

From: Alex Tsarkov  
To: State Representative Josh Elliott  
Re: Nonconsensual condom removal (“stealthing”)<sup>1</sup>  
Date: June 19, 2020

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### *Introduction*

Nonconsensual condom removal or “stealthing” is a type of deceptive interference with sexual protection in which one party removes a condom during sex after previously agreeing to its use.<sup>2</sup>

Stealthing can inflict a number of psychological and physical harms on victims. Victims may experience nonconsensual condom removal as a clear violation of their bodily autonomy and the trust they had placed in their sexual partner.<sup>3</sup> Nonconsensual condom removal during sexual intercourse also exposes victims to an increased risk of unwanted pregnancy and sexually transmitted diseases (STDs). That said, nonconsensual condom removal does *not* require an intent to impregnate, a resulting pregnancy, or the transmission of an STD to be considered “stealthing.”

Over the past few years, discussions in the legal and advocacy communities have raised a number of questions about stealthing. Is nonconsensual condom removal a legal harm? If so, what criminal or tort remedies may currently be available to victims? If stealthing is not a legal harm, should it be?

Currently, no state laws explicitly prohibit the nonconsensual removal of a condom, though such behavior may be covered by other existing criminal statutes. Similarly, while there are no available records of a United States court being asked to consider nonconsensual condom removal, cases in related areas of law may indicate that victims may have remedies in certain situations. These include cases concerning misrepresentation of fertility risk and failure to disclose a communicable disease.

### *Misrepresentation of Fertility Risk and Contraception Fraud*

Misrepresentation of fertility risk or “contraception fraud” occurs when an individual fraudulently misrepresents their fertility or their use of contraception/birth control. This can result in an unplanned and unwanted pregnancy. If the pregnancy is carried to term, this deception can transform the life of the uninformed partner, who might incur legal or financial responsibilities for the child.<sup>4</sup> Furthermore, if the uninformed partner is a woman, such deceptions can jeopardize her health.

Notwithstanding these adverse outcomes, contraception fraud is not a crime in the United States and is rarely a tort. Courts are typically reluctant to intervene in cases where misrepresentation of fertility risk resulted in an unwanted pregnancy. When denying these claims, courts often cite privacy concerns and concerns with the health and welfare of the children born under such circumstances.

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<sup>1</sup> This memo was prepared in response to a request from State Representative Josh Elliott.

<sup>2</sup> Alexandra Brodsky, “Rape-Adjacent”: Imagining Legal Responses to Nonconsensual Condom Removal, 32 *Columbia J. Gender & Law* 183 (2017).

<sup>3</sup> *Ibid*

<sup>4</sup> Shane M. Trawick, *Birth Control Sabotage as Domestic Violence: A Legal Response*, [100 CALIF. L. REV. 721 \(2012\)](#).

For example, the New Mexico Court of Appeals in *Wallis v. Smith* upheld the trial court's determination that claims based on intentional misrepresentation regarding the use of birth control in personal relationships do not give rise to legally enforceable rights.<sup>5</sup> In that case, the court held that all children, whether or not their conception "violated a promise between the parents," should benefit from child support. Additionally, the court stated that an individual's "sphere of privacy" included one's choice whether to use or not to use contraceptives, and that the courts should not interfere in this area.<sup>6</sup> As legal scholar Kim Shavo Buchanan noted in her review of contraceptive fraud cases, civil courts recognize that, in the exercise of their sexual autonomy through sex and relationships, adults take risks that their partners may deceive and betray."<sup>7</sup>

Some courts have made exceptions in cases where misrepresentation of fertility risk resulted in physical harm to one of the partners. In *Barbara A. v. John G.*, a California appellate court found that a respondent could be liable for battery when his sexual partner agreed to intercourse based on his representation that he was infertile. There, plaintiff alleged that she consented to sexual intercourse in reliance on the man's knowingly false representation that he was sterile. The plaintiff suffered an ectopic pregnancy, and was then forced to undergo surgery to save her life, which rendered her sterile. While the court noted that "consent to an act, otherwise a battery, normally vitiates the wrong," it found that "the act of impregnation exceeded the scope of the consent."<sup>8</sup>

Two scholars, Shane Trawick and Professor Leah Plunkett, have proposed model statutes that would criminalize contraception sabotage as a separate crime in the United States. These statutes would only criminalize the conduct if there is an actual pregnancy or if the perpetrator has at least a reckless intent to impregnate.<sup>9</sup>

#### *Failure to disclose a communicable disease*

State statutes and courts are less forgiving of sexual deception in cases involving sexually transmitted diseases. Notably, in most states, people with human immunodeficiency virus (HIV) can be prosecuted for failing to disclose their serostatus before having sex.<sup>10</sup>

Some states have statutes that explicitly criminalize sexual nondisclosure of HIV, while other states punish nondisclosure of HIV through general criminal statutes, such as reckless endangerment or aggravated assault.

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<sup>5</sup> 2001- NMCA-017, 130 N.M. 214, 22 P.3d 682

<sup>6</sup> *Id.* P 13, 130 N.M. at 217, 22 P.3d at 685.

<sup>7</sup> Kim Shavo Buchanan, When Is HIV a Crime? Sexuality, Gender and Consent, 99 Minn. L. Rev. 1231, 1285 (2015)

<sup>8</sup> *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 375 (Ct. App. 1983)

<sup>9</sup> Shane M. Trawick\* (June, 2012). Comment: Birth Control Sabotage as Domestic Violence: A Legal Response. *California Law Review*, 100, 721 ("A person is guilty of the crime of reproductive coercion if he or she: (a) knowingly or recklessly tampers with [birth control methods], against his or her sexual partner's will, with the specific intent of inducing pregnancy; or (b) knowingly or recklessly fails to withdraw, or cooperate with withdrawal, before ejaculation with the specific intent of inducing pregnancy. [This subsection] shall apply only if both parties have agreed in advance that the male shall withdraw prior to ejaculation and the female has agreed in advance to cooperate with withdrawal).

<sup>10</sup> Rene Bennett-Carlson et al., Positive Justice Project, Ctr. for HIV Law & Policy, Ending and Defending Against HIV Criminalization: State and Federal Laws and Prosecutions (2014). Margo Kaplan, Rethinking HIV-Exposure Crimes, 87 IND. L.J. 1517, 1518 (2012).

Under these laws, a person who knows they have HIV must disclose it before engaging in sexual activities that might expose a partner to HIV.<sup>11</sup> Although some courts differ on this question, use of protection such as condoms is not a valid defense in most states. Indeed, an HIV-positive person may be found guilty even if the sexual activity posed a very low risk of transmission.

In terms of civil remedies, some courts have found that a sexual relationship may give rise to a sufficient duty of care in which failing to disclose an STD could constitute liability in a negligence claim.<sup>12</sup>

Scholars and advocates have written and debated at length about the prudence of criminal and tort liability for STD transmission and nondisclosure. While courts have upheld nondisclosure laws against constitutional challenges, critics argue that criminalization has no positive effect on risk behavior and that it undermines public health goals.<sup>13</sup> HIV nondisclosure criminalization might discourage individuals from seeking testing and treatment, as a positive test result can subject a person to criminal liability for otherwise noncriminal conduct. Furthermore, criminalization further stigmatizes an already-marginalized population and may reinforce unfounded beliefs about the actual risks of HIV transmission.<sup>14</sup>

*What if there is neither pregnancy nor STD transmission?*

Victims who do not become pregnant or contract an STD as a result of nonconsensual condom removal have fewer civil remedies available to them. Civil damages based on emotional distress alone are rare, and often require some kind of physical harm.<sup>15</sup>

There may be other civil remedies for victims of nonconsensual condom removal, such as a battery tort, which can be the basis of liability for offensive contact even if it is not physically harmful. While these theories of liability provide potential remedies, they have not yet been tested in courts.

*International Developments*

Some foreign jurisdictions have explicitly criminalized various acts of nonconsensual condom removal, even in cases where there is not a resulting pregnancy or STD.

In 2011, the England and Wales High Court of Justice in *Assange v. Swedish Prosecution Authority* held that the removal or damaging of a condom during intercourse without a partner's consent could sustain a finding of rape liability. In the case, Sweden sought the extradition of Wikileaks founder Julian Assange from the United Kingdom based on an allegation of sexual violations.<sup>16</sup> Under the allegation, Assange was aware of the injured party's prerequisite that a condom be used during sexual intercourse, and deliberately damaged the condom without the injured party's consent.

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<sup>11</sup> CTR. FOR HIV LAW & POLICY, PROSECUTIONS AND ARRESTS FOR HIV EXPOSURE IN THE UNITED STATES, 2008-2014 (2015)

<sup>12</sup> *McPherson v. McPherson*, 712 A.2d 1043, 1046 (Me. 1998), *State v. Thomas*, 983 P.2d 245 (Idaho Ct. App. 1999); *People v. Jensen*, 586 N.W.2d 748 (Mich. Ct. App. 1998)).

<sup>13</sup> *State v. Musser*, 721 N.W.2d 734, 757 (Iowa 2006), *State v. Gamberella*, 633 So. 2d 595, 607 (La. App. 1993).

<sup>14</sup> Sun Goo Lee (Summer, 2013). ARTICLE: Tort Liability and Public Health: Marginal Effect of Tort Law on HIV Prevention. *South Texas Law Review*, 54, 639.

<sup>15</sup> Restatement (Second) of Torts § 46 (1965).

<sup>16</sup> *Assange v. Swedish Prosecution Auth.* [2011] EWHC (Admin) 2849 (Eng.).

The High Court of Justice, in affirming the District Judge's order of extradition, held that deception about protection by itself could vitiate consent. The Court concluded: "It would plainly be open to a jury to hold that if [the victim] had made clear that she would only consent to sexual intercourse if [Assange] used a condom, then there would be no consent if, without her consent, he did not use a condom, or removed or tore the condom. His conduct in having sexual intercourse without a condom in circumstances where she had made clear she would only have sexual intercourse if he used a condom would therefore amount of an offense."<sup>17</sup>

In 2014, the Nova Scotia Supreme Court affirmed the sexual assault conviction of a man who impregnated his partner without her knowledge.<sup>18</sup> In that case, the defendant, desperate to keep his girlfriend from breaking up with him, poked holes in his condoms with a pin and impregnated her. He was subsequently convicted of sexual assault and sentenced to 18 months in jail. In the appeal, the court found that when a woman has chosen not to become pregnant, "deceptions that deprive her of the benefit of that choice ... may constitute a sufficiently serious deprivation for the purposes of fraud vitiating consent."<sup>19</sup>

Courts in other European jurisdictions have made similar findings.<sup>20</sup>

#### *Recent Legislative Efforts in the United States*

Several lawmakers in different states have proposed legislation to explicitly criminalize nonconsensual condom removal. In 2017, proposed legislation in Wisconsin sought to change the definition of consent under state law. Under the bill, sex would not be categorized as consensual if one partner removes a "sexually protective device" during intercourse without notifying the other partner. The change would have effectively meant that nonconsensual removal of a condom during intercourse would constitute sexual assault.<sup>21</sup>

A similar bill in California would have expanded the state's definition of rape to include tampering with a protective device during sex without the other person's knowledge.<sup>22</sup>

Professor Alexandra Brodsky cautions against these criminalization-based approaches. Skeptical about the efficacy of criminalizing stealthing in addressing victims' needs, Brodsky argues instead for the creation of a new tort, claiming that a tort would provide victims with a more viable cause of action and would better reflect the harms wrought by nonconsensual condom removal."<sup>23</sup>

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<sup>17</sup> Id. at [86]

<sup>18</sup> R. v. Hutchinson, [2014] 1 S.C.R. 346 (Can.).

<sup>19</sup> Id. at 375, at para. 67.

<sup>20</sup> See Tom Embury-Dennis, Man Convicted of Rape for Taking Off Condom During Sex, INDEP. (Jan. 12, 2017), (a man in Switzerland was "convicted of rape after taking off a condom during sex without his sexual partner knowing").

<sup>21</sup> Katie Mettler. (May 17, 2017 Wednesday). Wis. lawmaker wants to outlaw 'stealthing' - nonconsensual condom removal - as sexual assault. *Washington Post*

<sup>22</sup> Cara Lombardo. (May 17, 2017 Wednesday). Wisconsin and California lawmakers take aim at 'stealthing'; Wisconsin and California lawmakers take aim at 'stealthing'. *Canadian Press*.

<sup>23</sup> Brodsky, A. (2017). Rape-adjacent: Imagining legal responses to nonconsensual condom removal. *Columbia Journal of Gender and Law*, 32(2), 183-210.

Most recently, in 2019, Representatives Carolyn Maloney and Ro Khanna of the U.S. House of Representatives asked Attorney General William Barr to clarify the Department of Justice's stance on nonconsensual condom removal. The Members of Congress explained that "[n]onconsensual condom removal during sexual intercourse is extremely dangerous. It can lead to lasting consequences, such as unplanned pregnancies and sexually transmitted infections, and is also a violation of trust between two sexual partners..." In their letter, the Representatives asked the Attorney General to explain the DOJ's process in collecting data on stealthing and what, if any, guidance is sent to states about this type of sexual assault.<sup>24</sup>

### *Conclusion*

Nonconsensual condom removal or "stealthing" can inflict physical and psychological harm on victims, including unwanted pregnancy and sexually transmitted infections. That said, no jurisdictions in the United States appear to have had an occasion to address nonconsensual condom removal outside the context of STD transmission or unwanted pregnancy. This does not mean, however, that stealthing has not inflicted real harm to victims. Indeed, many believe that stealthing, like sexual assault, is notoriously underreported.

The experiences of other countries as well as some recent state legislative efforts to address nonconsensual condom removal indicate that scholars, advocates, lawmakers, and the public will continue to debate how to best address the practice of stealthing. Whether the legal harm should result in a criminal or civil penalty continues to be an evolving conversation.

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<sup>24</sup> (February 26, 2019 Tuesday). New York: Reps. Maloney and Khanna Ask DOJ to Formally Address Sexual Assault Practice of Stealthing. *US Official News*.