

## “RAPE-ADJACENT”: IMAGINING LEGAL RESPONSES TO NONCONSENSUAL CONDOM REMOVAL

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### *Abstract*

*Nonconsensual condom removal during sexual intercourse exposes victims to physical risks of pregnancy and disease and, interviews make clear, is experienced by many as a grave violation of dignity and autonomy. Such condom removal, popularly known as “stealthing,” can be understood to transform consensual sex into nonconsensual sex by one of two theories, one of which poses a risk of over-criminalization by demanding complete transparency about reproductive capacity and sexually transmitted infections. Adopting the alternative, preferable theory of non-consent, this Article considers possible criminal, tort, contract, and civil rights remedies currently available to victims. Ultimately, a new tort for “stealthing” is necessary both to provide victims with a more viable cause of action and to reflect better the harms wrought by nonconsensual condom removal.*

### INTRODUCTION

Rebecca<sup>1</sup> is a doctoral student living in a university town. When she is not researching for her dissertation, Rebecca works for a local rape crisis hotline. In this role, she often hears from undergraduate students at the state college. Of these callers, a significant number describe upsetting sexual contact that they struggle to name. Their partners have, during sex, removed a condom without their knowledge. Their stories often start the same way: “I’m not sure this is rape, but. . . .” Their accounts resonate with Rebecca. A boyfriend did

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1 Out of respect for interviewees, all names have been changed.

the same thing to her when she was a college freshman.<sup>2</sup>

Victims<sup>3</sup> like Rebecca say they do not know what to call the harm and United States courts have not had occasion to address and name the practice.<sup>4</sup> Yet, despite a lack of legal recognition, the practice is widespread and known: an online sub-community of perpetrators has identified and dubbed the practice of nonconsensually removing condoms during sex “stealthing.”<sup>5</sup> The practice puts partners at risk for unwanted pregnancies and sexually transmitted infections (STIs) and, survivors explain, it feels like a violation of trust and a denial of autonomy, not dissimilar to rape. Nonetheless, the law is largely silent in the face of what this Article will argue is widespread violence.<sup>6</sup>

In the first Part of this Article, I describe the problem, drawing on victim interviews.

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2 Telephone Interview with “Rebecca” (Feb. 23, 2016) (transcript on file with author).

3 In this Essay, I use the terms “victim” and “survivor” interchangeably to make space for a wide range of responses to violence and trauma. For critiques of the limiting function of either term, see Dana Bolger, “*Hurry Up and Heal*”: Pain, Productivity, and the Inadequacy of “Victim vs. Survivor”, FEMINISTING.COM (Dec. 10, 2014), <http://feministing.com/2014/12/10/hurry-up-and-heal-pain-productivity-and-the-inadequacy-of-victim-vs-survivor/> [<http://perma.cc/UHB5-PDVF>]; Parul Sehgal, *The Forced Heroism of the ‘Survivor’*, N.Y. TIMES MAG., May 3, 2016, [http://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html?\\_r=0](http://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html?_r=0) [<http://perma.cc/7QK2-BNK3>].

4 I have, to date, been unable to find a single domestic legal case concerned with the removal of a condom during sex.

5 See, e.g., *I Remove the Condom without Them Knowing During ‘Stealth’ Sex*, EXPERIENCE PROJECT, <http://www.experienceproject.com/stories/Remove-The-Condom-Without-Them-Knowing-During-Stealth-Sex/2441931> [<http://perma.cc/453V-PPQJ>] [hereinafter *The Experience Project*].

6 Others have written about stealthing in the context of a broader trend of what the American College of Obstetricians and Gynecologists describes as “active interference [by one partner] with [the other] partner’s contraceptive methods in an attempt to promote pregnancy,” known as “birth control sabotage.” AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, REPRODUCTIVE AND SEXUAL COERCION (2013), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co554.pdf?dmc=1&ts=20170203T1725073970> [<http://perma.cc/F4H2-8UFR>]. See, e.g., Leah A. Plunkett, *Contraceptive Sabotage*, 28 COLUM. J. GENDER & L. 97 (2014); Shane M. Trawick, Comment, *Birth Control Sabotage as Domestic Violence: A Legal Response*, 100 CALIF. L. REV. 721 (2012). The scope of this Essay is both narrower and wider than that of these works on birth control sabotage. I consider only one form of so-called sabotage—condom removal—excluding interference with other methods of contraception such as birth control pills, IUDs, and NuvaRings, or secretive practices of poking holes in condoms. But, based on victims’ accounts, I also consider a wider range of harms: the contraceptive sabotage literature focuses on pregnancy alone and I consider the risk of sexually transmitted infections as well as dignity harms. As a result, while this Essay engages with the literature on contraceptive sabotage, it does not fit squarely in the current debate over the appropriateness of various legal remedies.

Survivors make clear that, as a result of the removed condoms, they experienced fear of STIs and pregnancy and also a less concrete but deeply felt feeling of violation. I also present writings from perpetrators, whom I did not interview directly, but who have provided explanations for their behavior on online forums, to demonstrate the gendered motivations for nonconsensual condom removal.

After that, I consider two possible arguments for why such condom removal should be understood to vitiate consent to sex: first, that contact with the skin of a penis is distinct from contact with a condom, and so requires separate consent, and, second, that the greater risks associated with sex without a condom transforms the contact into a new type of act outside the scope of the initial consent. Ultimately, I warn against adopting the second line of reasoning, which may unintentionally promote rape by deception claims and overly punitive treatment of people with STIs.

In Part III, I consider whether and how criminal law, tort law, gender violence civil rights actions, and contract law might provide remedy to nonconsensual-condom-removal victims. Finally, I consider possible drawbacks to remedies currently available at law and make the case for a new cause of action.

## I. The Phenomenon

Interviews with people who have experienced condom removal and online accounts from victims indicate that nonconsensual condom removal is a common practice among young, sexually active people. Both men and women<sup>7</sup> describe having sex with male partners with penises who, during sex, removed the condom without their knowledge. Some realized their partner had removed the condom at the moment of re-penetration; others did not realize until the partner ejaculated or, in one case, notified them the next morning.<sup>8</sup> While survivors' narratives and responses to the experience vary, two common themes emerge

7 The victims who responded to open interview invitations on social media were all women. However, men do report condom removal by partners as well. See, e.g., *Tops Taking Condom Off Without Bottom Noticing*, REDDIT (JAN. 13, 2016), [https://www.reddit.com/r/askgaybros/comments/40pxtr/tops\\_taking\\_condom\\_off\\_without\\_bottom\\_noticing/](https://www.reddit.com/r/askgaybros/comments/40pxtr/tops_taking_condom_off_without_bottom_noticing/) [<http://perma.cc/GDG5-7X23>] (“That has happened to me before. The guy was a fucking creep, did it like 3–4 times, and kept insisting it was coming off on its own. Looking back I probably should have left, but we were in his car and I was kind of nervous.”).

8 Email from “Irin” to the author (Feb. 21, 2016) (on file with author) (“The next morning we woke up and after a couple of awkward moments during which I told him about a weird dream I had, he said, ‘Wait, so you know I came inside of you last night, right?’ To which I replied, having ensured he was wearing a condom before any p-in-v action happened, ‘Uh . . . what? Weren’t you wearing a condom?’ to which he said something like ‘I took it off.’”).

from their stories. The first is that, unsurprisingly, survivors fear unwanted pregnancies and sexually transmitted infections. The second is that, apart from these specific outcomes, survivors experienced nonconsensual condom removal as a clear violation of their bodily autonomy and the trust they had mistakenly placed in their sexual partner.

All victims' accounts expressed fear of unwanted pregnancies or STIs. One victim turned to an online forum for people with HIV in the wake of her experience because she was so worried she may have contracted the virus from her assailant.<sup>9</sup> Multiple survivors described their search for Plan B and appointments for STI tests.<sup>10</sup> Rebecca, of the rape crisis center, experienced an unequal burden to address these risks, especially after her assailant refused to help pay for emergency contraceptives. "None of it worried him. It didn't perturb him. My potential pregnancy, my potential STI," she said. "That was my burden."<sup>11</sup>

Apart from the fear of specific bad outcomes like pregnancy and STIs, all of the survivors experienced the condom removal as a disempowering, demeaning violation of a sexual agreement. One survivor, a young political staffer in New York, described her assailant's dismissal of her will with particular poignance:

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9 *He Removed the Condom*, HIV AIDS POSITIVE STORIES (Sept. 24, 2008), <http://www.hivaidspositivestories.com/text/st578.html> [<http://perma.cc/LR9U-42HJ>] ("I want to begin by saying that I have not yet been tested for HIV. . . not because I am afraid, but because it has only been 3 weeks since my possible exposure. . . . 3 months ago, I met a guy who I became smitten with. Tall, handsome, funny, and incredibly intelligent, I saw myself with him for quite awhile. Before we became intimate, we talked about HIV/STD's, and even about past drug usage (as he admitted to trying heroine, among other drugs, in college at MSU). Anyway[], two months into our relationship, we decided to be intimate. During our second time, he took the condom off towards the end, without bothering to ask, or even tell me (his penis is very small—sadly—so, I honestly couldn't feel the difference). I believe that it was towards the end because I watched him place the condom on in the beginning, and he removed his penis from me, only once, and briefly, towards the end when we were switching around. I didn't know until the end, when he pulled out that the condom had been off for that last 45 seconds or so. Very distraught, I asked him, 'What happened to the condom?' He lied and said, 'oh wow, it must've broken. But don't worry, I pulled out anyways so you won't get pregnant.' I have never felt so disrespected in my entire life. I believe that he removed it deliberately, and only after prodding him for a week did he admit that he 'might've known that it had broken, and should have told me.' He still didn't take full responsibility, and he [definitely] didn't apologize. . . . Absolutely traumatized at that point, I asked him if he would please get tested for HIV. All he would say is 'I'm clean . . . you're so paranoid . . . you have some intrinsic issues you need to deal with . . . I don't understand why you won't just believe me?").

10 Telephone Interview with "Sara" (Feb. 24, 2016) (transcript on file with author); Interview with "Dara" (Feb. 24, 2016) (transcript on file with author); Email from "Irin" to author (Feb. 21, 2016) (on file with author).

11 Telephone Interview with "Rebecca," *supra* note 2.

In November, I'd been seeing this guy for a couple weeks. . . . We'd been sort of dating and we were hooking up at his house and he was like, "oh, I wanna have sex without a condom." And I was like, I'm really not ok with that, I'm currently not on birth control. My exact words were "that's not negotiable." [I told him,] "if that's a problem with you that's fine. I'll leave."

We were hooking up and halfway through he took his condom off. Obviously I was very upset. We kinda fought about it. . . .

I ended up talking to him about it later. [I told him,] "I'm not seeing you any more, this is why. This is really messed up." [He told me,] "Don't worry about it, trust me." That stuck with me because [he'd] literally proven [himself] to be unworthy of [my] trust. . . . There is no situation in which this is something I agreed to do.

Obviously the part that really freaked me out . . . was that it was such a blatant violation of what we'd agreed to. I set a boundary. I was very explicit.<sup>12</sup>

Similarly, Rebecca described her experience as a "consent violation." As she put it bluntly, "That's the bottom line. I agreed to fuck him with a condom, not without it."<sup>13</sup> These survivors spoke not only of betrayal but of their partners' wholesale dismissal of their preferences and desires. Irin the student, said that, for her, "the harm mostly had to do with trust. He saw the risk as zero for himself and took no interest in what it might be for me and from a friend and sexual partner[.] [T]hat hurt."<sup>14</sup> In this way, survivors describe nonconsensual condom removal as a threat to their bodily agency and as a dignitary harm. *You have no right to make your own sexual decisions, they are told. You are not worthy of my consideration.*

Given contemporary momentum to treat consent rather than force as the distinguishing factor between sex and rape, an updated, expansive vision of gender violence might consider nonconsensual condom removal a form of rape. Yet interestingly, while many interviewed victims had previously been raped, they did not see the condom removal as

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12 Telephone Interview with "Sara," *supra* note 10.

13 Telephone Interview with "Rebecca," *supra* note 2.

14 Email from "Irin," *supra* note 10.

*equivalent* to sexual assault.<sup>15</sup> Nevertheless, they identified a clear connection. As Sara put it, stealthing is “rape-adjacent.”<sup>16</sup> In relating their experiences with rape and condom removal, interviewees identify the latter as an often-overlooked form of sexual and gender-based violence akin to more recognizable harms.

Assailants’ narratives underscore the ties between so-called “stealthing” and other forms of sexual and gender-based violence like rape. Internet forums provide not only accounts from victims but encouragement from perpetrators. Promoters provide advice, along with explicit descriptions, for how to successfully trick a partner and remove a condom during sex.<sup>17</sup> “Stealthing is controversial,” writes Mark Bentson, who runs a website dedicated to teaching others how to trick their sexual partners into condom-less sex. “But it’s also a reality. If you want to do it, you need to know how.”<sup>18</sup>

Online writers who practice or promote nonconsensual condom removal root their actions in misogyny and investment in male sexual supremacy. While one can imagine a range of motivations for “stealthers”—increased physical pleasure, a thrill from degradation—online discussions suggest offenders and their defenders justify their actions as a natural male instinct—and natural male right. One commenter on an article about stealthing wrote, “It’s a man’s instinct to shoot his load into a woman’s \*\*\*\*\*. He should never be denied that right. As a woman, it’s my duty to spread my legs and let a man shoot his load into my wet \*\*\*\*\* whenever he wants.” Another defender, commenting on a blog post detailing one man’s “strategy” for stealthing, explained: “Oh I completely agree with this. To me you can’t have one and not the other, if she wants the guy’s \*\*\*\*\* then she also has to take the guy’s load!!!” A further contributor on the thread asked whether the sexual partners of “stealthers” “deserve to be impregnated.” “Yes, they deserve it,” another replied. “[T]hat’s how god created this universe, we are born to do it,” replied another,

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15 Telephone Interview with “Rebecca,” *supra* note 2 (“It didn’t feel like my rape (which was really recent in memory) but like a violation.”); Interview with “Dara,” *supra* note 10 (“It happened in the summer of 2011 when I was living in DC as an intern. I was having all sorts of weird sexual experiences at that point. It was in the aftermath of having been raped in college. . . . I never thought of it in this other category of [violent] things that have happened to me.”); Telephone Interview with “Sara,” *supra* note 10 (“I personally did not feel harmed to the same degree [as rape]. [But this] feels violent.”).

16 Telephone Interview with “Sara,” *supra* note 10.

17 See, e.g., *The Experience Project*, *supra* note 5; Mark Bentson, *Top 10 Stealthing Tips*, 1 BLAST INSIDE, <http://iblastinside.com/2012/06/top-10-stealthing-tips/> [<http://perma.cc/K79M-2FM2>] (last visited Feb. 3, 2017) (emphasis added).

18 Bentson, *supra* note 17.

presumably referring to impregnation of women by men. “Yes!” confirmed a third.<sup>19</sup>

Men who stealth assault other men display similar rhetoric focused on a man’s “right” to spread his seed—even when reproduction is not an option. On a website dedicated to giving men advice about removing condoms during sex with other men, the author presents a scenario in which a partner is on the lookout for the condom. “So you’ve got a condom watcher[.] Someone who is monitoring too closely for a tip-off broken condom or to slip it off mid-fuck,” he says. “*How are you going to breed[?]*”<sup>20</sup> Again, a commenter ties nonconsensual condom removal to a natural male instinct—in this case, to “spread one’s seed,” even if the act cannot, in fact, result in pregnancy. Certainly, the role of gender in male-on-male sexual violence is far from resolved, as heated debate within feminist circles makes clear.<sup>21</sup> Yet, without resolving the question around which that debate has swirled—in which precise ways sexual victimization of men is *because of sex*—one can note that proponents of “stealthing” root their support in an ideology of male supremacy in which violence is man’s natural right.

Situating nonconsensual condom removal within the broad category of gender violence reveals that the practice is an ethical wrong with practical, psychic, and politically salient repercussions for its victims. Feminists have long worked to make these kinds of harms legible in both civil and criminal law—and ensure actual, not merely theoretical, access to court<sup>22</sup>—in order to address victims’ needs and shape sex(ual) norms. Consider, for example, first- and second-wave campaigns to push courts to recognize marital rape,<sup>23</sup> intimate partner abuse,<sup>24</sup> and so-called “date rape”<sup>25</sup> as legally cognizable wrongs, not

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19 *The Experience Project*, *supra* note 5.

20 Bentson, *supra* note 17 (emphasis added).

21 See, e.g., Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J. L. & GENDER 99, 142 (2006); Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown & Janet Halley eds., 2002).

22 The most high profile example of this is the provision for attorneys’ fees for the gender violence private cause of action in the original Violence Against Women Act, 42 U.S.C. § 13981(c) (1994).

23 *New Laws Recognizing Marital Rape as a Crime*, N.Y. TIMES (Dec. 29, 1984), <http://www.nytimes.com/1984/12/29/us/new-laws-recognizing-marital-rape-as-a-crime.html> [<http://perma.cc/D3CW-EBBF>].

24 SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT* 11–16, 24–26 (1982); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996).

25 Ellen Sweet, *Date Rape: The Story of an Epidemic and Those Who Deny It*, MS. MAG., Oct. 23, 1985. See



merely regrettable staples of heterosexuality. The categorization of “stealthing” as gender violence thus raises a question: is nonconsensual condom removal a *legal* harm, and if not yet, how can it be?

## II. Nonconsensual Condom Removal and Consent to Sex

The availability of legal remedies for nonconsensual condom removal will depend in part on whether that condom removal vitiates consent to the continued intercourse. This Article defers the normative question of whether consent is a desirable standard by which to distinguish sex from sexual violence.<sup>26</sup> However, as Part III makes evident, both criminal and civil law have in fact adopted this standard, and a “stealthing” victim’s success on the merits will likely turn on whether he or she can establish non-consent. Interviewed victims experienced the condom removal as, in Rebecca’s words, “a consent violation.”<sup>27</sup> Whether a court would agree is uncertain.

There are two primary ways to argue that the nonconsensual removal of a condom vitiates consent to the sex itself. The first, which I will argue is preferable, is a literal approach: the victim consented to touch by a condom, not touch by the skin of a penis. The law is clear that one may consent to one form of sexual contact without providing blanket future consent to all sexual contact.<sup>28</sup> For example, that one has given consent to a partner

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*generally*, ESTELLE FREEDMAN, *REDEFINING RAPE*, (2013); SUSAN ESTRICH, *REAL RAPE* (1987).

26 For feminist critiques of consent, see, e.g., JOSEPH J. FISCHER, *SEX AND HARM IN THE AGE OF CONSENT* (2016); Maya Dusenbery, *Dispatch from the Post-Rape Future: Against Consent, Reciprocity, and Pleasure*, in *THE FEMINIST UTOPIA PROJECT: FIFTY-SEVEN VISIONS OF A WILDLY BETTER FUTURE* 17 (Alexandra Brodsky & Rachel Kauder-Nalebuff eds., 2015); Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1406 (2005).

27 Telephone Interview with “Rebecca,” *supra* note 2.

28 In *State in Interest of M.T.S.*, the Supreme Court of New Jersey upheld the rape conviction of a juvenile who nonconsensually penetrated a partner after engaging in “consensual kissing and heavy petting,” 129 N.J. 422, 425 (1992). For those outside of law schools, the most famous illustration of sexual consent with limited scope arose in the Kobe Bryant trial, in which the alleged victim consented to some sexual activity but not sexual intercourse. Note, *Acquaintance Rape and Degrees of Consent: “No” Means “No,” but What Does “Yes” Mean?*, 117 HARV. L. REV. 2341, 2346 (2004) [hereinafter “*No*” Means “*No*”]. See also *In re John Z.*, 60 P.3d 183, 184 (Cal. 2003) (“[A] withdrawal of consent effectively nullifies any earlier consent and subjects the male to forcible rape charges if he persists in what has become nonconsensual intercourse.”); *Commonwealth v. Fischer*, 721 A.2d 1111, 1112 (Pa. Super. Ct. 1998) (upholding rape conviction of college student despite victim’s earlier consent to some sexual acts). *But see* “*No*” Means “*No*”, *supra* at 2346 (“Typically, the idea that consent to some sexual contact creates a presumption of generalized consent to all sexual activity is not stated so explicitly. However, this idea tends to manifest itself in the sensibilities of judges, juries, and



to penetrate digitally does not mean the partner may, without more, legally penetrate by a penis.<sup>29</sup> The leap is not far, then, to say that consent to touch by a condom covering a penis is distinct from consent to touch by the penis itself.<sup>30</sup>

Of course, drawing clear lines between separate acts that may occur during the same sexual “event” is not always easy. We may easily accept that, for example, a person who consents to vaginal penetration does not consent to anal penetration but be reluctant to say that someone who consents to touch of his or her left breast does not consent to touch of the right. This Article does not pretend to offer a uniform rule to determine what acts are similar enough to fall under the same umbrella of consent. Factors that intuitively counsel in favor of distinction in the instant case include the fact that sexual partners often do have strong preferences between sex with or without a condom, which they generally do not treat as interchangeable (like they do the touch of different breasts). The notion of two separate acts is underscored by the fact that a perpetrator will need to interrupt intercourse to withdraw, remove the condom, and then re-penetrate, further distinguishing the two separate “contacts.”<sup>31</sup> Yet I must admit that I cannot identify a bright line rule to determine whether sexual acts are so different as to require separate consent. Just as I must rely, in part, on current sexual practices and intuitions, so may a court—which may arrive at a different conclusion.

The second rationale for viewing “stealthing” as a consent violation centers on the different risks inherent to sex with a condom and sex without a condom. The logic would go like this: Someone who consents to a certain sexual act does so after balancing the benefits and risks of that behavior. Sex without a condom carries higher risks of pregnancy and STI transmission than sex with a condom. Because of the increased risk, the removal of the condom transforms the sexual act into a different act, such that consent to one is not

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prosecutors, as well as in the background rules of resistance that still operate in rape law.”).

29 *E.g.*, *Shiu v. Alameida*, No. 1:03-CV-05202LJOJMDHC, 2008 WL 2344719, at \*9 (E.D. Cal. June 5, 2008), *report and recommendation adopted*, No. 1:03-CV-5202LJOJMDHC, 2008 WL 2705415 (E.D. Cal. July 9, 2008) (holding that a patient’s consent to her doctor inserting his fingers and a speculum in her vagina did not provide consent to sexual intercourse).

30 One might also argue that the victim did not consent to contact with sperm, but such a frame might limit the number of survivors who can claim non-consent: does the harm only occur if the stealthier ejaculates in or on the victim?

31 *See, e.g.*, *Bentson*, *supra* note 17 (“As a tip, pulling completely out and plunging it back in needs to happen a few times needs to be part of your regular routine. Even after the condom comes off. Work the condom down and then take it off.”).

carried over to consent to the other. Consider, for example, *Barbara A. v. John G.*, in which a California court found that a respondent committed battery when his sexual partner agreed to intercourse based on his representation that he was infertile.<sup>32</sup> “Consent to an act, otherwise a battery, normally vitiates the wrong,” the court wrote. “However, appellant has alleged . . . that the act of impregnation exceeded the scope of the consent.”<sup>33</sup> While Barbara A was in fact impregnated, it would be difficult to argue her consent *would have been meaningful* if, for whatever reason, the same contact with fertile John had not ultimately resulted in a pregnancy: the consent is vitiated because she agreed to have sex without risk of pregnancy when in fact the sex carried risk of pregnancy. A number of similar cases have presented a parallel argument: that “the failure to disclose a communicable disease prior to intercourse vitiates consent” because the plaintiff consented to sex, not to exposure to a health risk.<sup>34</sup> A condom removal victim might make the same claim.

Between these two visions of why nonconsensual condom removal undermines consent to sex, the first is preferable for a few reasons. First, as a purely practical matter, it is more likely to resonate with courts. Despite exceptions like *Barbara A.*, courts are often reluctant to intervene in cases in which sexual partners misrepresent their fertility risk.<sup>35</sup> As Kim Shavo Buchanan concluded from her review of “contraceptive fraud” cases, “[C]ivil courts recognize that, in the exercise of their sexual autonomy through sex and relationships, adults take risks that their partners may deceive and betray them in ways that matter very

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32 *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 375 (Ct. App. 1983). It is worth noting, however, that some courts have been reluctant to intervene in cases where sexual partners misrepresent their fertility risk.

33 *Id.* (internal citations omitted).

34 *In re Louie*, 213 B.R. 754, 764 (Bankr. N.D. Cal. 1997). *See also* *Aetna Cas. & Sur. Co. v. Sheft*, 989 F.2d 1105, 1109 (9th Cir. 1993); *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 997 (Ct. App. 1984).

35 *See, e.g.*, *L. Pamela P. v. Frank S.*, 88 A.D.2d 865 (N.Y. App. Div. 1982) (declining to reduce a father’s support obligation based on accusation that mother lied about being on the Pill when they had sex); *Stephen K. v. Roni L.*, 105 Cal. App. 3d 640, 643 (Ct. App. 1980) (“[Alt]hough Roni may have lied and betrayed the personal confidence reposed in her by Stephen [when she lied about taking the Pill], the circumstances and the highly intimate nature of the relationship wherein the false representations may have occurred, are such that a court should not define any standard of conduct therefor.”). *See also* Kim Shavo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1285 (2015) (“[C]ivil courts recognize that, in the exercise of their sexual autonomy through sex and relationships, adults take risks that their partners may deceive and betray them in ways that matter very much. Rather than protect people against the risks of heterosexual sex, civil courts have been reluctant to intervene. Contraceptive fraud is rarely a tort, and never a crime.”).

much.”<sup>36</sup> Notably, courts are less likely to forgive such deception in the context of STIs than fertility.<sup>37</sup>

Second, the focus on the unwanted physical contact avoids an intuitively appealing but potentially dangerous demand for full reproductive transparency. One might worry that a legal regime that requires complete transparency about reproductive risk to distinguish sex from violence may unduly burden vulnerable women. Imagine if courts came to view nonconsensual condom removal as a form of battery under a theory, similar to that in *Barbara G.*, that the unknown potential of pregnancy renders the victim’s consent meaningless. Then imagine an abusive relationship in which a woman feels unable to turn her male partner down for sex and is made sick by the birth control he insists she takes, so instead throws out a pill each morning. As a result, she submits to sex that her abuser believes carries little risk of pregnancy because she has, in some sense, deceived him. If unknown reproductive risk vitiates consent, can the abuser take his victim to court? Certainly that is an undesirable outcome.<sup>38</sup>

Relatedly, one might worry that a demand for full transparency might result in overly punitive responses to STI non-disclosure. This Article does not aim to contribute to the robust literature debating the prudence of criminal and tort liability for STI transmission and non-disclosure. However, both feminists and public health experts warn against too-harsh laws that punish people who fail to disclose STIs—but who do not ultimately transmit disease—which, they fear, may discourage testing and invite selective enforcement against queer people and people of color.<sup>39</sup> In the context of HIV exposure cases, some courts

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36 Buchanan, *supra* note 35, at 1285.

37 *Id.* at 1274.

38 Leah Plunkett contends that reproductively-capable cis men and cis women have different self-possessory interests in condom sabotage. Plunkett, *supra* note 6, at 107. Her argument places undue import on the bounds of the physical body when she writes that no injury to dignity or autonomy occurs to a male victim of a female saboteur because “the sperm has left his body.” *Id.* (This is perhaps inevitable, given her theoretical rooting in Jed Rubenfeld’s self-possession theory, which requires severe physical compulsion to transform sex into rape. Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE L.J.* 1372, 1380 (2013)). Without contending that cis men and cis women are equally burdened by an unwanted pregnancy, I would query why a man’s control over his sperm is no longer relevant to his bodily possession, let alone dignity and autonomy, after ejaculation.

39 See generally Buchanan, *supra* note 35 (presenting multiple critiques of HIV criminalization from anti-racist, anti-sexist, and public health perspective).

have relied on an assumption that HIV non-disclosure vitiates otherwise valid consent.<sup>40</sup> A regime in which incomplete information vitiates consent may legitimize such aggressive HIV-disclosure laws where they exist and, where they do not, open up liability for non-disclosure as sexual assault or battery.

Further, a regime demanding full reproductive transparency may inadvertently provide support for rape by deception claims. “Rape by deception” refers to the set of sexual acts that, in 2008, the Israeli Supreme Court described as such: “when a man or woman falsely represents himself or herself and, by deception, has intimate relations with someone who, had he known things to be as they were, would never have considered sexual intercourse with that person.”<sup>41</sup> As a general matter, Anglo-American courts have refused to recognize rape by deception outside of two exceptional circumstances: where sex was represented by the wrongdoer as a medical procedure and where a man impersonated a woman’s husband.<sup>42</sup>

Theorists’ and judges’ justifications for rejecting rape by deception often appear invested in male sexual supremacy; consider the British judge who concluded fraud could not vitiate consent because then “many seductions would be rape,”<sup>43</sup> as though violence against women must be uncommon and so any widespread sexual practices must be fine. Nonetheless, politically troubling patterns of enforcement in countries like Israel that do recognize rape by deception have largely discouraged feminist support for the category.<sup>44</sup> Too often, courts use rape by deception to validate and operationalize bigotry, like a Jewish Israeli woman’s horror to learn she had slept with an Arab man<sup>45</sup> or a partner’s horror to

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40 *Id.* at 1271.

41 CrimA 2411/06 Saliman v. State [2008] (Isr.) (cited in Aeyal Gross, *Rape by Deception and the Policing of Gender and Nationality Borders*, 24 TUL. J.L. & SEXUALITY 1 (2015)).

42 See Rubinfeld, *supra* note 38, at 1396–98 (2013) (summarizing history of rape by deception in Anglo-American courts). *But see* Act of Sept. 9, 2013, 2013 Cal. Stat. ch. 282 (amending CAL. PENAL CODE §§ 288a, 289) (criminalizing rape by impersonation).

43 *R v. Clarence*, (1888) 22 Q.B.D. 23 at 43 (Stephen, J.) (Eng.) (cited in Rubinfeld, *supra* note 38, at 1396).

44 Consider, for example, the feminist responses to Professor Jed Rubinfeld’s piece, *supra* note 38, that calls for decriminalizing all but rape that relies on force akin to slavery. Rubinfeld argues his conclusion follows inevitably from a rejection of rape by deception, but feminist critics refused to defend rape by deception in order to undermine his proposal. See, e.g., Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1 (2015); Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 336 (2013).

45 CrimA (Jer) 5734/10 Kashur v. State [2012] (Isr.).

learn a man with whom she had been sexually intimate is transgender.<sup>46</sup> For this reason, this Article seeks to avoid inadvertent support for “rape by deception” claims.

One might attempt to draw a meaningful distinction between the second, risk-enhancement theory of “stealthing” and the theory underlying classic cases of rape by deception: one objects to the type of contact and the other objects to the unknown identity of the person with whom the contact occurs.<sup>47</sup> A court can reasonably say, for example, that sexual contact between a victim’s genitals and the skin of a penis when he or she only consented to sexual contact with a condom over a penis is not akin to sexual contact with a person who he or she believed to be of a race, gender, or religion they, in fact, were not. As a matter of public policy, we want individuals to discriminate between forms of sexual contact based on risk but not based on their partners’ ethnicity, trans identity, or religion, common bases for rape by deception cases.<sup>48</sup> Yet the practical and ethical line between reproductive misrepresentation and other forms of misrepresentation is far from crystal clear. Whether a person is trans or cis<sup>49</sup> might bear on his or her reproductive capacity; a person may only want to bear a child whose parentage will permit membership in a certain religion or Indian tribe. A judge or advocate may be unwilling to endorse a theory of stealthing that will require such difficult line-drawing between permissible and impermissible forms of deception, perhaps out of prudishness or genuine concern to avoid legitimizing racist and transphobic rape by deception laws.

For these reasons, this Article will proceed under the first argument for why nonconsensual condom removal vitiates previous consent to sex: that touch by a condom is fundamentally physically different from touch by the skin of a penis and thus each requires separate consent. In the background, however, will remain the possibility that a different conceptual foundation for legal liability—the second line of argument detailed above—carries serious risks. Advocates must remain aware of these unintended doctrinal consequences given that the dividing line between the two theories of non-consent is, at best, porous, aspects of each informing (infecting?) the other. For example, strong preferences

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46 Sentencing Judgment, CrimC (Hi) 389/02 State v. Alkobi (Sept. 7, 2003) (Isr.) (unpublished). For more on “gender impersonation” rape by deception cases, see Gross, *supra* note 41, at 4–15.

47 For an overview of rape by deception laws, see Gross, *supra* note 41.

48 *E.g.*, CrimA (Jer) 5734/10 Kashur v. State [2012] (Isr.); Judgment on Application No. 7, CrimC 2372/07 Gross v. State (Jan. 1, 2012) (Isr.).

49 “Cis” is a term used to refer to people whose biological sex at birth corresponds to their gender identity—that is, that they are not transgender. See *Definition of Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/cisgender-meaning> [<http://perma.cc/8YNL-PRQQ>] (last visited Feb. 3, 2017).

between touch by a condom and touch by a penis are inevitably rooted, at least in part, in different risks. One theory—the literal approach focused on different physical touches—is better than the other, but they are not so separate that the latter’s risks may be forgotten.

### III. Existing Legal Remedies

None of the victims of nonconsensual condom removal interviewed considered bringing legal action, and no record is available indicating that a United States court has ever been asked to consider condom removal. Nonetheless, survivors experience real harms—emotional, financial, and physical—to which the law might provide remedy through compensation or simply an opportunity to be heard and validated. In this Part, I consider available causes of action under current criminal law, tort law, focusing on tort law, both common law and statutory, and gender violence civil rights options.

#### A. Criminal Law<sup>50</sup>

Is stealthing criminal? It may be, though—in keeping with victims’ description of their own experiences—it may be more likely be prosecuted, if at all, as a sexual misdemeanor rather than a felony. Let us consider New York law as an example.

In the absence of forcible compulsion, first and second degree rape in New York require non-consent by means of “being physically helpless” or “by reason of being mentally disabled or mentally incapacitated.”<sup>51</sup> Neither description characterizes the non-consent of a stealthing victim. The definition of consent for third degree rape is more capacious: when the accused “engages in sexual intercourse without another person’s consent where such lack of consent is by reason of some factor other than incapacity to consent.”<sup>52</sup> As a matter of literal meaning, one might argue convincingly that a nonconsensual-condom-removal victim is incapable of consent to continued intercourse because he or she does not know that the sex act has changed, but the New York criminal code makes clear that “incapacity to consent” covers a narrow range of mental and physical states that exclude such lack of

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50 Like many feminists, I am skeptical of the liberatory potential of criminal law. Surely it would be disingenuous to claim that an abstract interest in whether conduct is criminal is shielded entirely from the project of criminalization. Nonetheless, I feel an inquiry into potential legal responses to stealthing would be incomplete without any consideration of criminal law—especially since not all victim-survivors share my politics.

51 N.Y. PENAL LAW §§ 130.30, 130.35 (McKinney 2001).

52 N.Y. PENAL LAW § 130.25 (McKinney 2001).

knowledge.<sup>53</sup> What, then, may count as “lack of consent . . . by reason of some factor other than incapacity to consent”? The New York penal code defines the universe for third degree rape as when

at the time of the act of intercourse, oral sexual conduct or anal sexual conduct, the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person would have understood such person’s words and acts as an expression of lack of consent to such act under all circumstances.<sup>54</sup>

The 130.05(2)(d) definition of non-consent for third degree rape may encompass certain stealthing victims’ experiences. For example, Sara recounts an explicit conversation about condom usage with her assailant before they began having sex, in which she said that condom use was a non-negotiable requirement for her and she would not have sex with him without a condom.<sup>55</sup> However, not all interview subjects conducted such an explicit conversation. One could imagine a court finding that a victim who asked or agreed to use a condom but did not make explicit that the condom use was a condition of the sex did not “clearly express[] that he or she did not consent to engage in such act.”<sup>56</sup>

For such survivors, misdemeanor sexual abuse prosecution may still be possible. Under New York state law, “[a] person is guilty of sexual abuse in the third degree,” a class B misdemeanor, “when he or she subjects another person to sexual contact without the latter’s consent.”<sup>57</sup> Lack of consent sufficient for sexual abuse may result from one of two situations: forcible compulsion, incapacity, or “any circumstances . . . in which the victim

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53 N.Y. PENAL LAW § 130.05(3) (McKinney 2013).

54 N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2013).

55 Telephone Interview with “Sara,” *supra* note 10. N.Y. PENAL LAW § 130.55 (McKinney 2001). One might also argue that nonconsensual condom removal constitutes “Sexual Misconduct,” a class A misdemeanor, under which “a person is guilty of sexual misconduct when . . . he or she engages in sexual intercourse with another person without such person’s consent.” N.Y. PENAL LAW § 130.20 (McKinney 2003). However, the grounds for lack of consent are narrower for sexual misconduct than sexual abuse, see PENAL § 130.05(2). Alternatively, a victim might attempt a similar claim as “forcible touching,” N.Y. PENAL LAW § 130.52 (McKinney 2015), another class A misdemeanor, but convincing a court that a removal of the condom vitiates consent will likely be easier than convincing the same court that the removal constitutes force.

56 PENAL § 130.05(2)(d).

57 PENAL § 130.55.



does not expressly or impliedly acquiesce in the actor's conduct."<sup>58</sup> To state the obvious, a nonconsensual-condom-removal victim does not "expressly or impliedly acquiesce" to the removal of the condom. The challenge, though, will be that presented in Part II: convincing a court that the "sexual contact" fundamentally changes when the condom is removed such that new consent is needed for intercourse without a condom and the "old consent" to intercourse with a condom is not preserved during the removal. The statutory focus on "contact" may be useful for a prosecutor, since the language diverts focus from the kinetic act, penetration, to *what is touching*. Nonetheless, for the reasons presented above, courts may refuse to parse these distinct aspects of the acts.

In addition to formal legal barriers, those who pursue criminal charges may meet skepticism from prosecutors who may not see nonconsensual condom removal as a "serious" crime likely to result in a win. "Stealth" survivors face a number of common obstacles to jurors' sympathy: previous sexual activity, a relationship with the perpetrator, and a lack of visible harm.<sup>59</sup> As a result, prosecutors may be reluctant to bring these cases.<sup>60</sup> Even if a criminal remedy is available as a matter of law, then, it may not be as a matter of practice.

## B. Tort Law

Nonconsensual-condom-removal victims may find remedies in tort law. The most straightforward claims will be those based on STI transmission. 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 an STI fails to take caution to prevent transmission—including notifying their partner of the risk.<sup>61</sup> Further, a

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58 PENAL § 130.05(2).

59 See, e.g., Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1835–36 (2011) (describing how these same characteristics present obstacles to successful prosecution in the context of marital rape).

60 *Id.*

61 E.g., *McPherson v. McPherson*, 712 A.2d 1043, 1046 (Me. 1998) ("[W]e hold that one who knows or should know that he or she is infected with a sexually transmitted disease is under a duty to protect sexual partners from infection."); *Berner v. Caldwell*, 543 So. 2d 686, 689 (Ala. 1989) *overruled by* Ex parte Gen. Motors Corp., 769 So. 2d 903 (Ala. 1999) ("We hold that one who knows, or should know, that he or she is infected with genital herpes is under a duty to either abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them."); *R.A.P. v. B.J.P.*, 428 N.W.2d 103, 109 (Minn. Ct. App. 1988) ("We have already concluded that people who know that they have genital herpes have a legal duty to take reasonable care to prevent the disease from spreading, and that this duty generally includes, at

number of states have criminalized the transmission of an STI.<sup>62</sup> In those states, violation of the statute—communication of an STI—is negligence per se.<sup>63</sup> An STI infection due to “stealth” removal of a condom may also give rise to a claim of fraudulent or conscious misrepresentation causing physical harm, which requires proof of physical injury.<sup>64</sup>

A victim who is impregnated as a result of nonconsensual condom removal is less likely to find a specialized remedy for the pregnancy in tort, though she will likely have more success under a general fraud or misrepresentation action. Historically, courts were unwilling to recognize unwanted births, supposedly a “blessed event,” as a tortious outcome.<sup>65</sup> Over the last few decades, courts have begun to sustain “wrongful birth” or “wrongful pregnancy” tort actions for unwanted births caused by various kinds of medical mistakes. These actions have prevailed based on failed sterilization;<sup>66</sup> a doctor’s incorrect

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a minimum, the duty to inform potential sex partners of the possibility of infection.”). *See also* Mary G. Leary, *Tort Liability for Sexually Transmitted Disease*, 88 AM. JUR. TRIALS 153 (updated February 2016) (“The existence of a duty to use due care may be predicated merely upon a relation between the parties. In fact, it is essential to negligence liability that the parties have a relationship recognized by law as the foundation of a duty of care, for, unless some relationship exists between the person injured and the defendant, by which the defendant owes a duty to the person injured, there can be no liability for negligence. If a special relationship is found, such as that between sexual partners, it will give rise to a duty on the part of the defendant to act reasonably and exercise ordinary care in carrying out its contractual duties.”).

62 Leary, *supra* note 61 (citing CAL. HEALTH & SAFETY CODE § 120600 (formerly § 3198); MICH. COMP. LAWS ANN. § 333.5210 (West 1989); OKLA. STAT. ANN. Tit. 63, § 1-519 (West 2014); *State v. Thomas*, 983 P.2d 245 (Idaho Ct. App. 1999); *People v. Jensen*, 586 N.W.2d 748 (Mich. Ct. App. 1998)).

63 *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 285(a) (1965) (the standard of conduct of a reasonable person may be established by legislative enactment or administrative regulation which so provides)).

64 RESTATEMENT (SECOND) OF TORTS § 557A (1977) (“One who by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person or to the land or chattel of another who justifiably relies upon the misrepresentation, is subject to liability to the other.”); RESTATEMENT (SECOND) OF TORTS § 310 (1965) (“An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely to induce action by the other, or a third person, which involves an unreasonable risk of physical harm.”).

65 *See, e.g.*, *Christensen v. Thornby*, 255 N.W. 620 (Minn. 1934) (“[T]he plaintiff has been blessed with the fatherhood of another child”); Michael T. Murtaugh, *Wrongful Birth: The Courts’ Dilemma in Determining A Remedy for A “Blessed Event”*, 27 PACE L. REV. 241, 243 (2007); Gregory G. Sarno, Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R.3d 15 (1978).

66 *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169 (Minn. 1977); *Bowman v. Davis*, 356 N.E.2d 496 (Ohio 1976).

advice that a woman was, due to medical complication, sterile;<sup>67</sup> or a pharmacist negligently filling a birth control prescription with another pill.<sup>68</sup>

A pregnancy due to nonconsensual condom removal does not fit easily into the wrongful pregnancy tort scheme given its focus on misrepresentations or mistakes by healthcare professionals. That said, courts' growing comfort viewing unwanted pregnancy or birth as a harm worthy of tort remedy—largely driven by these medical cases—may create more room for a pregnant victim to recoup additional, pregnancy-specific damages under a generic tort. Here, *Barbara A. v. John G.* is again instructive. In that case, the plaintiff was able to recover for expenses related to her pregnancy, though not the actual life of the child, under a deceit tort.<sup>69</sup> In support of this conclusion, the court cited to STI cases in which plaintiffs successfully brought battery or fraud actions based on sexual partners' "fraudulent concealment of the risk of infection with venereal disease or infestation with vermin."<sup>70</sup>

But what about victims, like those interviewed, who did not contract an STI or become pregnant because of "stealthing," but still surely experienced a grave harm? While the injury is primarily emotional, damages based on emotional distress alone are notoriously rare. Negligent infliction of emotional distress (NIED) torts nearly always require accompanying physical harm as well.<sup>71</sup> Victims who experience particularly severe emotional distress may be able to recover under a common law intentional infliction of emotional distress (IIED) tort if they can prove both that the perpetrator was reckless in his or her conduct and that the nonconsensual condom removal was "extreme and outrageous," and "utterly intolerable in a civilized society."<sup>72</sup> That conclusion may seem obvious to a sympathetic reader, and victims very well may prevail. Yet the bar to prove IIED is high, discretion

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67 *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982).

68 *Troppe v. Scarf*, 187 N.W.2d 511 (Mich. Ct. App. 1971).

69 *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 375 (Ct. App. 1983).

70 *Id.* at 381 (citing *De Vall v. Strunk*, 96 S.W.2d 245 (Tex. Civ. App. 1936); *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920)).

71 RESTATEMENT (SECOND) OF TORTS § 436A (1965). *But see* *John & Jane Roes, 1-100 v. FHP, Inc.*, 985 P.2d 661, 663 (Haw. 1999) (holding, in case concerning plaintiffs' exposure to HIV-positive blood without subsequent infection, NIED "damages may be based solely upon serious emotional distress, even absent proof of a predicate physical injury").

72 RESTATEMENT (SECOND) OF TORTS § 46 (1965).

is wide,<sup>73</sup> and not every judge and jury is sure to recognize the resultant grave psychic injury—or assume the perpetrator should have recognized its high likelihood, as required for recklessness.<sup>74</sup> None of this is to say, that “stealththing” *should* be tolerated, but merely that it, like many other forms of gender violence, often is, and courts may be no exception.

A perhaps more reliable common law option for a nonconsensual-condom-removal victim, then, might be a battery tort, which can be the basis of liability for offensive but not physically harmful touch. The unwanted contact between the penis or semen and the vaginal walls, cervix, or anus might reasonably be understood as a battery in common law: the contact is intentional, the victim does not consent to the contact, and, as clear from survivors’ accounts, the contact is an affront to the personal dignity of the victim.<sup>75</sup> Importantly for “stealththing” plaintiffs, who may not know the condom was removed until well after the sex is over, a battery victim does not need to be aware of the contact at the time that it occurs.<sup>76</sup> Unfortunately, though, while nonconsensual condom removal may seem patently offensive to the sympathetic reader, the same unsympathetic judge who might find such conduct insufficiently “extreme and outrageous” for IIED may fail to recognize the dignitary harm necessary for a successful battery claim, though providing offensiveness will likely be a lighter burden than that required for IIED.

Victims may similarly consider specialized torts for sexualized touch where available under state law. For example, California law includes a civil sexual battery cause of action against one who

[a]cts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results [or a]cts with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a

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73 Paul T. Hayden, *Religiously Motivated “Outrageous” Conduct: Intentional Infliction of Emotional Distress As A Weapon Against “Other People’s Faiths”*, 34 WM. & MARY L. REV. 579, 580 (1993) (IIED “substantive standards are ill defined, requiring the trier of fact in each case to render an ad hoc judgment about the outrageousness of the particular defendant’s particular conduct.”).

74 *Supra* note 6 and accompanying text.

75 RESTATEMENT (SECOND) OF TORTS §§ 18, 19 (1965); RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 101DD (2014); *Cotter v. Summit Sec. Servs., Inc.*, 14 A.D.3d 475, 475 (N.Y. App. Div. 2005) (“To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature.”).

76 RESTATEMENT (SECOND) OF TORTS § 18 cmt. d (1965).

sexually offensive contact with that person directly or indirectly results.<sup>77</sup>

Like common law battery, these sexual battery torts do not require the victims' knowledge of the contact at the time it occurs.<sup>78</sup>

### C. Civil Rights Options

In 1994, the first Violence Against Women Act provided a civil law private right of action for gender-based violence. Victims of "crimes of violence motivated by gender" could sue their assailants in federal court.<sup>79</sup> The Supreme Court struck down the cause of action in 2000's *United States v. Morrison*, in which a 5-4 Rehnquist majority found Congress lacked authority to enact the civil remedy provision under either the Commerce Clause or Section Five of the Fourteenth Amendment.<sup>80</sup> Some states and localities responded to *Morrison* with their own civil remedy equivalents.<sup>81</sup> Such laws can be found in California,<sup>82</sup> Illinois,<sup>83</sup> New York City,<sup>84</sup> and Westchester County.<sup>85</sup> Some legislatures explicitly referenced *Morrison* as the motivation for creating a local, constitutional alternative.<sup>86</sup> "Other than restricting plaintiffs to a state versus federal forum, these laws

77 CAL. CIV. CODE § 1708.5 (West 1998).

78 In re Louie, 213 B.R. 754 (Bankr. N.D. Cal. 1997).

79 42 U.S.C. § 13981.

80 *United States v. Morrison*, 529 U.S. 598 (2000).

81 Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L.Q. 157, 165 (2005); J. Rebekka S. Bonner, Note, *Reconceptualizing VAWA's "Animus" for Rape in States' Emerging Post-VAWA Civil Rights Legislation*, 111 YALE L.J. 1417, 1419 (2002).

82 CAL. CIV. CODE § 52.4 (West 2016).

83 740 ILL. COMP. STAT. ANN. 82/1-20 (West 2013).

84 N.Y.C. ADMIN. CODE § 8-901 (2014).

85 Westchester County, NY, Laws of Westchester County ch. 701 (2001).

86 *Id.* ("In a May 15, 2010 decision, the United States Supreme Court held that the Constitution provided no basis for a federal cause of action by victims of gender-motivated violence against their perpetrators either under the Commerce Clause or the Equal Protection Clause of the Fourteenth Amendment. In so ruling, the Supreme Court held that it could 'think of no better example of police power, which the Founders denied the National Government and reposed to the States, than the suppression of violent crime and vindication of its victims.' In the exercise of its police powers, the County of Westchester has determined to grant victims of gender-motivated violence a private right of action against their perpetrators."); N.Y.C. ADMIN. CODE § 8-902 (2000) ("In light of the void left by the Supreme Court's decision, this Council finds that victims of gender-

provide virtually identical substantive relief, with similar elements of proof, to that which was provided for in the now-unavailable federal law.”<sup>87</sup>

A victim of condom removal might be able to bring a claim under such a civil remedy, but will likely struggle to show sufficient physical harm. Taking the New York City law as an example, the city’s code defines the two key elements of an offense under the Victims of Gender-Motivated Violence Prevention Act: a 1) crime of violence 2) motivated by gender:

a. “Crime of violence” means an act or series of acts that would constitute a misdemeanor or felony against the person as defined in state or federal law or that would constitute a misdemeanor or felony against property as defined in state or federal law if the conduct presents a serious risk of physical injury to another, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction.

b. “Crime of violence motivated by gender” means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.<sup>88</sup>

Identifying gender motivation may be theoretically more complex than determining what is a crime of violence. Yet that prong may turn out to be the easier lift for a victim of condom removal, or at least for women victims “stealthed” by a man. First, VAWA civil remedies practitioners found that, whatever their academic concerns about defining gender motivation, judges easily accepted that rape, sexual assault, and domestic violence—

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motivated violence should have a private right of action against their perpetrators under the Administrative Code.”).

87 Goldschied, *supra* note 81, at 165–66.

88 ADMIN. § 8-901.

even against men<sup>89</sup>—were *per se* gender-motivated.<sup>90</sup> Second, as detailed above, online commentary on “stealthing” suggests that those who regularly commit, wish to commit, or otherwise support condom removals recognize the act as a form of male dominance.<sup>91</sup>

Of course, the fact that other perpetrators have left evidence of gender motivation will not provide definitive proof of any given defendant’s motive. Yet the ways that online proponents tie nonconsensual condom removal to gender subordination—the rightful position of women as receptacles for men’s “seed”—suggest that some victims may be able to find similar records of misogynistic tendencies for their assailants or, at least, rely on these forums as evidence that the practice is generally gender-motivated. Even those victims who could establish gender animus will need to convince a court in New York or states with similar statutes modeled off of VAWA that nonconsensual condom removal is a “crime of violence.” Here, civil remedy depends on whether criminal prosecution is possible, as discussed in Part III(A).

Finally, a victim would need, under New York City law, to show that “the conduct presents a serious risk of physical injury to another.”<sup>92</sup> A pregnancy or STI would likely be considered a serious risk. What if, however, the assailant is infertile and does not have an STI?

Notably, not all state civil rights remedies include identical “crime of violence”

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89 Male victims have successfully brought gender violence civil rights actions. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1200-01 (9th Cir. 2000) (“Although the larger bill within which the GMVA was passed was known as the Violence Against Women Act, the short title of the civil rights cause of action is the ‘Gender-Motivated Violence Act.’ As the district court correctly noted, the language of the civil rights statute is entirely gender-neutral and there is no indication that Congress intended to exclude men from its purview. Rather, the legislative history makes it clear that Congress specifically intended to *include* men within the statute’s protection.”). *See also* Joseph Biden, Press Conference to Release the Senate Report on S. 11, *The Response to Rape: Detours on the Road to Equal Justice*, May 27, 1993 (“I might add . . . in the issue of rape, a male can bring a civil rights action. There is a great deal of rape in prison of males by males. So although it is a very small portion of the problem, this is literally gender-motivated, and in a strange sense gender-neutral. If the crime is a consequence of gender-motivation and that predicate can be laid down in court, then there can be a civil rights action. In almost all rape you’d find that situation.”); 42 U.S.C. § 13925(b)(8) (2006) (“Nothing in this subchapter shall be construed to prohibit male victims of domestic violence, dating violence, sexual assault, and stalking from receiving benefits and services under this subchapter.”).

90 Conversation with Julie Goldschied (Feb. 29, 2016) (on file with author).

91 *See supra*, Part I.

92 N.Y.C. ADMIN. CODE § 8-903 (2000).



requirements modeled off of VAWA.<sup>93</sup> For example, California defines “gender violence” as such:

- (1) One or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction.
- (2) A physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction.<sup>94</sup>

Although this statute, unlike New York’s, makes room for non-criminal behavior, California’s civil rights remedy likely provides even less room for nonconsensual-condom-removal victims. The first clause of the definition pays no attention to consent, restricting eligible crimes to those committed by force. The second clause looks outside criminal conditions, but stealthing is not obviously an invasion based on coercion. A victim’s court battle under a civil rights statute is, then, distinctly uphill.

Nonconsensual-condom-removal victims may have more luck in court under tort law than gender violence civil rights options. That said, survivors may be rightfully optimistic that, faced with a sufficiently open-minded judge, they may be able to establish that current civil law provides a remedy for nonconsensual condom removal.

#### **D. Contract Law**

The victims in Part I point out perhaps the most obvious risks: unwanted pregnancy and STIs, bad outcomes to which current law likely offers remedy. Yet no victims reported actually becoming pregnant or being diagnosed with an STI—but they still experienced real harm. All spoke of fear of these outcomes. But apart from pregnancy and STIs altogether, the nonconsensual-condom-removal victims spoke of a betrayal of trust that insulted their dignity and violated their autonomy. As discussed above, none of the interviewed victims

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93 Westchester County law looks much like the New York City statute discussed *supra*; Illinois law is more similar to California law. See Westchester County, NY, Laws of Westchester County ch. 701 (2001); 740 ILL. COMP. STAT. ANN. 82/1–20 (West 2013).

94 CAL. CIV. CODE § 52.4 (West 2016).

identified their experience as a rape. Many did, however, identify a violation of agency of a kind with, if not identical to, rape.

In this way, the experienced harm of nonconsensual condom removal can also be understood as a contract violation. The focus on the physical act of violence within a battery claim, criminal prosecution, or gender violence cause of action fails to comprehend a central aspect of the wrong: the breaking of an agreement with disregard for the other's will and wellbeing, difficult to distinguish from a simple disregard for the other, period.

However, courts generally refuse to recognize sex as consideration for a valid contract<sup>95</sup>—and it is difficult to imagine what other than sex could provide consideration in the agreement to have sex with a condom. The policy emerged from an objection to commercial sex, operationalized by the common law tradition of refusing to enforce contracts counter to public policy.<sup>96</sup> Yet the objection is not limited to sex work. Instead, courts often blur the distinction between sex work and sex otherwise exchanged as part of a non-pecuniary contract.<sup>97</sup> Consider, for example, the landmark case *Marvin v. Marvin*. In that case, the longtime romantic companion of the actor Lee Marvin, Michelle Triola Marvin, filed suit after their split for “palimony”—that is, the equivalent of alimony for an unmarried dependent partner. Lee, Michelle claimed, had promised to provide for her financially for the rest of her life, and she had relied on that vow, creating a contract. There, the California Supreme Court determined that the presence of sex in the Marvins' non-marital romantic relationship did not automatically mean that sex served as the primary consideration for a possible marriage-like contract. Nonetheless, it made clear that, if sex had played that role, the agreement would have been invalid because “such a contract is,

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95 See, e.g., Andrew Gilden, *Sexual (Re)consideration: Adult Entertainment Contracts and the Problem of Enforceability*, 95 GEO. L.J. 541, 557–79 and accompanying notes (2007) (tracing history of courts' refusal to recognize sex as consideration); *Siple v. Corbett*, 447 A.2d 1184, 1186 (Del. 1982) (“Contracts founded upon consideration for romantic involvement including sexual favors are void as against public policy and unenforceable by the courts.”); *Hewitt v. Hewitt*, 39 N.E.2d 1204, 1208 (Ill. 1979) (noting courts' historical refusal to treat sex as consideration); *Latham v. Latham*, 547 P.2d 144, 147 (Or. 1976) (deciding a contract was not void because sex was not the primary or only form of consideration); RESTATEMENT (FIRST) OF CONTRACTS § 589 (1932) (“A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal; but subject to this exception such intercourse between parties to a bargain previously or subsequently formed does not invalidate it.”).

96 Gilden, *supra* note 95, at 548–59. As Gilden notes, the public policy doctrine, developed in common law, has been codified in California's Civil Code. CAL. CIV. CODE § 1550(3) (West 1982).

97 See, e.g., *Siple*, 447 A.2d at 1186.

*in essence*, an agreement for prostitution and unlawful for that reason.”<sup>98</sup> In so writing, the court made clear that, for the purposes of contract law, sex as consideration is impermissible even where the agreement is not *in fact*, but only “in essence,” prostitution. Later, another California court determined that a mistress could not establish a contract with her late paramour because their arrangement was based upon “illicit meretricious consideration,”<sup>99</sup> even though no party or the court ever suggests the couple’s forty-two year relationship was in fact sex work.

Despite the long-standing presumption against sex as consideration, Andrew Gilden notes that at least one lower state court has narrowly interpreted the ban to apply only to contracts for actual sex work.<sup>100</sup> *Della Zoppa v. Della Zoppa* concerned a romantic agreement wherein an unmarried couple agreed to share property. “An integral part of the basic agreement . . . was commitment to try to ‘have a family,’” which, the trial court worried, necessarily included sex—which might be meretricious consideration.<sup>101</sup> The appellate court, however, determined that only prostitution itself—and not other forms of sex somehow related to a contract, like in the instant case of *Marvin*—is forbidden.<sup>102</sup> Gilden is ultimately pessimistic that the court’s attempts to depart from tradition are well-reasoned enough to provide a tenable strategy for plaintiffs seeking enforcement of contracts based in sexual consideration, in part because the *Della Zoppa* court narrows violations of public policy that can invalidate a contract only to violations of the penal code.<sup>103</sup> Nonetheless, *Della Zoppa v. Della Zoppa* reminds us that the capacious ban is not inevitable. Given courts’ general reluctance to wade into intimate agreements, judges may lean on the ban as an excuse. However, if any court were willing to consider contracts made about non-commercial sex, it might, for lack of alternatives, pursue the *Della Zoppa* strategy to accept sex as consideration.

Even apart from the precedential obstacles to a successful claim, contract law’s primary power in the context of nonconsensual condom removal is likely as an ethical lens rather than practical tool. Imagining a contract remedy helps us to recognize that other causes of

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98 *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (emphasis added).

99 *Taylor v. Fields*, 224 Cal. Rptr. 186, 194 (Cal. Dist. Ct. App. 1986).

100 Gilden, *supra* note 95, at 560 (discussing *Della Zoppa v. Della Zoppa*, 103 Cal. Rptr. 2d 901 (Cal. App. Dep’t Super. Ct. 2001)).

101 *Della Zoppa*, 103 Cal. Rptr. 2d at 903–04.

102 *Id.* at 905.

103 Gilden, *supra* note 95, at 560.

action—even under a gender violence statute—fail to foreground an aspect of the harm of nonconsensual condom removal central to victims' experience: one party's unilateral decision to violate the terms of an agreement. Of course, while contract is the obvious metaphor, plenty of legal doctrines incorporate a similar concept in the form of consent. While other legal remedies, as currently used, may prioritize the physical violation over the psychic harm of the "broken contract," a powerfully written complaint or insightful judge could likely present a rich vision of the disregard for the victims' personhood central to "stealththing" even without a contract claim.

#### IV. The Case for a New Cause of Action

A few concerns may emerge from the above discussion of potential remedies. One might worry that existing law is insufficient for victims. The success of tort remedies, absent state sexual battery statutes, will depend on courts' recognition of the severity of the harm. Contract claims are likely unavailable. A prosecutor willing to take up a nonconsensual-condom-removal case, or a plaintiff seeking remedy in tort, will have to convince a judge that condom removal vitiates consent—a reasonable but by no means uncomplicated conclusion. Plaintiffs lucky enough to live in a city, county, or state that provides a gender violence cause of action will face the same obstacle to establish a "crime of violence."

Plus, even if law as it stands today might in fact prohibit nonconsensual condom removal, it has plainly failed to condemn "stealththing." Whether or not legal recourse may be available, the absence of such cases shows that few recognize such condom removal as a potential legal wrong. Tellingly, as is clear from Part I, many victims are unsure whether their experiences are merely boys behaving badly or a true moral wrong.

Even if a plaintiff did prevail in court, the law might fail to articulate the actual harm experienced by victims. As discussed in Part III, contract law is uniquely situated to capture the dignitary harm victims report: a sexual partner's clear refusal to abide by mutually agreed upon conditions, as though the survivor's desires and decisions were worthy of no respect. The violated *agreement* is not legible in tort or criminal law. If courts are unwilling to narrow the sexual consideration ban though, contract law will be unavailable. Victims, then, may lack legal language to express the harm that they feel, asked instead to fit their experiences into boxes that fail to capture their assailants' refusal to honor a joint commitment. While that may make little difference for damages, survivors may leave court frustrated that they were unable to communicate their lived injury.

A new tort specific to condom removal might ameliorate some of the concerns raised

above. Such a tort should prohibit the removal of a condom during sex without both partners' affirmative permission. The law is far from requiring such affirmative agreement to most sexual practices.<sup>104</sup> However, the alternative—a “no means no” model, where the tort would require victim objection rather than the absence of permission—would be of little use: as Part I demonstrates, nonconsensual-condom-removal victims rarely know the sex act has changed and the risks brought by even brief condom-less penetration, before the victim has a chance to object, are great. A requirement for affirmative permission reflects the contract-like nature of the sexual agreement; the partners must actively negotiate to change the conditions of a joint enterprise, rather than proceed unilaterally until they meet resistance. As a result, the specific cause of action would promote victims' chance of success in court by reducing reliance on judges' willingness to fit an unrecognized harm into a pre-existing legal landscape and send a clear signal that “stealthing” is inexcusable—and, at the same time, could also reflect the “broken contract” harm experienced by victims. The law could give voice to survivors where, to date, it has failed them.<sup>105</sup>

A tort remedy that allows for compensatory and punitive damages and injunctive and declaratory relief—as did the original VAWA gender violence private right of action<sup>106</sup>—would also allow victims to pursue remedies that would best address the varied harms of “stealthing.” To butcher the words of Eve Sedgwick: survivors are different from each other. As demonstrated in Part I, victims experience nonconsensual condom removal in different ways, and a wide range of remedies provides an opportunity for personalized and creative legal interventions.

Although a new tort for nonconsensual condom removal would provide significant benefits to victims, a novel remedy is not without drawbacks. Most significantly, an isolated cause of action may isolate our understanding of the harm. For those resistant to the idea that “stealthing” is any more than rude or, in Bentson's words, “controversial,” situating the act in an existing legal violation—particularly one as ethically evocative as a gender violence right of action or criminal sexual assault—might illuminate the content of the

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104 Anderson, *supra* note 26, at 1403.

105 Leah Plunkett, in her writing on a range of forms of birth control sabotage, suggests that tort liability may be ineffective because it would not add any deterrent effect the risk of child support would not. Plunkett, *supra* note 6, at 97 n.7. Plunkett's concern is not fully responsive to the scope of this Essay: she considers additional forms of contraceptives, not only condoms, but focuses on a single bad outcome, pregnancy. To the extent that the proposed stealthing tort would seek, in part, to address pregnancy-related harms, however, there is no reason to think that additional punishment will be ineffectual. More importantly, though, damages are appropriate to address the dignity harm, which child support does not address.

106 See 42 U.S.C. § 13981 (2012).

wrong: that it is rape-adjacent, as Sara put it, of a kind with recognized gendered harms. Bentson and his gang of “stealth” promoters might not be moved, but perhaps some of the assailants described by victims in Part I might. Of course, as discussed above, the current legal landscape has failed to send a clear message that nonconsensual condom removal is unethical. Yet an advocate might still prefer to try to push courts to hold wrongdoers responsible for violating existing laws before creating a new cause of action.

### CONCLUSION

While overlooked by the law, nonconsensual condom removal is a harmful and often gender-motivated form of sexual violence. Remedy may be found under current law, but a new cause of action may promote the possibility of plaintiffs’ success while reducing negative unintended effects. At its best, such a law would clearly respond to and affirm the harm victims report by making clear that “stealth” doesn’t just “feel violent”—it is.