *Ibid* at para 30.

¹¹² *Ibid* at para 35.

In *R v Poirier*,¹¹³ the Alberta Court of Appeal upheld the accused's conviction for the sexual assault of a 14-year-old. Because the trial judge had a reasonable doubt that the accused believed the complainant was above the age of consent, the analysis of the sexual assault charge turned on whether she had consented. The allegations at issue involved deception about wearing a condom, and the trial judge treated this deception as a lack of voluntary agreement to the sexual activity in question. The Court of Appeal agreed:

The Appellant also admitted to lying to the complainant about wearing a condom. Even if the complainant consented to protected sex, there is no doubt on this record that she did not consent to unprotected sex. Further, the evidence about anal intercourse does not suggest that the Appellant honestly but mistakenly thought the complainant affirmatively communicated her consent to anal intercourse at all, much less unprotected anal intercourse.¹¹⁴

Here, acts of unprotected vaginal and anal intercourse were treated by the trial judge as specific forms of sexual activity, distinct from penetration with a condom. This analytic framing was simply accepted on appeal.

Judges in these early cases appreciated the complex individual and collective harms caused by NCCR. In *R v Changoo*,¹¹⁵ the accused was convicted of sexual assault after ignoring the complainant's insistence on a condom. In sentencing, Lane J took pains to describe how the sexual assault culminated in an "abusive and threatening verbal barrage,"¹¹⁶ thus situating this act of NCCR within the context of the accused's aggressive and controlling conduct towards the complainant. That this abuse happened just after the complainant objected to the condom removal reveals the role of power, control, and objectification often found in NCCR:

[T]he assault culminated in an abusive and threatening verbal barrage in which Mr. Changoo told the complainant that she was "really selfish and unfair" to him; that people "don't say no" to him, that "because you are new, he would let it go

¹¹³ *Supra* note 103.

¹¹⁴ *Ibid* at para 8.

¹¹⁵ *Supra* note 103.

¹¹⁶ *Ibid* at para 3.

this time but you are never to say no to him again,” that she was insulting to him, that “what was the difference between a condom and not a condom,” that she was talking back to him, “If a man talks back to him, he punches him out; I was a girl, think about that. Women talk back to me too much now, and that was wrong,” and that she was not “submissive enough.”¹¹⁷

We were unable to find a single pre-*Hutchinson* decision that treated condom use as collateral to consent.

Post-*Hutchinson* NCCR Decisions

The decisions following *Hutchinson* demonstrate the lack of clarity left in the wake of that decision. Some courts have distinguished deceptions about condoms from cases where the accused simply ignored the complainant’s insistence on a condom, with the former going to fraud and the latter to consent.¹¹⁸ Other cases have flatly ignored *Hutchinson*—perhaps because of the direction it would lead them. Overall, these decisions demonstrate the profound confusion left in the wake of the *Hutchinson* majority’s finding that condom use is “collateral” to subjective consent.

The first decision on this issue after *Hutchinson* was *R v SY*,¹¹⁹ where the complainant was the ex-girlfriend of the accused. She testified that the accused went to her home to talk to her, refused to leave, and blocked her exit. After several hours, she agreed to have sexual intercourse with him to get him to leave but only if he wore a condom.¹²⁰ She testified that in the middle of the intercourse he began to laugh and asked her if she thought he was wearing a condom. When she said yes, he pointed to the condom lying on the bed. She was immediately upset, stopped the sexual activity, and left the room. She testified that he later forcibly raped her.

¹¹⁷ *Ibid* at para 3. In the final pre-*Hutchinson* case, *Watson supra* note 103, the case was about the validity of a search and did not address the issue of condom refusal that arose on the facts.

¹¹⁸ See e.g. *Kirkpatrick, supra* note 10.

¹¹⁹ *Supra* note 103.

¹²⁰ See *ibid* at para 4.

The accused, by contrast, testified that the two of them had consensual intercourse. He agreed that she had insisted on a condom but indicated that it must have fallen off during intercourse, possibly when he lost his erection.¹²¹ While the trial judge believed the accused that the condom fell off accidentally, he did state 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.”¹²² The judge did not cite *Hutchinson* nor mention fraud.

*R v Dadmand*¹²³ was one of the few cases directly involving stealthing. The accused pretended to be a modelling agent and tricked women into believing he would sign them to lucrative contracts if they engaged in sexual activity with him on video.¹²⁴ In one of the counts, the video evidence clearly showed the accused engaging in stealthing:

He directs [the complainant] 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.¹²⁵

The accused’s NCCR was simply ignored in the reasons for judgment. The sexual interaction within which this occurred was found to have been consensual and the accused was acquitted.¹²⁶ Pearlman J’s discussion of *Hutchinson* earlier in the decision clearly set the stage for this finding. He indicated that, “the need for restraint and certainty has influenced the law’s approach to

¹²¹ See *ibid* at para 8.

¹²² *Ibid* at para 92.

¹²³ *Supra* note 103.

¹²⁴ The trial judge rejected the argument that there was no consent because the complainants did not know the accused’s identity, holding that after *Hutchinson*, identity should be narrowly defined and only include the impersonation of a sexual partner. See *ibid* at paras 19, 36, 39, 79. In making this argument, the Crown relied on *R v GC*, 2010 ONCA 451, a case involving a twin brother who had impersonated the complainant’s boyfriend.

¹²⁵ *Dadmand*, *supra* note 103 at para 99.

¹²⁶ See *ibid* at paras 99–101.

consent, particularly where consent has been obtained by deception”.¹²⁷ Following *Hutchinson*, deception negating consent must “carry with it the risk of serious harm”.¹²⁸ Pearlman J found that Crown had not led any evidence to support the existence of a “significant risk” sufficient to ground the negation of consent by fraud.¹²⁹ The defendant’s NCCR was placed beyond the scope of criminal law.

Dadmand’s restricted interpretation of the scope of consent, along with the insistence that fraud vitiating consent requires an evidentiary foundation (to substantiate a risk of pregnancy, STIs, or other serious bodily harms), point towards a hesitant legal approach to NCCR. What kind of evidence would the Crown have to lead to prove that the complainant was capable of becoming pregnant? The profound violation of privacy involved in such a requirement, opening the door to invasive questioning by police, Crown, and defence regarding the complainant’s risk of physical harm, will only deter complainants from proceeding. Responsibility for managing the risk of NCCR becomes an individual responsibility, placed beyond criminal legal regulation. The message is clear. Women are expected to carefully conform to the norms of sexual safekeeping in order to avoid being subjected to unprotected penetration against their will. Decisions such as *Hutchinson* and *Dadmand* construct women, as Ben McJunkin puts it, as “discriminating purchasers, both empowered and obligated to see through a ‘seller’s puffery,’ ignoring the profound inequality often present in sexual relationships.”¹³⁰

*R v Lupi*¹³¹ reveals how *Hutchinson* has required judges to force condom refusal into the fraud framework in order to reach a just result. The accused and the complainant had met on an

¹²⁷ *Ibid* at para 33.

¹²⁸ *Hutchinson* SCC, *supra* note 10 at para 35, citing *Cuerrier*, *supra* note 65 at 435 [emphasis in original].

¹²⁹ See *Dadmand*, *supra* note 103 at para 168.

¹³⁰ McJunkin, *supra* note 31 at 32–33.

¹³¹ *Supra* note 103.

internet dating site. The accused admitted to being aware that the complainant limited her consent to sexual activity with a condom, testifying that she had made it “absolutely clear” that refusing to wear a condom would be a “deal breaker”.¹³² The trial judge accepted the complainant’s evidence that she heard a snapping sound during penetrative sex with the accused after he moved behind her.¹³³ The accused continued to have intercourse with her for a few seconds after he removed the condom.¹³⁴

The trial judge convicted the accused, distinguishing the facts from *Hutchinson* because in this case there was clearly no consent to penetration without a condom at the time of the sexual intercourse.¹³⁵ The trial judge acknowledged how NCCR undermines women’s sexual integrity and agency, and how this in turn reinforces gender inequality: “‘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 the *Charter* values of equality and autonomy’.”¹³⁶ He went on to hold that if this approach was mistaken, then the complainant’s consent would have been vitiated by fraud.¹³⁷

On a summary conviction appeal, Justice Roberts found that the trial judge had erred in his approach to consent, and that the circumstances described by the complainant fell squarely within the framework set by the *Hutchinson* majority.¹³⁸ He concluded that the appropriate approach was instead to consider whether her consent was vitiated by fraud, finding that “[t]he

¹³² *Ibid* at para 25.

¹³³ See *ibid* at para 1.

¹³⁴ See *ibid*.

¹³⁵ See *ibid* at para 3.

¹³⁶ *Ibid* at para 35, quoting the trial judge.

¹³⁷ See *ibid* at para 3.

¹³⁸ See *ibid* at para 31.

surreptitious removal of the condom was directly contrary to Ms. V’s express wishes. Mr. Lupi literally did this behind her back. It was dishonest.”¹³⁹

Roberts J stressed the importance of evidence of physical harm, describing how the complainant had engaged in lengthy courses of prophylactic treatment that established that she experienced a clear risk of unwanted pregnancy and STIs.¹⁴⁰ In concluding that the accused’s stealthing vitiated the complainant’s consent, Roberts J held:

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” 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.¹⁴¹

Despite Robert J’s acknowledgement of the psychological harms the complainant suffered, he minimized the serious emotional and dignitary harms of NCCR, constructing those feelings as “mere sadness.”¹⁴²

In *R v Rivera*,¹⁴³ notwithstanding the finding in *Hutchinson*, the trial judge recognized that the use of a condom was central to consent. The complainant and the accused met on an online dating website; they exchanged messages where the complainant indicated that “she had two rules: condoms were a must and ‘no means no.’”¹⁴⁴ Mr. Rivera texted back that he was “totally Ok with that”¹⁴⁵ The complainant testified that when she insisted on a condom after they met in person, the accused replied that “it will be OK, I’m clean,” after which he simply proceeded with condom-less intercourse, overriding her clear verbal instructions.¹⁴⁶ In shock, she

¹³⁹ *Ibid* at para 34.

¹⁴⁰ See *ibid* at para 37.

¹⁴¹ *Ibid* at para 40. While Roberts J does not attribute the passage in quotations, it is taken from the majority judgment in *Hutchinson SCC*, *supra* note 4 at para 72.

¹⁴² See *ibid* at para 40.

¹⁴³ *Supra* note 103.

¹⁴⁴ *Ibid* at para 5.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid* at para 7.

testified that she froze and “laid there limp”.¹⁴⁷ The trial judge accepted the complainant’s story of what then occurred, finding that the fact that she went to the hospital the next day for a pregnancy test, STI tests, and a sexual assault kit supported her credibility.¹⁴⁸

Justice Champagne made clear that there was no voluntary agreement to the sexual activity in question:

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 [individual’s] 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 [gamut] of emotions resulting from an assault.¹⁴⁹

Perhaps recognizing that her decision was vulnerable on appeal because of *Hutchinson*, Justice Champagne offered an alternate path to conviction through fraud: “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) *Criminal Code*)”.¹⁵⁰ In this case, there was a significant risk of bodily harm because of the increased risk of unwanted pregnancy and STIs.¹⁵¹ Justice Champagne found that the accused engaged in deception when he “[led] the complainant to believe he would wear a condom as he had previously agreed to do so and at the last minute he penetrated her without a condom telling her it would be ok”.¹⁵² This analysis

¹⁴⁷ *Ibid.*

¹⁴⁸ See *ibid* at para 21.

¹⁴⁹ *Ibid* at para 24.

¹⁵⁰ *Ibid* at para 25.

¹⁵¹ See *ibid* at para 27.

¹⁵² *Ibid.*

expands the understanding of what constitutes a deception. Here, the failure to follow through on a prior commitment to use condoms is squeezed into the category of fraud.¹⁵³

*R v Kirkpatrick*¹⁵⁴ was the first Canadian provincial appellate decision to consider the implications of *Hutchinson* for consent and condom use as the main issue on appeal. The Court of Appeal for British Columbia divided along the same lines as in *Hutchinson*, with the majority holding that condom refusal is conceptually different from condom deception and that *Hutchinson* only excludes deceptive condom removal from subjective consent. The case is currently on appeal to the Supreme Court of Canada, offering an opportunity for the Court to reconsider *Hutchinson* as it applies to NCCR.

In *Kirkpatrick*, once again the complainant and the accused met on a dating website. The complainant testified that she told the accused that she always insists on condom use, although the accused denied this conversation took place.¹⁵⁵ She visited the accused at his house and the two engaged in some consensual sexual activity. The accused then asked her to “‘hop on’ top of him.”¹⁵⁶ She inquired about whether he had a condom, and he reached into the bedside table to get one.¹⁵⁷ After they were finished, the complainant asked to see the condom because she wanted to be sure he had worn one.¹⁵⁸ In the middle of the night, she awoke and noticed that the accused was aroused. She testified that she assumed that, when Kirkpatrick leaned towards the bedside table, he was getting another condom, and they again had vaginal intercourse, with the accused asking her if it “‘felt better this way’”.¹⁵⁹ The complainant assumed that the question was

¹⁵³ Cf *Landry*, *supra* note 103 at para 6; *BL*, *supra* note 103 at para 5. In this case, the complainant did not consent to sexual intercourse and said no, “especially not without a condom”. The accused forced intercourse on the complainant without a condom and thus this case involved a more direct finding of non-consent.

¹⁵⁴ *Supra* note 10.

¹⁵⁵ See *ibid* at para 5.

¹⁵⁶ *Ibid* at para 6.

¹⁵⁷ See *ibid*.

¹⁵⁸ See *ibid* at para 7.

¹⁵⁹ *Ibid* at para 13.

related to the sexual position, and only realized that the accused was not wearing a condom when he ejaculated.¹⁶⁰ Later she confronted him by text and he responded with “abusive” messages, one of which included a link to a porn video entitled ““OMG Daddy came inside me””.¹⁶¹ In the aftermath, the complainant attended the hospital and suffered serious side effects from the preventative HIV treatment she underwent for 28 days.¹⁶²

The trial judge granted a no-evidence motion on the basis that the complainant had agreed to the sexual activity in question (which he defined as vaginal intercourse) and that there had been no deception, determining that there was therefore no reasonable basis upon which a trier of fact could convict.¹⁶³ In concluding that the accused did not deceive the complainant, the trial judge relied on evidence that he had asked the complainant to guide his penis into her vagina and that he therefore did not hide the fact that he was not wearing a condom.¹⁶⁴ On a Crown appeal, Justice Groberman for the majority found that protected sex is a specific form of sexual activity that is included within the scope of the sexual activity consented to and therefore ordered a new trial.

While all three appellate judges in *Kirkpatrick* would have overturned the directed verdict, the Court was deeply divided on the scope of *Hutchinson*. For the majority, Groberman J took the position that there was no consent to the sexual activity in question, i.e. sex without a condom, while Justice Bennett’s concurring minority found that the only path to conviction was through the doctrine of fraud.

¹⁶⁰ See *ibid* at para 10.

¹⁶¹ *Ibid* at para 63.

¹⁶² See *ibid* at para 64.

¹⁶³ See *ibid* at para 3.

¹⁶⁴ See *ibid* at para 13.

The majority decision recognized that failing to see condom use as going to consent would be “seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy.”¹⁶⁵ Groberman J held that the *Hutchinson* majority was primarily concerned with how including the “intact state of the condom” within the scope of the “sexual activity in question” would extend the scope of voluntary agreement to “potentially infinite collateral conditions”.¹⁶⁶ He went on to contend that “[n]othing in the judgment suggests that there was an intention on the part of the majority 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”.¹⁶⁷ In other words, the *Kirkpatrick* majority decision draws a distinction between condom refusal (intercourse without a condom) and condom deception (intercourse with a condom full of holes), and asserts that while the latter is collateral to the consent inquiry, the *Hutchinson* majority never intended to exclude the former from the definition of “the sexual activity in question.”¹⁶⁸ Justice Groberman rejected fraud as a possible path to conviction. There was nothing in the facts to suggest that the accused intentionally deceived the complainant; he simply refused to comply with her insistence on condom use.¹⁶⁹ If the majority analysis is correct, there is one pathway to conviction for condom refusal, which negates subjective consent, and another more onerous test if the NCCR involves deception, requiring proof a significant risk of serious bodily harm.

The concurring minority opinion honed in on the *Hutchinson* majority’s clear conclusion that “[e]ffective condom use is a method of contraception and protection against sexually

¹⁶⁵ *Ibid* at para 3.

¹⁶⁶ *Ibid* at para 24.

¹⁶⁷ *Ibid* at para 27.

¹⁶⁸ See *ibid* at para 27.

¹⁶⁹ See *ibid* at paras 40–41..

transmitted disease; it is not a sex act”, indicating that it was not open to the majority to find that condom use is part of the definition of a sexual activity.¹⁷⁰ To criminalize a sabotaged condom differently than the refusal to wear a condom does not offer “a ‘principled and clear line’¹⁷¹. . . between what is and is not part of the nature of a sexual act”.¹⁷²

Justice Bennett, following *Hutchinson*, treated condom use as collateral to the “sexual activity in question,” and as only relevant to the second stage of the consent analysis, which looks at whether any factors vitiated an otherwise valid consent.¹⁷³ She held that there was sufficient evidence to proceed to trial on the fraud issue, holding that “[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”.¹⁷⁴ Justice Saunders agreed with Justice Groberman on the consent issue but, alternatively, agreed with Justice Bennett on fraud, thus leaving the Supreme Court of Canada with an “out” should it want to uphold the decision without departing from *Hutchinson*.¹⁷⁵

The Court of Appeal for Ontario has disregarded *Kirkpatrick* and *Hutchinson* in two recent decisions involving condom refusal. In *R v Ma*,¹⁷⁶ the Court dealt with this issue in the context of a complainant involved in the sex trade who always insisted on a condom. When she refused to participate in unprotected sex with the accused, he penetrated her regardless. The trial judge convicted the accused of sexual assault, and the Court of Appeal agreed, citing neither *Hutchinson* nor *Kirkpatrick*:

¹⁷⁰ *Ibid* at para 47 [emphasis in original], citing *Hutchinson*, *supra* note 4 at para 64.

¹⁷¹ *Ibid* at para 104, citing *Hutchinson* SCC, *supra* note 4 at para 49.

¹⁷² *Kirkpatrick*, *supra* note 10 at para 104 [citation omitted].

¹⁷³ See *ibid* at para 91.

¹⁷⁴ *Ibid* at para 115.

¹⁷⁵ A few months after *Kirkpatrick*, the same Court dealt with a case where an accused ignored the complainant's insistence on a condom in *Tso*, *supra* note 103. Neither *Kirkpatrick* nor *Hutchinson* was cited, and the conviction appeal was dismissed without discussing this issue.

¹⁷⁶ *Supra* note 103.

In our view, the appellant's refusal to use a condom and his subsequent use of a boxcutter to stroke the neck of the second complainant as he kissed her entitled the trial judge to conclude that sexual activity that started as consensual evolved later into a non-consensual sexual assault.¹⁷⁷

Similarly, in *R v IAD*,¹⁷⁸ a case involving mistaken belief in consent, the Court treated the complainant's insistence on condom use as being an integral part of the sexual activity in question and therefore, essential to the analysis of the mistaken belief in consent defence:

We agree with the appellant that this case required a clear inquiry into the reasonable steps potentially taken by the respondent. This is particularly true given both the complainant and respondent's clear evidence that she asked for a condom, yet the sexual intercourse ensued without one. Even taking the respondent's evidence at its highest, this is a circumstance that was known to him at the time that the intercourse commenced, yet he did not inquire of the complainant whether she wished to proceed without a condom.¹⁷⁹

At least one court has relied on *Kirkpatrick* as a persuasive authority that protects a complainant's right to limit her voluntary agreement to intercourse with a condom. *R v Kraft*¹⁸⁰ involved a summary conviction appeal of an acquittal in a case involving the question of consent to unprotected intercourse. The complainant and the accused engaged in consensual foreplay but, in the absence of any discussion, the accused penetrated the complainant without telling her he was going to do so. The complainant immediately informed the accused that he had to put a

¹⁷⁷ *Ibid* at para 10.

¹⁷⁸ *Supra* note 103.

¹⁷⁹ *Ibid* at para 15. The complainant was a vulnerable 15-year-old who had recently left home and was couch-surfing. The accused was an 18-year-old from whom the complainant sometimes bought cannabis. One night, they ended up sleeping in the basement of an acquaintance's home. The complainant testified that she moved to sleep on the couch with the accused because she was cold. When they started to cuddle, the accused began to pull down her pants and digitally penetrate her. She attempted to get off the couch, but the accused pulled her back. She testified that he started to penetrate her and that she said "no." When she realized he wasn't going to stop, she said, "we should put a condom on," and the accused replied that she was being "childish," and continued to have unprotected intercourse until he withdrew and ejaculated on and around her vagina. The trial judge found no consent but acquitted on the basis of a reasonable doubt about the defence of mistaken belief in consent. See *ibid* at paras 5–8, 17.

¹⁸⁰ *Supra* note 103.

condom on.¹⁸¹ At issue on appeal was the trial judge's treatment of this single act of unprotected intercourse, both with respect to consent and mistaken belief in consent.

The trial judge had imposed the *Hutchinson* fraud formula, holding that condoms are not sex acts, that the complainant had consented to the intercourse, and that, because there was no deception, there was nothing to negate her voluntary agreement. In rejecting this approach, Justice Williams, cited *Kirkpatrick* for the proposition that "condom use is highly relevant to the consent analysis: no condom, no consent".¹⁸² Williams J agreed that sex without a condom is a specific form of sexual activity. Because the accused had taken no steps to clarify the complainant's consent, he was not entitled to claim that he mistakenly believed that the complainant was consenting to sex without a condom.

It is abundantly evident from these recent decisions that *Hutchinson* has created a lack of clarity about whether condom use is part of what is consented to. We have seen judges try to expand the notion of deception in order to fit into the narrow constraints of *Hutchinson*, and we have seen judges disregard *Hutchinson* altogether. The Supreme Court has a unique opportunity in *Kirkpatrick* to retreat from the confusing and unprincipled logic of *Hutchinson*, and we hope it rises to the occasion.

Legislative Options

Relying on doctrinal developments to provide clarity can be risky for feminists. Supreme Court decisions may turn on complicated points of law, and, as we saw in *Hutchinson* and *GF*, on concerns about how those developments impact other areas of law not before the Court. The Supreme Court may be reluctant to reconsider a decision as recent as *Hutchinson*, notwithstanding the legal confusion left in its wake. If the Court declines to retreat from

¹⁸¹ See *ibid* at para 12.

¹⁸² *Ibid* at para 49.

Hutchinson, law reform will be necessary to address the widespread and pervasive phenomenon of NCCR.

Cross-nationally, there have been several efforts to secure legal remedies for NCCR both through civil and criminal law reforms.¹⁸³ As we have argued here, NCCR constitutes sexual assault because the survivor has not voluntarily agreed to penetrative sex without a condom. While civil actions for NCCR could be empowering for survivors, offering them control over the process and the possibility of compensation for the harms suffered, civil remedies are slow and costly, and thus not accessible to many complainants. Nor does an individualized civil remedy have the same expressive function as criminal law. As Chesser and Zahra have argued, “[i]f the sexual wrong of stealthing was rectified by a civil remedy, society may perceive stealthing as a wrong less severe than other sexual offences shielded by the criminal law.”¹⁸⁴ For this reason, many jurisdictions are contemplating criminal law reform to designate NCCR as a form of sexual assault.

Criminal law reforms in other jurisdictions have paralleled the divergent approaches taken by the majority and concurring opinions in *Hutchinson*. In 2019, Singapore became the first country to pass a criminal law amendment to respond to stealthing.¹⁸⁵ Using a fraud formulation that shares most of the weaknesses of the *Hutchinson* majority position, the Singapore *Penal Code* now criminalizes misrepresentation about “sexually protective measures” as its own offence: “procurement of sexual activity by deception.” Similarly, there is currently an

¹⁸³ The California legislature recently passed a bill that would allow survivors of NCCR to seek civil damages from perpetrators: US, AB 453, *An act to amend Section 1708.5 of the Civil Code, relating to civil law*, 2021-2022, Reg Sess, Cal, 2021. This bill followed an earlier and ultimately unsuccessful effort to criminalize stealthing as a form of sexual assault. See also McKenney Cornett, “Taking the Lead: A Strategic Analysis of Stealthing and the Best Route for Potential Civil Plaintiffs to Recover” (2021) 27:3 William & Mary Journal of Race, Gender, and Social Justice 931.

¹⁸⁴ Chesser & Zahra, *supra* note 40 at 229.

¹⁸⁵ See *Criminal Law Reform Act 2019* (No 15 of 2019, Sing), s 376H.

opposition-sponsored bill before the Legislature of Australian Capital Territory that would amend the *Crimes Act* to include “the intentional misrepresentation by the other person about the use of a condom” as fraud negating consent.¹⁸⁶

In contrast to law reforms that restrict criminalization to deceptive forms of condom removal, a New York bill passed but still pending in committee would criminalize the “unconsented to removal or tampering with a sexually protective device” as a form of sexual battery.¹⁸⁷ While encompassing both deceptive and overt forms of non-consensual condom removal, the broad definition of “sexually protective devices” creates the potential for women to be criminalized when they interfere with contraceptive devices, ignoring how the experience of unprotected penetration and the risk of unwanted pregnancy represent specific forms of gendered harm. This is one reason the *Hutchinson* minority limited its judgment to the *how* of sexual activity, explicitly not extending its reach to the consequences of sexual activity.

Perhaps the clearest proposal for law reform, and one that best captures how NCCR violates sexual integrity and gender equality, has recently been proposed by the New South Wales Law Reform Commission. Within a set of recommendations aimed at simplifying and strengthening the law of sexual consent, the Commission proposes an amendment to the *Crimes Act* that would provide that “a person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to another sexual activity,” stating that “a person who consents to sexual activity using a condom is not to be taken, by reason only of that fact, to consent to sexual activity without using a condom.”¹⁸⁸ This amendment thus clearly defines sex

¹⁸⁶ *Crimes (Stealth) Amendment Bill 2021* (ACT) (introduced April 22, 2021).

¹⁸⁷ US, SB S4401, *Relates to Unconsented Removal or Tampering with a Sexually Protective Device*, 2019-2020, Reg Sess, NY, 2019. (“sexually protective device” includes “a male or female condom, spermicide, diaphragm, cervical, contraceptive sponge, dental dam or another physical device”).

¹⁸⁸ New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences*, Report 148 (September 2020) at 66, online (pdf): <lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report%20148.pdf>.

with a condom as a specific form of sexual activity within the scope of the consent inquiry. The government has committed to legislating these proposed changes, making NSW the first jurisdiction to explicitly recognize the right to limit consent to protected sex.¹⁸⁹

The Canadian Parliament could accomplish the same result by amending section 273.1 of the *Criminal Code* to clarify that whether a condom is used is part of “the sexual activity in question” to which one must voluntarily agree. A simple definition of “sexual activity in question” could make clear that the complainant must consent to each sexual activity, and how it is performed, including whether a condom is used.

Conclusion

Concern about NCCR has been constructed as a hysterical moral panic that is complicit in the regressive politics of the carceral state. To the contrary, NCCR needs to be understood as a widespread form of gender-based violence. As long as we criminalize sexual assault as a violation of sexual autonomy, NCCR must be understood as non-consensual. It is a form of sexual touching that the complainant does not want to take place. While violative condom practices can subject survivors to the risks of unwanted pregnancies and STIs, these acts also produce complex forms of harm, undermine survivors’ sexual agency and dignity, and reinforce a form of masculinity defined by sexual conquest, premised on the objectification of women, and antithetical to any concept of sexual equality. Whether the criminal law recognizes a person’s autonomy to choose whether or not to engage in unprotected sexual intercourse should not depend on whether they are capable of becoming pregnant. *How* the sexual activity is undertaken must be part of the consent inquiry.

¹⁸⁹ NSW Government, “Proposed Reform of Sexual Consent Laws: Information About Proposed Changes to Consent Laws Announced by the NSW Government” (2021), online: <dcj.nsw.gov.au/justice/proposed-reform-of-sexual-consent-laws>.

The Canadian cases discussed in this paper illustrate how NCCR interacts with patterns of abuse and degradation, whether enacted as a form of reproductive coercion within a relationship characterized by coercive control, performed within a more elaborate scheme of sexual deception, or perpetrated by men in the context of casual sexual encounters. The case law reveals that NCCR is sometimes followed up by abusive tirades, texts, and unsolicited stealthing porn. It is precisely the manipulation, deception, and the transgression of boundaries that are eroticized by NCCR.

The analytical framework established by *Hutchinson* draws a number of untenable distinctions that work to insulate some forms of NCCR from criminal sanction. Even though the definition of consent in Canadian law is supposed to be subjective, by defining condom use as collateral to the consent inquiry, *Hutchinson* paternalistically informs survivors that they subjectively consented to acts that they did not agree to and may have experienced as deeply violating at the time they occurred. The test for sexual fraud directs attention only to practices that are deceptive and that risk serious bodily harm, thus minimizing violations of women's sexual agency and dignity, which can be dismissed as "mere sadness."¹⁹⁰ It is noteworthy that in several of these prosecutions, judges referred to the fact that complainants behaved as responsible risk managers, who carefully surveilled their sexual partners' condom use and immediately sought testing and prophylaxis when their vigilance failed. Conversely, however, as the treatment of NCCR in *Dadmand* suggests, a complainant who fails to approximate the normative standard of the risk-managing good victim may be denied legal protection. Establishing a complainant's status as a good victim according to this overemphasis on physical harm requires that she be willing to have confidential medical information disclosed in court.

¹⁹⁰ *Lupi*, *supra* note 103 at para 40, citing the majority judgment in *Hutchinson* SCC, *supra* note 4 at para 72.

Postmenopausal, pregnant, infertile, or trans women, as well as men who insist on condom use when having sex with men, are simply out of luck unless their sexual partner had an STI.

Ultimately, the *Hutchinson* formula creates a number of unprincipled distinctions between those situations of NCCR subject to legal regulation and those relegated to the realm of ethical and moral harms. Why should there be legal distinctions drawn between deceptive forms of NCCR and those that are carried out blatantly, when the difference between the two circumstances can turn on factors that should be insignificant to the definition of sexual assault? This may amount to drawing a legal distinction based on the mere seconds before the complainant discovers that her insistence on protected sex has been violated or whether the accused was in front or behind her when he penetrated her without a condom.

Judges appear to be resisting the *Hutchinson* framework precisely because the result conflicts with their common sense understanding of what consent means. The Court of Appeal majority opinion in *Kirkpatrick* could be characterized as a deliberate misreading of *Hutchinson* and an invitation for the Supreme Court to revisit the conclusion that condom use is collateral to the sexual activity in question. Whether or not the Court takes up this invitation, feminist legal scholars committed to substantive equality must rise to the challenge of forging a principled basis for defining the scope of consent to sexual activity.

Where a complainant insists on condom use, it is surely not unduly onerous to require a man to either use a condom or refrain from sexual intercourse. To argue that a woman who consents to vaginal intercourse only with a condom is giving subjective consent to any vaginal intercourse without a condom resurrects the much-discredited notion of implied consent—that agreement in one context implies agreement in a completely different context. The majority

position in *Hutchinson* is quite simply a form of implied consent—a doctrine explicitly rejected by the Supreme Court in *Ewanchuk*.

While we strongly support the conclusion of the *Kirkpatrick* majority that disregard of the complainant’s insistence on condom use negates subjective consent, it is inconsistent with the absurd conclusion from *Hutchinson* that consent to sex with a condom implies subjective consent to sex without a condom unless vitiated by fraud. Extending fraud, as the minority does in *Kirkpatrick*, to cases where there is no clear evidence of deception is not the solution nor is making an artificial distinction between deceptions and overt disregard of the complainant’s wishes on condom use. It is essential to rethink the definition of “the sexual activity in question” with respect to condom use and how the sexual activity is carried out.

The Supreme Court of Canada has a unique opportunity in *Kirkpatrick* to rethink a decision made by only four justices of that Court that has left the law “seriously out of touch with reality, and dysfunctional in terms of its protection of sexual autonomy.”¹⁹¹ The Court can make this adjustment without upending the meaning of voluntary agreement and the structure of subjective consent set out in *GF*. The Court need only acknowledge that “the sexual activity in question” includes the complainant’s express wishes about whether a condom was used. We urge the Court to allow Canadians to determine for themselves whether or not they are willing to consent to sex without a condom. If the Court fails to rise to the occasion, Parliament should intervene and amend the definition of consent in section 273.1 by including condom use and how sexual activity is carried out as being within the scope of the sexual activity that must be consented to.

¹⁹¹ *Kirkpatrick*, *supra* note 10 at para 3.