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Mikaela Shapiro
Touro Law Center

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YES, "STEALTHING" IS SEXUAL ASSAULT... AND WE NEED TO ADDRESS IT

*Mikaela Shapiro**

ABSTRACT

Nonconsensual condom removal, more popularly known as "stealththing," exposes victims to potential physical risks such as pregnancy and disease and, as victims make clear, feelings of violation and shame. Such condom removal changes sex from consensual sex into nonconsensual sex. There are currently no laws criminalizing stealththing in the United States. This Note considers possible criminal and civil remedies victims may seek in a court of law. Conditional consent, initial consent to sexual activity that is contingent upon intercourse with a condom and may be revoked once that condom is removed, is a key factor in stealththing cases. Ultimately, this Note recommends current sex crime laws in the United States be amended to include stealththing, and states prosecute perpetrators of stealththing as sexual assaulters, rather than as rapists.

* J.D. Candidate, Touro College Jacob D. Fuchsberg Law Center, 2022. Thank you so much to my note editor Samantha Karpman, my faculty advisor Professor Desiree Kennedy, and to the rest of the law review staff for taking the time to improve my work and make me a better writer. Thank you to my parents, Nancy and James, for supporting me throughout law school and encouraging me to always do my best. And to my siblings, Kelsey and Jake. Jake- maybe one day you will be published too. To my grandma, share a smile. And lastly, I would like to dedicate this Note to all of the victims of stealththing. I hope one day they will be able to seek justice in a court of law.

I. INTRODUCTION

Sex is among the most private, intimate acts a person can experience. When a person is violated during sex, it leaves detrimental and often lasting effects. Despite rape's destructive nature, it is the most underreported crime in the United States.¹ In fact, it is estimated that "230 out of every 1,000 sexual assaults are reported to the police. That means about 3 out of 4 go unreported."² In the very few cases that are reported and investigated, most of the accused rapists will never be convicted.³

However, even more underreported than rape is stealthing, which is the nonconsensual removal of a condom during sex.⁴ Stealthing transforms consensual sex into nonconsensual sex as soon as the perpetrator removes the condom.⁵ Unfortunately, sexual assault is extremely common in the United States.⁶ There are online forums and websites that encourage stealthing, which even instruct men on how to successfully stealth their partner without getting caught.⁷ There are no formal statistics to show the number of men who have taken part in the act of stealthing, and the number of people who have been made victims to stealthing.⁸ Regardless of the actual number of victims to this crime, they deserve legal protection. However, no criminal or civil laws in the United States currently provide legal remedies to stealthing victims.

This Note will argue that stealthing should be recognized as both a sexual assault crime and tort in the United States. It will additionally argue that perpetrators should be punished in criminal court and victims should be allowed to sue in a civil court for

¹ *The Criminal Justice System: Statistics*, RAINN (last visited, July 7, 2021), <https://www.rainn.org/statistics/criminal-justice-system>.

² *Id.*

³ *Id.*

⁴ Alexandra Brodsky, "Rape-Adjacent": *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 183 (2017).

⁵ *Id.*

⁶ *Id.*

⁷ James McWilliams, *For Women Who Have Been Victims of 'Stealthing,' There Can Be Dangerous Health Consequences- And Little Option for Legal Recourse*, PSMAG (Jan. 30, 2018), <https://psmag.com/news/for-women-who-have-been-victims-of-stealthing-there-can-be-dangerous-health-consequences-and-little-option-for-legal-recourse>.

⁸ *Id.*

remedies. Criminalizing stealthing could help facilitate the prosecution of sex crimes and aid in removing the stigma and barriers surrounding the reporting process.⁹ Barriers to reporting sexual assault include not wanting the offender to be punished, fears that the police would not think the assault was important or would be unable to help the victim, and fear the defendant could retaliate.¹⁰ If reporting these crimes becomes more socially acceptable, it would likely encourage more victims of both stealthing and rape to come forward.¹¹

This Note will be divided into nine sections. Section II will discuss the similarities between stealthing and rape. Section III will explore why men feel the desire to stealth their partners. Section IV will provide an overview of sex crime laws in the United States, at the federal level and in New York State. It will then show how sex crime laws could be applied to stealthing. Section V will analyze court decisions and policies regarding stealthing in countries outside of the United States. Then, Section VI will discuss why the United States should recognize stealthing as a criminal offense on a state-by-state basis, because criminal laws often differ among states. Section VII will analyze the possibilities for civil actions against perpetrators of stealthing. Section VIII will discuss the implications of criminalizing stealthing, and will explore how the criminalization of stealthing will benefit views of gender roles in our country. Finally, Section IX will conclude that stealthing should be a punishable offense under criminal and civil law in the United States.

II. STEALTHING AND ITS RELATION TO RAPE

Rape and stealthing share many similarities. Though they are similar, this is not to say that these two acts are identical. The physical acts are different, yet how the victims are subsequently left to feel are much the same.¹² Victims of both crimes feel violated and

⁹ Marjorie R. Sable, Fran Danis, Denise L. Mauzy & Sarah K. Gallagher, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. C. HEALTH 157, 158 (2006).

¹⁰ *Id.*

¹¹ Annie Hendricks, *Attitudes of Men and Women Towards Sexual Assault: The Role of Stigma, Self-Stigma, and Gender Roles*, U. S. MISS. (2019) https://aquila.usm.edu/cgi/viewcontent.cgi?article=1640&context=honors_theses.

¹² Brodsky, *supra* note 4, at 183-187.

ashamed afterwards, sometimes blaming themselves.¹³ In her paper on stealthing, Alexandra Brodsky interviewed several victims of stealthing to understand how they felt.¹⁴ Brodsky began her paper by introducing Rebecca, a doctoral student who volunteers at a rape crisis hotline.¹⁵ Rebecca spoke to many people calling into the hotline who had an unsettling sexual experience but did not know what to call it.¹⁶ These people reported that their partner “removed a condom without their knowledge.”¹⁷ Rebecca had the same experience when she was in college.¹⁸ Some callers realized immediately that their partner had removed the condom, while others did not notice what happened until ejaculation or when their partner informed them about what they did.¹⁹ Brodsky wrote about the feelings the reported callers described – the visceral emotions associated with having their bodily autonomy violated, misplacing their trust in their partners.²⁰ They felt their partners blatantly disrespected the decision they had made regarding their bodies – the decision to use a condom – and the scope of their consent to the sexual contact.²¹ Likewise, victims of rape also feel as if their bodies were violated.²² After a rape occurs, victims are left with anxiety, depression, self-blame, and a loss of trust.²³ Like the hotline callers Rebecca spoke to about their stealthing experience, victims of rape are also often unsure how to define what happened to them, chalking

¹³ *Id.*

¹⁴ *Id.* at 185-87.

¹⁵ *Id.* at 183.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 185.

²⁰ *Id.* at 185-86.

²¹ *Id.* at 187.

²² *The Effects of Sexual Assault*, WCSAP (Feb. 7, 2021, 3:09 PM), <https://www.wcsap.org/help/about-sexual-assault/effects-sexual-assault>.

²³ Laura C. Wilson & Katherine E. Miller, *Meta-Analysis of the Prevalence of Unacknowledged Rape*, TRAUMA, VIOLENCE & ABUSE (Apr. 2016), https://www.jstor.org/stable/26638392?Search=yes&resultItemClick=true&searchText=how%20victims%20of%20rape%20feel&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3Dhow%2Bvictims%2Bof%2Brape%2Bfeel%26acc%3Doff%26wc%3Don%26fc%3Doff%26group%3Dnone%26refreqid%3Dsearch%253Aa4f5c57a2e5dc9f31ca38b044faab145&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3Ad8783bc09d483c64020c7bec381b1595.

it up to a miscommunication or just bad sex.²⁴ One victim Rebecca talked with mentioned specifically telling her partner prior to sex that a condom was non-negotiable for her.²⁵ When she realized he took the condom off, she was "freaked out," because she was very explicit with him and had set a boundary.²⁶

In addition to having their bodies assaulted and consent infringed upon, victims are left with the fear of unwanted pregnancies and sexually transmitted infections ("STIs").²⁷ Many of the victims Brodsky spoke to mentioned trips to the store for a Plan B pill or immediately making an appointment to get tested for STIs.²⁸ Not only were these women potentially impregnated or exposed to a sexually transmitted infection, but they had to pay money for emergency contraception and doctors' appointments, just as victims of rape must often do.²⁹ If the victim is unfortunate enough to have been impregnated, this leaves her with a life-long commitment she did not ask for if she is unable or unwilling to have an abortion, or a short term, but serious, commitment to pregnancy if she chooses adoption. Unwanted pregnancies and sexually transmitted infections are realities rape victims face as well. According to the Center for Disease Control (CDC), about three million women in the United States have experienced a "rape-related pregnancy" at some point in their lives.³⁰ While there are no statistics on stealthing related pregnancies, thirty percent of women have experienced a form of reproductive coercion from their partner.³¹

The most obvious similarity between rape and stealthing is the lack of consent involved in the two acts. Affirmative consent means a partner must agree to the sexual act generally, so it does not necessarily matter if they did not affirmatively consent to having sex

²⁴ *Id.*

²⁵ Brodsky, *supra* note 4, at 187.

²⁶ *Id.*

²⁷ *Id.* at 186.

²⁸ *Id.*

²⁹ Sarah DeGue, *The Cost of Rape*, NAT'L SEXUAL VIOLENCE RES. CTR. (2018), <https://www.nsvrc.org/blogs/cost-rape>.

³⁰ *Understanding Pregnancy Resulting from Rape in the United States*, CTR. FOR DISEASE CONTROL & PREVENTION (June 1, 2020), <https://www.cdc.gov/violenceprevention/datasources/nisvs/understanding-RRP-inUS.html>.

³¹ *Id.*

without a condom; it is consent to the sexual interaction as a whole.³² Affirmative consent alone cannot protect against stealthing.³³ While victims of stealthing had initially given affirmative consent to their partners to have sex, the consent was made on the condition their partner uses a condom.³⁴ This consent is explicit. Once that condition is violated, there is no longer consent to any sexual contact.³⁵ Consent to sex only with a condom on is also known as “conditional consent.”³⁶ Courts in the United Kingdom have recognized conditional consent and determined that true consent only exists where conditions upon which consent has been made are complied with.³⁷ Conditional consent will be explored in greater detail later in this Note.³⁸ Regardless of the consent model used, if a person consents only to have sex with a condom, the person’s consent is violated the instant the condom is removed. Just as someone who has been raped did not consent to the sexual contact, neither did the stealthing victim consent to sex without a condom.

III. WHY PEOPLE FEEL THE NEED TO STEALTH

Studying the act of stealthing requires an understanding of why and how men choose to stealth their unwitting partners. There are an alarming number of chat forums and websites online that allow men to exchange tips and tricks for stealthing their partners.³⁹ One man, Mark Bentson, has created the ultimate guide on stealthing.⁴⁰ In the article entitled “Top 10 Stealthing Tips,” Bentson likens stealthing to a “magic trick.”⁴¹ “[L]ike a professional magician, understanding that sometimes a trick can go wrong. You must simply be able to keep your cool and maintain the illusion.”⁴² The article

³² Melissa Blanco, *Sex Trend or Sexual Assault? The Dangers of “Stealthing” and the Concept of Conditional Consent*, 123 PENN STATE L. REV 217, 239 (2018).

³³ *Id.*

³⁴ *Id.* at 238.

³⁵ *Id.* at 239.

³⁶ *Id.*

³⁷ *Id.* at 238.

³⁸ *See infra* Part VI.C.

³⁹ Brodsky, *supra* note 4, at 188.

⁴⁰ Mark Bentson, *Top 10 Stealthing Tips*, PERMA (June 25, 2012), <https://perma.cc/K79M-2FM2>.

⁴¹ *Id.*

⁴² *Id.*

then goes on to recommend poking pinprick holes in the condom or keeping the condom in extreme heat and then switching to extreme cold to wear the condom down.⁴³ While this Note mainly regards stealththing as the physical removal of a condom, tampering with a condom to render it useless is also considered stealththing.⁴⁴ Slipping the condom off mid-intercourse is also suggested, and advice is given at the end of the article on how to lie to your partner if she catches on.⁴⁵ "If there's silence, don't try to fill it. Let there be some awkwardness. It makes the problem seem like it's his [or hers], not yours."⁴⁶

Brotsky provides suggestions on why some men feel the need to stealth.⁴⁷ One might think stealththing is all about the increased physical pleasure a man feels without a condom during intercourse.⁴⁸ However, the comments left on pro-stealththing articles suggest misogyny and, in terms of non-heterosexual relationships, feelings of male sexual supremacy are the main motivations behind stealththing.⁴⁹ One comment says, "[i]t's a man's instinct to shoot his [semen] into a woman's *****. He should never be denied that right."⁵⁰ This language demonstrates that the commentor clearly believes it is a male's right to have unprotected sex with a woman. Another contributor asked if the partners of "stealthers" deserve to be impregnated.⁵¹ In response to that question another person commented, "[y]es they deserve it," while another replied, "[t]hat's how God created this universe, we are born to do it."⁵² Some men refer to the act of ejaculating into a woman as "spreading their seed," which they believe is a man's right.⁵³ Even when reproduction is not an option, such as when men have sex with other men, the idea of spreading one's seed does not deter individuals who are motivated to

⁴³ *Id.*

⁴⁴ Randall Palmer, *Canadian guilty of sexual assault after piercing condom*, REUTERS, (Mar. 7, 2014, 10:08 AM) <https://ca.reuters.com/article/canada-us-courts-condom-idCABREA2610D20140307>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Brotsky, *supra* note 4, at 189.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 188.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 189.

stealth.⁵⁴ The article written by Bentson focuses on males stealthing other males, but the rhetoric about spreading one's seed is still the same as those on articles and comments focused on heterosexual intercourse.⁵⁵

The "Bareback Brotherhood" is a group of men dedicated towards sharing explicit stories and advice on stealthing.⁵⁶ In one section of their website, the Bareback Brotherhood explains, "[s]o #BBHH is a group of men (not women) who are bound by the exchange of [semen]."⁵⁷ There are sections of the website dedicated to both heterosexual and homosexual intercourse.⁵⁸ In one chat thread on this website, a user posed a question asking if others think that stealthing, despite the website users' mutual love of non-protected sex, is morally wrong.⁵⁹ A response to this query stated, "[f]or me, whether or not stealthing is wrong depends on the situation. The more anonymous the situation, the more acceptable I find stealthing is."⁶⁰ When this commentator says, "the more anonymous the situation," he means the less he is acquainted with the person he is about to stealth.⁶¹ An ideal situation for this person would be a one-night stand. Interestingly, a number of commentators said that they believe stealthing is morally wrong and they would not do it to someone.⁶² Another chat thread, on that same website, is dedicated to those who "love" to stealth.⁶³ As previously brought up in this Note, since there are no data or reports on stealthing, it is unclear how prevalent that act is.⁶⁴

Considering that feelings of male superiority and dominance are key factors driving men to stealth, this Note must ask whether there is anything we, as a society, can do to assuage these feelings in men. Our societal expectations regarding gender roles give men the

⁵⁴ *Id.*

⁵⁵ Bentson, *supra* note 31.

⁵⁶ *FAQs*, BBBH, <https://bbbh.men/about/faq> (last visited Feb. 25, 2021) (explicit content).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See supra* Part I.

belief that it is their right as a male to subject a woman to non-consensual unprotected sex.⁶⁵

IV. OVERVIEW AND APPLICATION OF STEALTHING TO SEX CRIMES

The definitions of sex crimes vary at the state and federal level, often differing among states as well.⁶⁶ To situate stealthing within the context of crimes and criminal law, it is important to understand how sex crimes are defined. This Note will specifically explore the sex crime laws of New York and the federal government.⁶⁷

For example, under New York State law a person is guilty of first-degree rape when

he or she engages in sexual intercourse with another person:

1. By forcible compulsion; or
2. Who is incapable of consent by reason of being physically helpless; or
3. Who is less than eleven years old; or
4. Who is less than thirteen years old and the actor is eighteen years old or more.⁶⁸

Likewise, under New York State law a person is guilty of second-degree rape when

1. Being eighteen years old or more, he or she engages in sexual intercourse with another person less than fifteen years old; or
2. He or she engages in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.⁶⁹

⁶⁵ Stefanie Sinno, Christine Schuette & Melanie Killen, *Developmental social cognition about gender roles in the family and societal context*, in *Gender and Development*, 133 (2014).

⁶⁶ Neal Davis, *Federal Crimes: Federal vs. State Offenses*, NEALDAVISLAW (Mar. 18, 2017), <https://www.nealdavislaw.com/criminal-defense-guides/federal-vs-state-offenses.html>.

⁶⁷ This Note will only study New York State and federal sex crime laws, because narrowing down United States laws to only one state and the federal level will facilitate a comparison with other countries' laws.

⁶⁸ N.Y. PENAL LAW § 130.35 (McKinney 2021).

Under New York State law a person is guilty of third-degree rape when

1. He or she engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old; or
2. Being twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old; or
3. He or she engages in sexual intercourse with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent.⁷⁰

The key difference between first-degree rape (the most serious rape charge) and second- and third-degree rape is forcible compulsion.⁷¹ For instance, in a first-degree rape case, a person could hold a knife to the throat of the victim and force her to have sex, and this would be forcible compulsion.⁷² Second- and third-degree rape do not require this.⁷³ The first-degree rape statute also includes younger victims than second- and third-degree do.⁷⁴

It is unlikely that any state or federal government will equate stealthing to first- or second-degree rape.⁷⁵ First- and second-degree rape require non-consent on the basis of being “physically helpless” or “mentally disabled or mentally incapacitated,” neither of which describe the non-consent aspect of stealthing.⁷⁶ Third-degree rape, on the other hand, requires a lack of consent “by some factor other than incapacity to consent.”⁷⁷ Penal Law section 130.05(2)(d) defines the non-consent of the third-degree rape statute as “the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have

⁶⁹ N.Y. PENAL LAW § 130.30 (McKinney 2021).

⁷⁰ N.Y. PENAL LAW § 130.25 (McKinney 2021).

⁷¹ N.Y. PENAL LAW § 130.35, .30, .25 (McKinney 2021).

⁷² N.Y. PENAL LAW § 130.35 (McKinney 2021).

⁷³ N.Y. PENAL LAW § 130.30, .25 (McKinney 2021).

⁷⁴ N.Y. PENAL LAW § 130.35, .30, .25 (McKinney 2021).

⁷⁵ *Id.*

⁷⁶ N.Y. PENAL LAW § 130.35, .30 (McKinney 2021).

⁷⁷ N.Y. PENAL LAW § 130.25 (McKinney 2021).

understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."⁷⁸ Thus, it may be argued, when the victim clearly expressed he or she did not consent to sex without a condom, that this non-consent may fall into the third-degree rape category of non-consent. Stealthing begins with consent, which is lost when the condom is removed, but rape starts without consent.⁷⁹

New York's sexual misconduct law is a class A misdemeanor, and a person can be found guilty of sexual misconduct in three ways.⁸⁰ First, "he or she engages in sexual intercourse with another person without such person's consent."⁸¹ Second, "he or she engages in oral sexual misconduct or anal sexual conduct with another person without such person's consent."⁸² Or third, "he or she engages in sexual conduct with an animal or a dead human body."⁸³ Even though the requirements and definitions vary depending on the specific sex crime, each form of misconduct indicates that a person's bodily autonomy has been violated.⁸⁴

Just as definitions of sex crimes vary among states, the federal government has its own definition.⁸⁵ The federal government's definition of rape is similar to first-degree rape in New York.⁸⁶ The federal government defines rape as "committing a sexual act" on another person, through the use of unlawful force or threats, or who is unconscious.⁸⁷ Abusive sexual contact is also included in federal sex crime laws, but not at the New York State level.⁸⁸ "Any person

⁷⁸ N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2021).

⁷⁹ *A British Man Has Been Convicted of Rape After Removing a Condom During Sex*, GRAZIADAILY (Apr. 25, 2019), <https://graziadaily.co.uk/life/in-the-news/stealththing-conviction-rape> (explaining the difference between stealthing and rape).

⁸⁰ N.Y. PENAL LAW § 130.20 (McKinney 2021).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Texas Sexual Assault Law*, SAPUTO (last visited July 10, 2021), <https://saputo.law/criminal-law/texas/sex-crimes/sexual-assault>. Texas state law, unlike New York State law, refers to rape as sexual assault and thus does not have different degrees of rape in its charges.

⁸⁶ 10 U.S.C. § 920; N.Y. PENAL LAW § 130.35 (McKinney 2021).

⁸⁷ *Id.*

⁸⁸ *Id.*

subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would be a sexual assault violation under § 920 (b) had the sexual contact been a sexual act is guilty of abusive sexual contact.”⁸⁹ § 920 (b) of the United States Code mentions a lack of consent.⁹⁰ Specifically, it says any person who commits a sexual act on another without the consent of the other person is guilty of sexual assault.⁹¹

Stealthing does not seem to fit in with federal sex crimes and would most likely be more useful being enforced at the state level, because most sex crimes are prosecuted at the state level.⁹² The concept of consent in federal law is more aligned with New York’s first-degree rape concept of consent, rather than the one required for stealthing. This is also more of a jurisdictional than a definitional issue. “Most sex crimes are prosecuted at the state level unless the crime occurs in a geographical location and/or if the crime is severe (aggravated) enough to trigger federal criminal laws.”⁹³

While there are a few specific state laws regarding sexual assault against children, most of the federal sex crimes are related to crimes against children, such as abusing minors sexually⁹⁴ and child pornography.⁹⁵ Children clearly cannot consent to sex with an adult; therefore, it is automatically rape and there is no need to apply stealthing.⁹⁶ Other sex crimes prosecuted at the federal level involve human trafficking,⁹⁷ death as a result of sexual assault,⁹⁸ and sex offenders with multiple offenses.⁹⁹ Although the Department of Justice should track reports of stealthing, and it would be beneficial for the federal government to make stealthing a crime, it would ultimately be more efficient for state governments to criminalize it.

⁸⁹ 10 U.S.C. § 920d (2010).

⁹⁰ 10 U.S.C. § 920b (2010).

⁹¹ *Id.*

⁹² *Federal Sex Crimes*, CASEXCRIMESATTORNEY (last visited July 10, 2021), <https://casexcrimesattorney.com/practice-area/federal-sex-crimes/federal-sex-crimes>.

⁹³ *Id.*

⁹⁴ 10 U.S.C. § 920b (2010).

⁹⁵ 18 U.S.C. § 2252.

⁹⁶ 10 U.S.C. § 920b(g) (2010) (Children cannot consent to sex with an adult because our penal laws forbid it.).

⁹⁷ 22 U.S.C. § 7102(12).

⁹⁸ 18 U.S.C. § 2245 (2001).

⁹⁹ 34 U.S.C. § 20913 (2018).

This is because stealthing applies to pre-existing state laws more so than it does to pre-existing federal laws, so most stealthing cases would be a local crime.

V. FOREIGN CASES AND LAWS ON STEALTHING

While the United States has never prosecuted a case on stealthing, other countries have tried stealthing cases and convicted the defendant.¹⁰⁰ Some foreign countries have passed or plan to pass laws criminalizing stealthing.¹⁰¹ Knowing that other countries have charged and convicted men of stealthing is encouraging for proponents of criminalizing it in the United States, since it provides them with practical examples to support their position.

A. The U.K. and their New Concept of Conditional Consent

In 2011, the United Kingdom changed its laws regarding conditional consent in the case, *Assange v. Swedish Prosecution Authority*.¹⁰² Julian Assange was visiting Sweden, for work, when he had sexual relations with two women.¹⁰³ The women later claimed that Assange had sex with them without using protection, even though they demanded he use a condom if he wanted to have sex with them.¹⁰⁴ Assange went back to the U.K., and Sweden requested extradition back to Sweden so he could be charged.¹⁰⁵ In order to allow extradition of Assange to Sweden, the charge against him

¹⁰⁰ Ashley Mateo, *Stealthing Is a Dangerous Type of Sexual Abuse- Here's What You Need to Know About It*, HEALTH (Oct. 14, 2019), <https://www.health.com/condition/sexual-assault/what-is-stealthing>.

¹⁰¹ See Alia Marsha, *Singapore is About to Make Stealthing Illegal*, VICE (Feb. 15, 2019), <https://www.vice.com/en/article/8xy5vb/singapore-is-about-to-make-stealthing-illegal>. These countries include the United Kingdom, Sweden, Germany, Switzerland, Canada and Singapore. *Id.* Singapore rewrote and reformed their criminal laws, expanding the definition of sex crimes to cover stealthing and other sexual assault situations such as voyeurism. *Id.* The other countries listed have court cases regarding stealthing *Id.*; *Assange v. Swedish Prosecution Authority* [2011] EWHC (Admin) 2849; *R. v. Hutchinson*, [2014] 1 S.C.R. 346 (Can.).

¹⁰² [2012] UKSC 22 (Eng.).

¹⁰³ *Id.* at 1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

needed to constitute a crime under English law.¹⁰⁶ At the time, conditional consent was not recognized in the U.K., as evidenced in the court's decision referring to the country's current definition of consent.¹⁰⁷ The court recognized conditional consent in English law, thus permitting extradition to Sweden.¹⁰⁸ The United States has yet to adopt the concept of conditional consent. While the U.K. does not have a statute related specifically to stealthing, the judges in this case relied on the statutory definition of consent to determine that consent was not given.¹⁰⁹ Section 74 defines consent as "if [a person] agrees by choice, and has the freedom and capacity to make that choice."¹¹⁰ Then, prosecutors must consider whether "[h]e or she was in a position to make that choice freely, and was not constrained in any way."¹¹¹

In the U.K., a British man was convicted of rape when he stealthed his partner who was a sex worker.¹¹² Lee Hogben, the defendant, hired a sex worker online.¹¹³ The two agreed to conditions of intercourse beforehand, one of which was that a condom must be worn at all times.¹¹⁴ The victim claimed that her website stated "protection must be used at all times during sex."¹¹⁵ During sex Hogben removed the condom and when the victim realized, she verbally protested by saying, "I don't do that – please no."¹¹⁶ Hogben refused to comply with her wishes, told her to stop, and continued having sex with her, despite her physical attempts to get

¹⁰⁶ *Assange v. Swedish Prosecution Authority* [2011] EWHC 2849, LAW.CORNELL, https://www.law.cornell.edu/women-and-justice/resource/assange_v_swedish_prosecution_authority_2011_ewhc_2849 (last visited Feb. 25, 2021).

¹⁰⁷ *Id.* at 81.

¹⁰⁸ *Id.* at 86.

¹⁰⁹ *Rape and Sexual Offenses-Chapter 6: Consent*, CPS (Oct. 19, 2020), <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *A British Man Has Been Convicted of Rape After Removing a Condom During Sex*, GRAZIA, (Apr. 25, 2019), <https://graziadaily.co.uk/life/in-the-news/stealththing-conviction-rape>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

away.¹¹⁷ After the woman made a complaint to the police, Hogben sent her threatening messages indicating he was going to kill her.¹¹⁸ In her case, the prosecuting attorney highlighted the victim's lack of consent.¹¹⁹ Once Hogben was found guilty of rape and two counts of sexual assault, he then threatened the sentencing judge.¹²⁰ This is a case of stealthing turned into rape.

B. A German Police Officer

The next stealthing case comes from Germany, where a police officer was charged with stealthing his partner.¹²¹ The incident took place in 2017, and the Berlin court found him guilty of sexual assault in December of 2018.¹²² The victim claimed she specifically told the defendant that she wanted him to wear a condom and would not consent to any sexual activity without one.¹²³ She did not realize the man had removed the condom until he ejaculated inside of her.¹²⁴ Upset and angry, she left his house, fearing a sexually transmitted infection or pregnancy, and called the police.¹²⁵ He claimed the condom had ripped, so he took it off and ejaculated outside of her, which the victim contested to.¹²⁶ The officer was tried for rape; but was found guilty of sexual assault, because the court determined the victim had consented to sex with the defendant.¹²⁷ He received an eight-month suspended jail sentence and had to pay the victim damages.¹²⁸ This conviction was only made possible by the recent changes Germany made to its sex crime laws in 2016.¹²⁹ Prior to the 2016 amendment, German sex crime law required the victim to prove

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Matthew Robinson, *Police Officer Found Guilty of Condom 'Stealthing' in Landmark Trial*, CNN, (Dec. 20, 2018, 7:37 AM) <https://www.cnn.com/2018/12/20/health/stealthing-germany-sexual-assault-scli-intl/index.html>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

that he or she physically fought off the attacker before being able to bring either a rape or sexual assault charge.¹³⁰ However, the new sex crime laws place an emphasis on consent, and focus on any “verbal or physical cues” showing the victim objected to the sexual contact.¹³¹ This is why lack of consent in stealthing is so important. The victim in this case proved she had only consented to having protected sex, and clearly expressed this to the defendant.¹³² Without Germany’s law reform, this conviction would not have been possible.

C. Switzerland Successfully Prosecutes Stealthing

In 2017, a Swiss court found a man guilty of stealthing a woman he had met on a dating app.¹³³ The man initially wore a condom but, during intercourse, he requested that they switch to unprotected sex, which the victim refused.¹³⁴ She did not realize in the moment that he had removed the condom.¹³⁵ The man claimed he had not intentionally removed the condom and had somehow lost it.¹³⁶ The court found him guilty of rape.¹³⁷ This was the first time a court had ever determined that nonconsensual removal of a condom could be considered rape.¹³⁸ However, this was short lived. The defendant appealed the conviction, and the charge against him was changed from rape to defilement;¹³⁹ but the appellate court still upheld his twelve-month sentence.¹⁴⁰ While the Appellate Court’s decision may make some believe that stealthing is not taken as

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Michael Shields, *Swiss Court Upholds Sentence in ‘Stealthing’ Condom Case*, REUTERS, (May 9, 2017) <https://www.reuters.com/article/us-swiss-stealthing/swiss-court-upholds-sentence-in-stealthing-condom-case-idUSKBN1851UN>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Hannah Smothers, *Man Accused of “Stealthing” in Landmark Case Will No Longer Be Found Guilty of Rape*, COSMOPOLITAN, (May 10, 2017) <https://www.cosmopolitan.com/sex-love/a9631484/stealthing-rape-charge-dropped-switzerland>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Swiss Court Upholds Sentence in ‘Stealthing’ Condom Case*, REUTERS, (May 9, 2017) <https://www.reuters.com/article/us-swiss-stealthing/swiss-court-upholds-sentence-in-stealthing-condom-case-idUSKBN1851UN>.

seriously as rape, which many may argue is itself not taken seriously enough, the case is still a major victory because stealththing was finally prosecuted successfully.

D. Canada Emphasizes Lack of Consent to a Sabotaged Condom

The Canadian Supreme Court upheld a man's conviction for poking holes in a condom and using it during intercourse with his girlfriend in 2014, making this case Canada's first successful stealththing prosecution.¹⁴¹ The girlfriend had agreed to only have sex as long as a condom was used so that she did not become pregnant.¹⁴² However, the boyfriend, the defendant, poked a hole in the condom to purposefully impregnate the victim in an attempt to save their deteriorating relationship.¹⁴³ The victim did become pregnant, and had an abortion.¹⁴⁴ The defendant waited until after the victim found out she was pregnant and after the couple had broken up to send the victim text messages admitting he had tampered with the condom.¹⁴⁵ The Chief Justice in his opinion wrote, "[w]e conclude that there was no consent in this case by reason of fraud . . . Mr. Hutchinson[,] [the defendant,] is therefore guilty of sexual assault."¹⁴⁶ Another Justice wrote in her decision that "[w]hat took place here was sexual intercourse with a sabotaged condom, a sexual activity to which the complainant did not consent."¹⁴⁷ The defendant was sentenced to eighteen months in prison.¹⁴⁸

Although the Canadian case differs from the others in that the condom was not physically removed during sex, the entire purpose of using the condom was rendered useless, because the defendant tampered with the barrier.¹⁴⁹ The court in this case emphasized the lack of consent in the defendant's act, which is what makes a

¹⁴¹ R. v. Hutchinson, [2014] 1 S.C.R. 346 (Can.).

¹⁴² *Id.* at 1.

¹⁴³ Randall Palmer, *supra* note 42.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

sabotaged form of birth control the same as completely removing the birth control.¹⁵⁰ Both are forms of stealthing.

E. Singapore Makes Stealthing a Crime

Section 376H of Singapore's new Criminal Law Reform Bill makes "procurement of sexual activity by deception or false representation" illegal.¹⁵¹ This includes "the deception or false representation mentioned in paragraph (c) relat[ing] to - (i) the use or manner of use of any sexually protective measure . . . and A [a person] knows or has reason to believe that the consent was given in consequence of such deception or false representation."¹⁵² Consent was procured as a result of deception or a false representation.¹⁵³ Acts such as stealthing would fall under this category because stealthing occurs when a person deceives another by claiming he will use a condom to obtain the other person's consent and then removes it without that person's knowledge. If convicted, this crime is punishable by imprisonment for up to two years, a fine, or both.¹⁵⁴ Singapore is the first country in Asia to make the act of stealthing illegal.¹⁵⁵

F. Overview of Foreign Cases

Ultimately, each of the cases and statutes mentioned in this section was primarily focused on whether consent was given, by the victim. Each court, although from different countries, was able to come to the same conclusion – while consent was initially given for the sexual act, this consent was conditioned upon condom usage during intercourse. Once that condom was removed, consent was revoked, rendering the act of unprotected intercourse a sex crime. Consent is key in stealthing cases. Similarly, other than in the U.K.,

¹⁵⁰ *Id.*

¹⁵¹ Criminal Law Reform Act, 2019 (Act No. 23/2019) (Sing), <https://sso.agc.gov.sg/Acts-Supp/15-2019/Published/20190604?DocDate=20190604>.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Alia Marsha, *Singapore is About to Make Stealthing Illegal*, VICE (Feb. 15, 2019), <https://www.vice.com/en/article/8xy5vb/singapore-is-about-to-make-stealthing-illegal>.

each country chose not to find the wrongdoers guilty of rape. Lee Hogben was found guilty of rape in the U.K. because the victim noticed the defendant had removed the condom and told him to stop having sex with her, which he refused to do.¹⁵⁶ This differs from the other cases in that the victim affirmatively rejected the initial consent because the victim noticed the condom had been removed,¹⁵⁷ whereas in the other cases, the victims did not realize what was happening at the time. This raises the question of whether stealththing requires a lack of awareness. Usually, a victim of stealththing would not notice the perpetrator took the condom off until after the sexual encounter was over. If, however, the victim realized during the act that the condom had been removed, that lack of awareness would turn into knowledge that a condom was not being used. If the victim then requests the perpetrator to stop, and he does not, this newfound awareness changes the act from one of stealththing to rape.

V. CHANGING THE PERCEPTION OF STEALTHING THROUGH CRIMINALIZATION

If other countries have the capability and wherewithal to criminalize stealththing, so should the United States. Judicial systems in the U.K., Switzerland, Germany, and Singapore can provide positive guidance regarding prosecuting stealththing in the United States. According to the World Justice Project, the United States' criminal justice system ranks below Canada, Germany, the U.K., Singapore, and many other developed countries in timeliness, effectiveness, and impartiality.¹⁵⁸ These countries are properly reforming their criminal systems, so it makes sense for the United States to follow their lead when it comes to emerging topics in criminal law like stealththing.

Although state laws addressing consent regarding sexual assault may differ, there are fundamental consistencies in the law across states. Generally, most sex crimes are prosecuted at the state

¹⁵⁶ *A British Man Has Been Convicted of Rape After Removing a Condom During Sex*, *supra* note 107.

¹⁵⁷ *Id.*

¹⁵⁸ *Criminal Justice for United States*, 2020, WORLDJUST.PROJECT, <https://worldjusticeproject.org/rule-of-law-index/country/2020/United%20States/Criminal%20Justice> (last visited Feb. 25, 2021).

level.¹⁵⁹ Due to the nature of stealthing, stealthing cases would also likely be prosecuted at the state level.¹⁶⁰

Generally, only a few states need to change their criminal laws to include stealthing because other states will most likely follow suit. This has previously happened in the U.S. in other areas of criminal law.¹⁶¹ For example, at one point, marital rape was not considered a crime.¹⁶² In 1983, seventeen states eliminated laws that made spousal rape impossible to prosecute.¹⁶³ By 1993, marital rape was made illegal in all fifty states.¹⁶⁴ This shift occurred because the concept of consent in a marital relationship was changed. No longer was it impossible to believe a spouse could say “no” to her partner. What started off as a minority of states criminalizing marital rape ended in the entire country criminalizing the act. This demonstrates that it is possible for a group of states, or even one state, to criminalize stealthing and set a precedent that other states will eventually follow.

A. The Push for Change in the United States

Despite the lack of stealthing laws in the U.S., there are political figures in Congress who currently advocate for its criminalization.¹⁶⁵ House representatives Carolyn Maloney and Ro Khanna are pressuring the Department of Justice (“DOJ”) to clarify its stance on stealthing.¹⁶⁶ They want to know if the DOJ has any

¹⁵⁹ *The Difference Between State and Federal Sex Crimes Defense*, BERRY LAW, <https://jsberrylaw.com/blog/the-difference-between-state-and-federal-sex-crimes-defense> (last visited Feb. 25, 2021). Typically, sex crimes that are prosecuted at the federal level include child pornography, trafficking people over state lines with the intent that they will engage in sexual activity and buying or selling children for sex. *Id.*

¹⁶⁰ *See supra* Part IV.

¹⁶¹ *Marital Rape in the US- How Far Government is Concerned?* VA, <https://va.org/marital-rape-in-the-us-how-far-government-is-concerned> (last visited Feb. 25, 2021).

¹⁶² *Id.*

¹⁶³ Lily Rothman, *When Spousal Rape First Became a Crime in the U.S.*, TIME (Jul. 28, 2015), <https://time.com/3975175/spousal-rape-case-history>.

¹⁶⁴ *Marital Rape in the US- How Far Government is Concerned?*, *supra* note 133.

¹⁶⁵ *Reps Maloney and Khanna Ask DOJ to Formally Address Sexual Assault Practice of Stealthing*, MALONEY.HOUSE, <https://maloney.house.gov/media-center/press-releases/reps-maloney-and-khanna-ask-doj-to-formally-address-sexual-assault> (Feb. 25, 2019).

¹⁶⁶ *Id.*

data or statistics on stealththing and whether the DOJ provides guidance for states on stealththing.¹⁶⁷ In the letter from these two Congresswomen to former Attorney General William Barr, the Congresswomen cite Alexandra Brodsky's report to emphasize the dangers of stealththing.¹⁶⁸ While Representatives Maloney and Khanna have not proposed any legislation, they urged the DOJ to "explicitly address nonconsensual condom removal when issuing guidance to state, local and tribal agencies and when collecting data from those same entities."¹⁶⁹ It is encouraging that our country's leaders are slowly seeing that stealththing is a relevant topic worthy of our attention and are starting to fight this serious, widespread issue.

In New York, a bill relating to non-consensual condom removal and tampering with a sexually protective device was introduced to the 2017-2018 state Senate.¹⁷⁰ Introduced by state Senator Diane Savino, the bill seeks to adjust the New York Penal Law to prohibit non-consensual condom removal.¹⁷¹ The proposed act changes subdivision three to subdivision four of section 130.20 and adds a new subdivision three which reads:

[h]e or she engages in sexual intercourse, oral sexual conduct, or anal sexual conduct with another person that was mutually agreed upon by the parties involved with the explicit understanding and knowledge that a sexually protected device would be used but (I) intentionally and without consent removes or tampers with such sexually protected device during sexual intercourse . . . [i]n a manner likely to render such device ineffective for its common purpose; (II) Intentionally and without consent uses a sexually protective device during sexual intercourse . . . [t]hat he or she knows has been tampered with . . . or (III) Intentionally misleads the other person into believing that a sexually protective device was being used during sexual intercourse . . . [a]nd such sexually

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ S.B. S4401, Leg. 2019-20 (N.Y. 2019).

¹⁷¹ *Id.*

protective device was known by such other person to be either not used or inoperable.¹⁷²

Not only does the proposed act cover intentional removal of a condom, it also includes instances where a condom is not used at all, but the defendant leads the victim to believe that protection is being used.¹⁷³ Brodsky's paper, as well as the concept of conditional consent, are mentioned multiple times within the bill's justification.¹⁷⁴ This legislation seeks to establish an additional sexual misconduct offense for stealthing, which means that stealthing would not be prosecuted as rape.¹⁷⁵ Though the bill was introduced four years ago, it is still in committee and has not yet been presented to the Assembly or Senate for approval.¹⁷⁶

B. How Should Stealthing Be Prosecuted?

This Note recommends that states should amend their sex crime laws to include stealthing and should prosecute stealthers as sexual assaulters, according to existing sexual assault laws, rather than as rapists. This is the most appropriate recommendation, because stealthing does not meet the elements of rape.¹⁷⁷ First- and second-degree rape laws in New York specifically mention forcible compulsion,¹⁷⁸ incapability to consent due to a mental disability,¹⁷⁹ and other instances where the victim lacks capacity to consent, such as age.¹⁸⁰ This statute, however, does not describe the lack of consent found in stealthing.

As previously mentioned in this Note, stealthing may be tried as third-degree rape.¹⁸¹ Though this is possible, it is not likely to happen. The general understanding of the concepts of consent and rape in the United States lead to the belief that someone who consented to having sex was not raped. A common belief about consent is that it is an agreement between participants to engage in

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ N.Y. PENAL LAW § 130.25, .30, .35 (McKinney 2021).

¹⁷⁸ *Id.* § 130.52.

¹⁷⁹ *Id.* § 130.05.

¹⁸⁰ *Id.* § 130.05.

¹⁸¹ *See supra* Part III.

sexual activity.¹⁸² It is reasonable, though not necessarily correct, to assume that someone who consents to a sexual encounter in the first place cannot be raped. In the Swiss case, the defendant successfully removed his initial conviction of rape to a lower charge of defilement.¹⁸³ In fact, none of the previously mentioned European cases charged the defendant with rape, other than the one defendant who continued having sex with the victim after she asked him to stop.¹⁸⁴ This further indicates that if the United States prosecuted stealthing cases, they too would not succeed if they were tried as rape crimes.

Additionally, a common consensus among stealthing victims is that their experiences do not justify the severe punishments associated with a rape conviction.¹⁸⁵ One stealthing victim is quoted as saying,

I never considered it rape or sexual assault because I had given consent to have sex, I just assumed I made a poor choice in sleeping with someone who was untrustworthy . . . I still don't know if I would consider it rape or sexual assault but it sure as hell should be illegal.¹⁸⁶

Another victim stated that, "[h]is removing the condom and putting my health at risk for STD's or possibly ruining my life with a pregnancy is sexual assault to me."¹⁸⁷ Although most of the victims interviewed did not feel as though their experience with stealthing was equal to a rape charge, they still felt violated and betrayed, and

¹⁸² *What Consent Looks Like*, RAINN (last visited July 10, 2021), <https://www.rainn.org/articles/what-is-consent>.

¹⁸³ Michael Shields, *Swiss Court Upholds Sentence in 'Stealthing' Condom Case*, REUTERS, (May 9, 2017), <https://www.reuters.com/article/us-swiss-stealthing/swiss-court-upholds-sentence-in-stealthing-condom-case-idUSKBN1851UN>.

¹⁸⁴ *A British Man Has Been Convicted of Rape After Removing a Condom During Sex*, *supra* note 111.

¹⁸⁵ Brodsky, *supra* note 4, at 187-88.

¹⁸⁶ Jenavieve Hatch, *Victim of Stealthing Open Up About Why It's So Damaging*, HUFFPOST, (May 10, 2017), https://www.huffpost.com/entry/victims-of-stealthing-open-up-about-why-its-so-damaging_n_59134ad1e4b0a58297e1ad88.

¹⁸⁷ *Id.*

indicated they would appreciate having some form of legal recourse against their perpetrator.¹⁸⁸

Stealthing may likely fit under sexual misconduct in New York. Sexual misconduct establishes the lack of consent as paramount to the crime, just as stealthing does.¹⁸⁹ However, since there is initially consent for sexual activity in stealthing cases, a jury may have difficulty requiring renewed consent for any sexual activity after that consent is voluntarily given, which is why stealthing victims feel that the crime does not amount to rape.¹⁹⁰ This is especially true for cases where the victim did not explicitly condition the sexual activity on the use of a condom.¹⁹¹

While stealthing behavior may not rise to the level of rape, it can certainly apply to one of the lesser sexual assault charges such as sexual misconduct. Sexual misconduct in New York is defined as “sexual intercourse with another person without such person’s consent.”¹⁹² Here, consent may be broadly construed which differs from rape charges that require specificity regarding the victim’s mental incapability to consent and a heightened standard of proof.¹⁹³

C. The Importance of Conditional Consent

It is necessary to address whether state lawmakers should create new laws classifying stealthing as rape or sexual assault. The possibility of prosecuting stealthing under pre-existing sexual assault laws remains. Melissa Blanco suggested that our existing sexual assault laws will work, but only if we adopt the concept of conditional consent.¹⁹⁴ Conditional consent was crucial in *Assange*, where the United Kingdom adopted conditional consent to prosecute stealthing.¹⁹⁵ Blanco explained that conditional consent does not shift the burden of proof from the prosecution to the defense.¹⁹⁶ The prosecution must still prove that the victim did in fact consent to sexual activity, but that the consent was revoked when the defendant

¹⁸⁸ *Id.*

¹⁸⁹ N.Y. PENAL LAW § 130.20 (McKinney 2021).

¹⁹⁰ Blanco, *supra* note 32, at 234.

¹⁹¹ *Id.*

¹⁹² PENAL LAW § 130.20.

¹⁹³ *Id.* § 130.25.

¹⁹⁴ Blanco, *supra* note 32, at 236.

¹⁹⁵ [2012] UKSC 22, 22 (Eng.).

¹⁹⁶ Blanco, *supra* note 32, at 241.

removed the condom and no longer complied with the wishes of the victim.¹⁹⁷ While conditional consent explains how consent may be revoked during consensual sex, it does not prove that the consent was actually revoked, and defendants may not always admit to removing the condom.

Blanco concluded that a conditional consent standard will provide courts with a more plausible framework to handle stealththing cases in a way that also complies with the Due Process Clause.¹⁹⁸ Since stealththing deals with varying degrees of consent and rape has no consent,¹⁹⁹ the United States criminal system should adopt conditional consent as the standard for stealththing.

If there is no reason for the alleged perpetrator to know that sex is conditional on the use of a condom, the act of removing the condom should not be punishable. If there was no specific conversation requiring condom use as a condition for sexual activity, there is no way for the other person to know. Also, if a condom accidentally falls off of the person wearing it through no fault of his own and neither person notices, that partner should not be held liable for stealththing. As long as there is a good faith attempt by both parties during intercourse to maintain and keep the condom on, neither party should be punished. It would be difficult, admittedly, for a defendant to establish that he did not remove the condom on purpose, for only he knows his true intent. Evidence that would indicate the defendant purposefully removed the condom would be if the victim noticed, requested that he put the condom back on, and the defendant refused or else put it back on and once again removed it.

VI. CIVIL REMEDIES

Victims of sexual abuse and rape have the ability to sue their abusers civilly.²⁰⁰ Stealththing victims should have the same opportunity. Civil suits are an inviting alternative to criminal prosecution due to the lower burden of proof involved in civil

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Sexual Consent*, PLANNEDPARENTHOOD (last visited July 10, 2021), <https://www.plannedparenthood.org/learn/relationships/sexual-consent>.

²⁰⁰ Corinne Casarino, *Civil Remedies in Acquaintance Rape Cases*, 6 BOSTON U. L.J. 185 (1996).

cases.²⁰¹ A reward in a civil suit against a perpetrator of stealthing could be extremely useful to the victim.²⁰²

Nonconsensual condom removal may have remedies under tort law. Brodsky thinks this is especially true in cases when a sexually transmitted infection is passed on to the victim.²⁰³ Some courts have previously decided that there could be grounds for liability if a person with a sexually transmitted infection does not take proper care to ensure that person does not spread it during their sexual activities.²⁰⁴ Civil litigation of a stealthing case will be even stronger if the victim contracted an STI during the encounter and if the perpetrator was aware they had a sexually transmitted infection but took the condom off anyway.

Victims may also have a possible civil claim for battery. Liability for battery is based on offensive and sometimes, but not always, harmful physical contact.²⁰⁵ The unwanted contact of the penis and the vagina could be a base for this harmful contact.²⁰⁶ In order to sue successfully for a battery claim, the plaintiff must prove that the contact was intentional, the plaintiff did not consent to the contact, and the contact was offensive.²⁰⁷ The plaintiff does not need to know of the contact when it occurs, which is extremely important for a stealthing victim, who most times would not know of the condom removal until after intercourse.²⁰⁸ In *Glaze v. Deffenbaugh*,²⁰⁹ the Idaho Supreme Court determined that “this Court recognizes that sexual abuse constitutes battery.”²¹⁰ Although the two plaintiffs suing for battery as a result of a rape committed by their adoptive father were denied relief, the court only found for the father because the two-year statute of limitations for battery had

²⁰¹ *Id.* at 36.

²⁰² A monetary reward could be used to reimburse the expenses of doctors’ appointments for sexually transmitted infection testing, pregnancy tests or a Plan B morning after pill.

²⁰³ Brodsky, *supra* note 4, at 198.

²⁰⁴ *Id.* “Some courts have found that a sexual relationship may, but does not always, give rise to a duty of care necessary for a negligence claim, thus creating grounds for liability if a person with a sexually transmitted infection fails to take caution to prevent transmission.” *Id.*

²⁰⁵ *Id.* at 201.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ 172 P.3d 1104 (Idaho 2007).

²¹⁰ *Id.* at 1107.

expired.²¹¹ If the statute of limitations had not run, it is likely the daughters would have succeeded with their claim.²¹² While this Note argues that stealththing should be prosecuted as sexual assault instead of rape, stealththing could and should still be regarded as battery in a civil suit, just like rape is. This is because there is a lower burden of proof in a civil court than a criminal court. If the contact can be described as so offensive that it is "extreme and outrageous," stealththing victims may seek recovery through a battery tort claim.²¹³

Intentional infliction of emotional distress ("IIED") is another possible civil remedy available to stealththing victims, but it is less likely to be successful than a battery claim. The basis for a stealththing IIED claim would be that defendant's reckless conduct, coupled with a finding that the nonconsensual condom removal was "extreme and outrageous," caused the victim severe emotional distress that would entitle them to relief.²¹⁴ It must be found that the condom removal is "utterly intolerable in a civilized society."²¹⁵ While it may seem obvious to a sympathetic viewer that stealththing should be considered "utterly intolerable," a judge and jury may not find this is so. Proving IIED in court has been notoriously difficult; moreover, the "extreme and outrageous" conduct necessary to establish an IIED claim requires a greater burden than the standard in a battery claim.²¹⁶ An IIED claim could successfully be used in specific stealththing cases, such as one where the defendant had an STI, or taunted the victim about it afterwards and continued harassing them.

Sexual battery is similar to a regular battery claim; however, sexual battery is specific to sexual assault. Some states, such as California, allow plaintiffs to sue for sexual battery in civil court.²¹⁷ Sexual battery is defined differently across the country.²¹⁸ In California, "elements of sexual battery are: (1) A person must act with a specific intent to cause harm or offensive contact, (2) A person must cause harm or contact to an "intimate part" of the body, (3)

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Brodsky, *supra* note 4, at 200.

²¹⁵ *Id.*

²¹⁶ *Id.* at 201.

²¹⁷ *Sexual Battery Laws, Definition, Elements and Affirmative Defenses, California*, NAKASELAWFIRM, <https://nakaselawfirm.com/personal-injury-lawyers/sexual-battery-laws-california> (last visited Feb. 25, 2021).

²¹⁸ *Id.*

Sexually offensive contact must occur.”²¹⁹ Generally, sexual battery is classified as non-consensual touching of another person’s body.²²⁰ Stealthing could easily apply to a sexual battery suit.

VII. IMPLICATIONS OF CRIMINALIZING STEALTHING

As previously discussed in section III of this Note, stealthing brings up issues of gender violence and societal expectations of men’s and women’s gender roles in our country.²²¹ Some have suggested that a possible motive of stealthing by men is that they feel they have a right to sex without a condom. Sexual violence against women is often a result of perceived unequal power equations between men and women.²²²

Sexual offenders may not even find the physical act of rape or stealthing gratifying.²²³ These types of sexual offenders only commit the assault to give themselves feelings of power and control over their victim.²²⁴ In the United States, women are taught at an early age to wear non-revealing clothing, not walk alone, and be attentive to their drink, so that it is not spiked with a drug while they are out at a bar or club.²²⁵ While it is clearly established that what a victim of rape is wearing at the time of their attack does not matter, women are still taught things to do in order to avoid being sexually assaulted.²²⁶ It is the victim that is embarrassed and shameful of the assault, rather than the assaulter.²²⁷

This Note asserts the idea that criminalizing stealthing could help equate our country’s views on gender roles and expectations of men and women, in addition to obtaining justice for stealthing victims and punishing their perpetrators. Rape still has a long way to

²¹⁹ *Id.*; CAL. CIV. CODE §1708.5 (West 2016).

²²⁰ *Id.*

²²¹ *See supra* Part II.

²²² Gurvinder Kalra & Dinesh Bhugra, *Sexual Violence Against Women: Understanding Cross-Cultural Intersections*, INDIAN J. PSYCHIATRY (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3777345>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Sexual Violence Myths and Facts*, RESILIENCE, <https://www.ourresilience.org/what-you-need-to-know/myths-and-facts> (last visited Feb. 25, 2021).

²²⁶ *Id.*

²²⁷ *Id.*

go to overcome these views that negatively impact women, but changing societal norms and values have expanded protection to women who were not protected before. The rape of a wife by her husband was not considered a crime until the 1970s.²²⁸ Prior to 1975, defendants in a rape case were allowed to bring up the victim's past sexual behavior and history.²²⁹

The concept of rape and its criminalization has radically changed throughout the years.²³⁰ Rather than teaching women ways to not be sexually assaulted, criminalizing such a demeaning sexual act such as stealththing has the potential to teach men that it is their job to make sure women – and, in some circumstances, other men – are not violated in this way.

VIII. CONCLUSION

"Nothing kills the mood quite like being violated," says Adrianna, a victim of stealththing.²³¹ No one goes into a sexual encounter looking to be stealthed by the person they are trusting with such an intimate moment. The shock, guilt, and shame a victim feels after being stealthed has no remedy within the United States court system, neither at the federal level nor the state level. It is appalling that other developed countries have established case law and statutes punishing stealththing, yet the United States is so far behind.

Adopting the concept of conditional consent is the first step to give victims of stealththing remedies under criminal and civil law under existing United States law. Classifying stealththing under current state sexual assault laws, rather than classifying the act as rape, is paramount to its criminalization. The concept of conditional consent is key here; the judge and jury need to understand that, while there was initial consent to sexual activity, consent was contingent upon intercourse with a condom.²³² Once that condom is removed, so is the consent that accompanied it. The concept of consent

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Kyla Bishop, *A Reflection on the History of Sexual Assault Laws in the United States*, ARK. J. SOC. CHANGE & PUB. SER. (2018), <https://ualr.edu/socialchange/2018/04/15/reflection-history-sexual-assault-laws-united-states>.

²³¹ Christian Gollayan, *I was a Victim of 'Stealththing'*, NYPOST (May 3, 2017, 4:03 PM), <https://nypost.com/2017/05/03/i-was-a-victim-of-stealththing>.

²³² See *supra* Part VI.C.

required for a stealthing case is similar to sexual misconduct in New York and should be prosecuted as such.²³³

There are a plethora of opportunities for a stealthing victim to seek legal recourse in civil court. Once again, consent plays an important role in determining whether the victim is granted any relief. Many existing civil suits require that there is some sort of offensive or harmful contact to find for the plaintiff in a sexual battery or battery case.²³⁴ Offensive or harmful contact can be proven in a stealthing case, especially when the victim contracts a sexually transmitted infection.²³⁵

Giving victims of stealthing a remedy through criminal charges or a civil suit could help give them a feeling of control over their bodies that they may have lost after the assault. It could also change the way our society views the roles of men and women, especially when it comes to sexual intercourse. Women, and men, deserve to make decisions regarding their bodily autonomy –that decision should not be violated by a man who wants to stealth someone merely for his own pleasure. It is crucial the United States incorporate stealthing into its laws, for no one deserves to believe that choices they make about their own body, have been violated. It is time for the United States to make clear that sexual entitlement to women, and the sexual gratification for men that comes with it, is not a right.

²³³ See *supra* Part VI.B.

²³⁴ See *supra* p. 23.

²³⁵ See *supra* p. 23.