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A Pricked Condom: Fraudulently Obtained Consent or No Consent in the First Place?

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Case commented on: *R v Hutchinson*, 2014 SCC 19

This post discusses a recent decision from the Supreme Court of Canada addressing consent in the context of sexual assault. The Court was unanimous on its final destination: dismissing the appellant's appeal of his conviction for sexual assault. However, the Court narrowly split, 4-3, on the path taken to get there. More specifically, the Court split on whether deliberately and secretly sabotaging a condom renders sexual activity with that condom non-consensual because the victim's consent was obtained fraudulently or because she never consented in the first place. This post reviews these two alternate approaches, notes their subtle overlap, and concludes that the state of consent in Canadian law is left unclear following this decision.

1. Background

In *R v Hutchinson*, 2014 SCC 19, the Supreme Court of Canada unanimously upheld the conviction of the appellant/accused, Mr. Hutchinson, for sexual assault under the *Criminal Code*, RSC 1985, c C-46, section 271.

The facts are plain and undisputed. Mr. Hutchinson deliberately and secretly poked holes in the condoms he used when having sex with his partner, the complainant, who testified that she only consented to sex with a condom (at para 2). As the concurring judgment points out, "[i]t goes without saying that when someone agrees to sexual intercourse with a condom, she is agreeing to sexual intercourse with an intact condom" (at para 79; emphasis in original). It's called "protected sex" for a reason.

Consequently, the complainant was sexually assaulted by Mr. Hutchinson – but why exactly; because her consent was fraudulently obtained, or because she never consented in the first place? The answer to that question is what divided the Court in *Hutchinson*. In fact, a majority of both judgments is spent comparing and justifying their respective approaches to consent.

2. Two Paths to a Sexual Assault Conviction

Both judgments grapple with the same fundamental question: "where should the line between criminality and non-criminality be drawn when consent is the result of deception?" (at para 3). Further, both judgments employ a two-step analysis rooted in the same statutory foundation:

1. The consent inquiry: whether there is consent based on its definition under [section 273.1(1)]() of the *Criminal Code*, and
2. The vitiation inquiry: whether consent was vitiated under [section 265(3)]() of the *Criminal Code* (at para 4 per the majority and para 92 per the concurring judgment).

However, both judgments resolve the issue of a sabotaged condom at different steps in the analysis. According to the majority judgment (authored by McLachlin CJ and Cromwell J, with Rothstein and Wagner JJ concurring) sex with a sabotaged condom amounts to sexual assault because consent is vitiated by fraud (at para 6). In other words, there is no consent under the vitiation inquiry. By contrast, the concurring judgment (authored by Abella and Moldaver JJ, with Karakatsanis J concurring) considers sex with a sabotaged condom a sexual assault because there is no consent "in the first place" (at para 79), i.e. no consent under the consent inquiry.

These two separate paths to a sexual assault conviction in *Hutchinson* are best explained by the conflicting approach to the consent and vitiation inquiries described in the two judgments.

(a) Two approaches to the consent inquiry

The majority judgment approaches the consent inquiry more narrowly. In particular, the majority opines that section 273.1(1) of the *Criminal Code* requires a consideration of consent to three discrete aspects of the sexual activity:

1. the touching,
2. the sexual nature of the touching, and
3. the identity of the partner (at para 5).

By contrast, the concurring judgment approaches the consent inquiry more broadly and argues that consent must be considered in relation to the following three aspects of the sexual activity:

1. the identity of the partner,
2. the sexual nature of the touching, and
3. "the manner in which the sexual touching was carried out" (at para 92).

Consequently, the concurring judgment employs the same consent inquiry as the majority save for the addition of the "manner in which the sexual touching was carried out." The remaining factors (the touching, its sexual nature, and the identity of the partner) are otherwise found in both judgments' consent inquiries.

This overlap is best explained by example. For instance, both judgments would consider identical twins swapping places as amounting to sexual assault because a component of the consent inquiry common to both judgments (the identity of the partner) would not be met. By contrast, there are circumstances where the consent inquiry would not overlap between the judgments. Take the example of a woman lying about using a diaphragm. Presumably, the concurring judgment would consider this as an aspect of "how the physical act was carried out" analogous to condom use, and would conclude that lack of consent to this aspect amounts to sexual assault. The majority, however, would likely not consider this a sexual assault (that is, unless the increased risk of a female partner's pregnancy vitiated the male partner's consent under the majority's approach).

(b) Two approaches to the vitiation inquiry

The two judgments also differ in their approaches to the vitiation inquiry.

Both judgments endorse the basic two step approach to vitiated consent from *R v Mabior*¸ [2012 SCC 47](https://www.canlii.org) at paras 104-05:

1. dishonesty, including the non-disclosure of important facts, and
2. deprivation or risk of deprivation that results from the dishonesty (at para 67 per the majority and para 94 per the concurring judgment).

However, the two judgments disagree with respect to the scope of "deprivation." More precisely, while the majority judgment adopts a narrower conception of consent, it offers a broader conception of deprivation.

According to the majority, whether or not a complainant experiences deprivation depends on if they experience harms that are "equally serious" to the "significant risk of serious bodily harm" contemplated by *R v Cuerrier*, [1998] 2 SCR 371 in the context of sexually transmitted diseases (*Hutchinson*, at para 69). On that basis, the majority held that the harm of an unintended pregnancy (or an increased risk thereof), with the physical and psychological implications that entails, amounts to deprivation sufficient to meet the vitiation inquiry (at para 70).

The concurring judgment, by contrast, adopts a narrower conception of deprivation. The concurring judgment argues that deprivation should be restricted to a narrower reading of *Mabior* and only apply to circumstances in which there is a "significant risk of serious bodily harm" rather than also applying to other "equally serious deprivations" (at para 95). In their view, the majority's approach results in a "moving target" that is uncertain (at para 95).

Again, like with the consent inquiry, the two judgments' approaches to the vitiation inquiry partially overlap. In particular, both judgments would find fraud vitiating consent if that fraud exposed the complainant to a "significant risk of serious bodily harm." For example, both judgments would likely approach the issue non-disclosure of HIV in the same way (though the majority thinks otherwise: see para 40).

By contrast, the judgments would differ if a complainant was exposed to equally serious harms that do not amount to significant risk of serious bodily harm. For example, the majority would conclude that substituting a women's birth control pills for sugar pills would amount to fraud vitiating consent (at para 47) whereas the concurring judgment would not (as I explain below).

(c) A distinction without a difference?

There are many circumstances, described above, in which both judgments would reach the same conclusion with respect to consent, and by the same reasoning. In addition, there are circumstances where both judgments would reach the same conclusion with respect to consent, but by different reasoning. Though such circumstances are theoretically fascinating, they arguably amount to a distinction without a difference.

The most obvious example of this is in *Hutchinson* itself. While the judgments discuss, at length, their conflicting approaches to assessing the impact of a sabotaged condom on consent, both judgments ultimately conclude that it results in a sexual assault (at para 6 per the majority and para 79 per the concurring judgment).

More broadly, any deception resulting in an "equally serious" harm to that described in *Cuerrier* (failing the vitiation inquiry according to the majority) that relates to the "manner in which the sexual touching

was carried out" (failing the consent inquiry according the concurring judgment) would similarly attract criminal liability under the reasoning of both judgments, though at different stages of the analysis.

3. Commentary

Both judgments have weaknesses. Neither judgment provides a predictable approach to assessing consent in the context of deception – an admittedly complex area of law. Further, as I describe below, neither judgment recognizes how their disagreement is a consequence of a tension inherent to the *Criminal Code* provisions they rely on: two provisions which support consent and vitiation inquiries that are both separate and overlapping. Greater engagement with this tension is the key to greater clarity regarding consent.

(a) Lacking clarity under the consent inquiry

Neither the majority nor the concurring judgment provide for a clear consent inquiry. This lack of clarity is problematic; especially in sexual assault law, which has received notoriously inconsistent treatment by courts and is related to social circumstances that are already difficult for individuals to navigate with certainty.

The majority claims its approach to the consent inquiry is clearest, going so far as to describe the concurring judgment's approach as one "lead[ing] to empty semantic arguments incapable of furnishing a principled and clear line between criminal and non-criminal conduct" (at para 49). The purported clarity of the majority comes from its omission of the "manner in which the sexual touching was carried out" from its consent inquiry. I agree that this factor lacks clarity. I disagree, however, that the majority avoids this lack of clarity.

Before discussing the obscurity of the majority judgment on the consent inquiry, I begin with the consent inquiry of the concurring judgment, the obscurity of which is most evident from the decision.

The key clarity problem in the concurring judgment's consent inquiry is its incorporation of "how the touching will occur" (at para 83). The majority correctly points out that "it is difficult to tell what matters [form] part of the [...] 'how' and which do not" (at para 41). For example, some of the concurring judgment's elaboration on the "how" aspect of consent merely refers to synonyms, which provide limited guidance: the "manner" of touching (at paras 79, 85, 88, 93-94, 97 and 102-03), the "means" of touching (at para 83), and the "specific" or "actual" touching that takes place (86, 88 and 92).

Clearer guidance comes from the concurring judgment when it indicates that the "how" of consent includes "where" the touching occurs and "by what" an individual is touched (at para 92). However, even with that basic description there are many unanswered questions. A dialogue between the majority and concurring judgments best illustrates the obscurity in the "how" factor of the consent inquiry.

First, the majority describes the obscurity in the concurring judgment's approach as follows:

> [46] [...] Under Abella and Moldaver JJ.'s test, the quality or effectiveness of a condom changes the sexual activity that takes place; why would it not follow that an individual might be prosecuted for using an expired condom or a particular brand of condom? Anomalies abound .
>
> (Emphasis in original)

In response, the concurring judgment replies:

> [103] [...] Mr. Hutchinson deliberately sabotaged the condom without her knowledge or agreement. It trivializes the seriousness of the violation of the complainant's integrity that occurred to analogize a sabotaged condom, as our colleagues have done, to its brand or expiration date.

Why does the majority's confusion over whether brand or expiration date fall within the "manner" of sexual activity "trivialize the seriousness of [...] a sabotaged condom"? If manner includes "by what" the complainant is touched, why would a change to the nature of the condom – that by which the complainant is touched – not impact consent? An expired condom could be much less effective at serving its protective purpose, and that purpose is presumably the basis for why "[i]t goes without saying" that consent to sex with a condom is consent to sex with an "intact condom" as the concurring judgment points out (at para 79). Further, a brand of condom could have practical consequences and falls, at least in principle, within the concurring judgment's view that the consent inquiry involves control over what an individual is touched by. A partner could insist on a brand of polyurethane condom because of a latex allergy, or a woman could insist that her partner use the regular Trojan condom because the Magnum brand may be too big and fall off (reducing effectiveness), or because she dislikes the taste of the flavoured version.

What is the principled basis for excluding from the scope of consent the decision of whether an expired or polyurethane condom touches you but not a sabotaged condom? I agree that sabotaging a condom is a more serious deception because of the significant consequences flowing from unprotected sex, but the concurring judgment rejects the relevance of those consequences to the consent inquiry because, in its view, an individual should be able to insist on condom use "for whatever reason" (at para 98). Accordingly, the concurring judgment's reasoning is not based on risks posed by a sabotaged condom, but rather, on a robust (and vague) "commitment to protecting a person's autonomy and dignity" (at para 83). Without a clear understanding of when deceptions cross the line between a violation of autonomy and dignity, and when they do not, the concurring judgment's approach keeps us guessing.

The majority judgment is similarly unclear, and does not provide "a clear line between criminal and non-criminal conduct" as it claims (at para 42). The majority limit their consent inquiry to "the basic sexual activity" and exclude "conditions and qualities of the act or risks and consequences flowing from it" (at para 21), but what is a "condition" or "quality" of a sexual act, and what does the "basic sexual activity" consist of? I can think of fewer elements more basic to sexual activity than whether or not a condom is used. Providing a bare definition of "sexual activity" and then excluding broader considerations such as the "quality" of the act, which the majority itself admits to be a vague notion (at para 30), brings limited clarity to its analysis of consent.

Some of the majority's elaboration on the meaning of the "basic sexual activity," similar to the concurring judgment's treatment of the "manner" of the sexual activity, merely repeats synonymous phrases: the "physical act," "sexual act," or "physical sex act" agreed to (at paras 22, 24, 27 and 54-55).

Clearer guidance comes later when the majority opines that the consent inquiry concerns only "the physical sex act itself (for example, kissing, petting, oral sex, intercourse, or the use of sex toys)" (at para 54). However, such a narrow view of the consent inquiry leaves only two options: either (1) the concurring judgment is justifiably critical of this scope of consent for "adverting to generic, categorical labels of sexual activity [that obscure] the purpose of the consent inquiry" (at para 86), or (2) the majority's approach is broader than it admits.

Consider the example of a woman having vaginal intercourse with a partner who is being too rough. If she desired vaginal intercourse but told her partner to be less rough and he persisted, would the majority conclude that her consent to the "physical sex act itself [...] for example [...] intercourse" was still

present? Otherwise, on what basis could the majority deny the presence of consent if not through reference to the "manner" of the intercourse, in this case, its degree of aggression? Would such a complainant be limited to an argument of vitiated consent under section 265(3)? As another example, what if a partner enjoyed the "specific sex act" of "[using] a sex toy" but only wanted the toy to be used if it was on a low vibration setting because of over-stimulation? The most intuitive way to explain this "condition" would be that it is "how" the sex act is being carried out, but the majority only considers the basic sex act. Would deliberately overlooking this condition be consensual according to the majority? To consider the performance of a specific sexual activity that a partner expressly forbid as consensual would be a shallow interpretation of consent. I doubt that the majority would consider excessively aggressive sex contrary to the express wishes of a complainant to be consensual. As a consequence, the majority likely considers aspects of "manner" as well and, like the concurring judgment, adopts an unclear consent inquiry.

That being said, the majority's approach to consent is not only unclear because of how it would presumably include aspects of the "manner" of touching similar to the concurring judgment. In particular, its list of "basic sexual activities" suffers from similar semantic flaws as the "how" factor in the concurring judgment. Enumerating a list of basic sexual activities without qualifying the characteristics of that list provides limited guidance. By what criteria does the majority include "the use of sex toys" within the basic sexual activity but not the use of protection? If "intercourse" being a category does not prevent a complainant from only consenting to the "specific sexual act" of anal or vaginal intercourse, why does it not contemplate the specific sexual act of protected intercourse? In other words, which specifications are allowed, and which are not? The majority purports to exclude "conditions or qualities of the physical sex act" (at para 55) but those exact terms have led in prior jurisprudence to the precise semantic problems the majority claims to avoid (at para 30). For example, how should a woman's consent to vaginal intercourse be characterized? As consent to a specific act or as consent that is conditional on a specific location of penetration? What if a specific sexual position or technique (such as the withdrawal method) is chosen to prevent the risk of pregnancy, should it then be treated like a condom, as only a condition related to the nature of the act (with a low risk of pregnancy) and not as the basic sexual activity itself (intercourse)? In my view, the majority do not overcome these uncertainties – they merely disregard them.

I note, parenthetically, that the majority's basis for rejecting advance consent to unconscious sexual touching in *R v JA*, 2011 SCC 28 is undermined by the narrow conception of consent the majority provides in *Hutchinson*. In *JA*, the Supreme Court rejected advance consent because "the consent of the complainant must be specifically directed to each and every sexual act, negating the argument that broad advance consent is what Parliament had in mind" (at para 34 per McLachlin CJ). But if consent is only directed at the basic category of sexual activity as the majority claims in *Hutchinson*, then why is a complainant prevented from consenting to that basic sexual activity being performed on them during her subsequent unconsciousness? Perhaps the majority was concerned that, in unconsciousness, though a category of sexual activity could be consented to in advance, the "manner" of its performance may not align with a complainant's wishes. In *JA*, the majority even opined that advance consent should be rejected because "[t]he unconscious partner cannot meaningfully control how her person is being touched" (at para 60; emphasis added), the factor which the majority rejects in *Hutchinson*.

Finally, the subtle overlap between the consent inquiries of the two judgments compounds the obscurity each judgment provides independently.

As I described above, the majority, though it claims otherwise, likely considers aspects of the "manner" of sexual touching in its consent inquiry. For example, the clearest guidance from the concurring judgment on the scope of the "manner" of sexual activity is the following:

> [92] [...] [T]he analysis under s. 273.1(1) must link consent to the specific sexual activity which occurred, including how the sexual touching was physically carried out. In other words, did the complainant consent to where she was touched and by what?
>
> (Emphasis in original)

The majority rejects the "how" criterion, but surely the majority also thinks that the consent inquiry includes where sexual touching occurs and with what an individual is touched; maybe not in the context of a sabotaged condom, but presumably in other circumstances. This is most clearly illustrated by examples raised by the concurring judgment about why "manner" is a necessary component of the consent inquiry:

> [87] [...] A person who has consented to being touched over her clothing above the waist, is not consenting to being touched under her clothing below the waist. Both instances are "touching", but only one was agreed to. In the same way, agreeing to "penetration" does not thereby mean consenting to any or all forms or penetration. The notion that general consent is given under s. 273.1(1) so long as the other person's actions fall somewhere within the generic category of what the complainant agreed to, such as touching or penetration, is untenable.

These examples hardly draw the line between the majority and concurring judgments. Anally penetrating a woman who consented only to vaginal penetration would be considered non-consensual at the stage of the consent inquiry in both judgments, just by different phrasing. As the majority expressly state, they would consider such touching to be non-consensual because only vaginal intercourse was "the specific physical sex act" agreed to (at para 54; emphasis in original). Alternatively, according to the concurring judgment, such touching would be non-consensual because the manner of sexual touching agreed to did not include anal intercourse.

These are not the only intersections between the judgments. These examples demonstrate a broader issue in the two judgments – a false dichotomy between their approaches which converge more than either decision admits. The concurring judgment's "expansive" approach that includes the "manner in which the sexual touching was carried out" (at para 92) and the majority's narrow approach that includes only the "basic sexual activity" (at para 21) are separated by a blurry line. Consequently, when read independently, and when read in concert, the judgments in *Hutchinson* provide for an unclear consent inquiry.

(b) Lacking clarity under the vitiation inquiry

Both judgments also provide for an unclear approach to the vitiation inquiry.

The majority judgment creates an unclear vitiation inquiry by failing to provide any criteria for the assessment of "deprivation." It characterizes pregnancy (or an increased risk thereof) as deprivation because of the "profound changes" it entails (at para 70). In so doing, the majority extends the prior test from *Mabior* ("significant risk of serious bodily harm") to include other "equally serious deprivations" (at para 69). Pregnancy certainly entails profound and significant changes in a woman's body. In particular, becoming pregnant inadvertently from deception is an immense violation of personal autonomy. As a consequence, I agree that being rendered non-consensually pregnant is equally serious to the harms contemplated in *Mabior*, but why? The notion of "equally serious" harms fails to outline a principled basis from which to assess future claims of deprivation. As the concurring judgment notes:

> [95] [...] By further redefining the deprivation component of the fraud test affirmed in *Mabior* only two years ago, our [colleagues] leave open the possibility that other "equally serious deprivations" could establish deprivation in future cases. This makes the deprivation component a moving target, and generates uncertainty in an already complex area.

The majority's application of *Mabior* to *Hutchinson* is reasonable. Linking the standard of a "significant risk of serious bodily harm" to the context of disease transmission (at para 69) is a robust approach to legal reasoning, which should always take the factual underpinning of legal precedents into account. However, the majority should have gone further to explain why pregnancy is equally serious for a clearer approach in future cases. Otherwise, the identification of 'analogous harms' to HIV transmission and pregnancy will be left indeterminate.

The concurring judgment's vitiation inquiry also suffers from obscurity despite its purported reliance on the clarity established in *Mabior*.

First, the concurring judgment claims to affirm a two-step approach in which the second step applies the *Mabior* vitiation standard: deception causing a "significant risk of serious bodily harm" (at para 94).

However, the concurring judgment then opines that the consent and vitiation inquiries could both simultaneously determine a lack of consent:

> [96] While the starting point for the analysis is s. 273.1(1), unlike our colleagues, we see no legal danger or uncertainty in recognizing that in a given case, lack of consent could theoretically have been established under either provision.

I appreciate how scenarios such as a sabotaged condom intuitively fall under both the consent and vitiation inquiries. The complainant never consented to unprotected sex (no consent) and her willing participation in the sexual activity was only by virtue of fraud (vitiated consent). However, to describe such an approach as without "uncertainty" is questionable.

Just four paragraphs earlier the concurring judgment outlines a two-step inquiry in which both steps are discrete (at para 92). The second stage of the concurring judgment's vitiation inquiry is only reached if there is a finding of consent at the first stage (the test reads: "has the complainant consented [...] if so, are there any circumstances that vitiate the complainant's consent": at para 92). Indeed, the concurring judgment expressly states that "[t]he two inquiries are conceptually distinct and must remain so" (at para 93). On that basis, the simultaneous use of both sections 273.1(1) and 265(3) to support a finding of non-consent is logically impossible, and yet, the concurring judgment describes their simultaneous use as certain.

While the concurring judgment's approach to deprivation is clearer than the majority in so far as it does not allow for "equally serious" harms, its view that a lack of consent could co-exist with vitiated consent, when the premise of vitiated consent is that consent exists but for its vitiation, results in a confusing analytical framework.

Further, the concurring judgment's approach to consent and vitiation contradicts its commitment to sexual autonomy and integrity. At paragraphs 47 and 48, the majority judgment describes the scenarios of a male partner substituting his girlfriend's birth control pills with sugar pills or lying about being sterile – two circumstances which, on my reading, would not result in a sexual assault according to the concurring judgment's reasoning. First, the consent inquiry would be

satisfied: there would be no issue with respect to the sexual nature of the touching, identity of the partner, or the manner of sexual touching (though the "manner" factor is admittedly vague). Second, the vitiation inquiry would not be satisfied (leaving consent intact). The concurring judgment expressly affirms the "significant risk of serious bodily harm" standard (at paras 94-95) in addition to considering the characterization of pregnancy as bodily harm to be "problematic" (at para 98). Accordingly, the concurring judgment would not consider an increased risk of pregnancy sufficient to qualify as deprivation, and in turn, neither lying about sterility nor sabotaging birth control pills would amount to a sexual assault. How could the reprehensible conduct of sabotaging birth control pills or lying about sterility not result in a sexual assault while sabotaging a condom does? If the concurring judgment's primary focus is on the preservation of sexual integrity and autonomy, how can it overlook the violated autonomy caused by what is arguably the most fundamental consequence of sexual activity?

In sum, the majority and concurring approaches in *Hutchinson* lack clarity in both the consent and vitiation inquiries.

(c) The likely source of a strained statutory interpretation

In my view, a strained interpretation of sections 273.1(1) and 265(3) of the *Criminal Code* is unavoidable.

The majority reasonably concludes, based on the presumption of non-redundancy in legislative drafting, that the "two-part scheme" (consent and its subsequent vitiation) requires an analytical framework in which the fraud provision is separate from the consent provision (at para 26).

However, the definition of consent under section 273.1(1) of the *Criminal Code* as a "voluntary agreement" inherently engages with the circumstances of vitiated consent under section 265(3) of the *Criminal Code* and in that way mandates partial redundancy. A <u>voluntary</u> agreement must reflect the free will of the complainant, and that free will is violated when consent is obtained through fraud. Similarly, a complainant who "does not resist" because of "threats or fear of the application of force" is surely not acting voluntarily. This overlap between sections 273.1(1) and 265(3) may be the source of the concurring judgment's view that there is "no legal danger or uncertainty in recognizing that in a given case, lack of consent could theoretically have been established under either provision" (at para 96). An accused that sabotages his condom both undermines the complainant's "voluntary" agreement under section 273.1(1) of the *Criminal Code* and obtains her consent (or at least, her willing participation) through fraud under section 265(3) of the *Criminal Code*.

Engagement with this overlap – a two-stage analysis where both stages logically intersect – is where the Supreme Court should turn to next. This tension, which arguably underlies the 4-3 split in *Hutchinson*, must be resolved. Only then will the Court find a unanimous voice and be able to invest greater time outlining a clear approach to consent, rather than debating between two approaches that both find support in the *Criminal Code*.

I note, however, that in resolving this tension, both the majority and concurring members of the Supreme Court will need to sacrifice aspects of their analysis in *Hutchinson*.

The majority should embrace the inherent redundancy in certain provisions of the *Criminal Code* addressing consent. Consent has long been misinterpreted by the courts, and the use of partially overlapping provisions, in my view, serves to strictly regulate the assessment of consent. Such redundancies in the *Criminal Code* are not only found, as I described earlier, between the "voluntary agreement" of consent (section 273.1(1)) and the vitiation of consent by coercion or fraud (section

265(3)). For example, the *Criminal Code* provides that "[n]o consent is obtained" where "the complainant expresses [...] a lack of agreement" (section 273.1(2)(*d*)) or where "the complainant, having consented to engage in sexual activity, expresses [...] a lack of agreement" (section 273.1(2)(*e*)). Technically, the first provision (section 273.1(2)(*d*)) covers both circumstances. However, these minor redundancies help ensure proper legal reasoning, such as preventing a judge from ruling that a woman was not sexually assaulted, despite changing her mind about sexual activity (and expressing that changed mind), because she had agreed earlier. In this regard, it is no surprise that there is overlap between the more general consent provisions in the *Criminal Code* (section 265(3)) and the more detailed consent provisions which came later (section 273.1) and arose out of concerns of judicial misinterpretation of consent in the context of sexual assault.

Additionally, the concurring judgment should be more willing to incorporate context into its assessment of consent. The majority persuasively critiques the concurring judgment for its inconsistent treatment of sabotaged birth control when the only difference is between a physical device (a condom) and a drug (the pill). While I applaud the concurring judgment's firm commitment to sexual autonomy, not all physical aspects of sexual touching should have the same impact on consent. The secret removal of a physical device that prevents pregnancy is not equivalent to the secret removal of a physical device that enhances sexual pleasure, and a principled approach to consent should recognize this.

4. Conclusion

Consent procured through deceit is a profoundly complex question of law and policy. As the majority judgment notes, there are "potentially infinite collateral conditions" (at para 27) that may or may not subjectively factor into an individual's agreement to engage in sexual activity.

Most of the pages in *Hutchinson* are directed at advancing the virtues of two purportedly distinct approaches to consent. In the future, more time should be invested in acknowledging where these approaches overlap and grappling with their true differences. Hopefully, with a greater appreciation for the significant agreement amongst the member of the Court regarding the assessment of consent, a single coherent approach to its assessment may be found.

There is a difficult balance to be struck between the desire to promote fully-informed sexual actors (in the interest of sexual autonomy) and the acceptance that some degree of being under-informed must be tolerated (in the interest of preventing over-criminalization). Not every deception merits the intervention of the criminal law. Distinguishing between a partner who sabotages a condom, conceals their marital status, or lies about their age is not easy. While the Court was unanimous in this case, the physical and psychological implications of unprotected sex and the overwhelming significance that condom use frequently plays in the negotiation of sexual consent makes Mr. Hutchinson's conduct clearly criminal. It will be interesting to see how the Court deals with the next case of vitiated consent that comes before it. If the deceit in that case relates to something less significant than a condom, it may result in a Court that not only takes two separate paths, but arrives at two separate destinations as well.

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