

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 453 (Cristina Garcia)
Version: May 28, 2021
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Fiscal: No
Urgency: No
AWM

SUBJECT

Sexual battery: nonconsensual condom removal

DIGEST

This bill clarifies that specified sexual contact following the nonconsensual removal of a condom is a sexual battery under the Civil Code, permitting a victim to bring a civil action for damages.

EXECUTIVE SUMMARY

Nonconsensual condom removal (NCCR), also known as “stealthing,” is the practice of removing a condom during sex without the consent of a sexual partner. Not only does NCCR result in a nonconsensual sexual act—consent conditioned on the use of a condom is vitiated when the condom is knowingly removed—but research indicates that NCCR results in increased sexually transmitted infection (STI) rates, increased unwanted pregnancy rates, and negative psychological effects for the victims. This bill would add NCCR to the existing civil sexual battery statute, expressly making it an intentional tort for a person to (1) cause contact between a sexual organ, from which a condom has been removed, and the intimate part of another who did not verbally consent to the condom being removed, or (2) cause contact between an intimate part of the person and a sexual organ of another from which the person removed a condom without verbal consent. Under this bill, victims of NCCR would have a clear path to civil redress for the violation of their bodily autonomy.

This bill is sponsored by the author and supported by the Erotic Service Providers Legal Education and Research Project, UCLA Sexperts, and two individuals. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that a person commits civil sexual battery if they do any of the following:
 - a) Act 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.
 - b) Acts with the intent to cause a harmful or offensive contact with another by use of their intimate part, and a sexually offensive contact with that person directly or indirectly results.
 - c) Acts to cause imminent apprehension of the conduct described above, and a sexually offensive contact with that person directly or indirectly results. (Civ. Code, § 1708.5(a).)
- 2) Provides that a person who commits the tort of sexual battery upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages; and that the court in such an action may also award equitable relief as it deems proper. (Civ. Code, § 1708.5(b) & (c).)
- 3) Defines the following, for purposes of the civil sexual battery statute:
 - a) "Intimate part" is the sexual organ, anus, groin, or buttocks of any person, or the breast of a female. (Civ. Code, § 1708.5(d).)
 - b) "Offensive contact" is contact that offends a reasonable sense of personal dignity. (Civ. Code, § 1708.5(f).)

This bill:

- 1) Adds NCCR to the existing civil sexual battery statute, making it a civil sexual battery for a person to:
 - a) Cause contact between a sexual organ, from which a condom has been removed, and the intimate part of another who did not verbally consent to the condom being removed; or
 - b) Cause contact between an intimate part of the person and a sexual organ of another from which the person removed a condom without verbal consent.
- 2) Makes nonsubstantive conforming changes to the civil sexual battery statute.

COMMENTS

1. Author's statement

I have been working on the issue of "stealthing" since 2017. And I won't stop until there is some accountability for those who perpetrate the act. Sexual assaults, especially those on women of color, are perpetually swept under the

rug. So much stigma is attached to this issue, that even after every critic lauded Micheala Coel's [television show] *I May Destroy You* for its compelling depiction of the horrors of sexual abuse including of stealthing, it got zero Golden Globe nominations. That doesn't seem like an accident or coincidence to me.

It's disgusting that there are online communities that defend and encourage stealthing and give advice on how to get away with removing the condom without the consent of their partner, but there is nothing in law that makes it clear that this is a crime.

Persuing civil action allows for victims to receive compensation that can assist with paying for medical or mental health services that are the result of nonconsensual condom removal. This is important.

This bill also helps with sexual education, allowing for lessons to demonstrate what is and is not a crime. Removing a condom consensually is fine, removing a condom without consent is not.

2. NCCR violates a sexual partner's consent and right to bodily autonomy

It should go without saying that consent to one type of sex, or sex on one occasion, is not consent to any other type of sex or sex on any other occasion – yet this basic statement of bodily autonomy needs to be reiterated and relitigated again and again and again. Until 1974, a defendant accused of sexual assault could introduce evidence of the alleged rape victim's prior sexual encounters as evidence of consent in the case at hand.¹ Until 1994, a defendant accused of sexually assaulting their spouse could use that marital relationship as evidence of consent.² Until 1997, a defendant accused of sexual assault could introduce, without exception, evidence of the alleged rape victim's "manner of dress" as evidence of consent.³ To this day, California has a separate statute for "spousal rape," which carries lighter possible penalties than non-spousal rape.⁴

NCCR is yet another head of the hydra that insists people do not have the right to autonomy over their bodies. The term "stealthing" is associated with NCCR because its perpetrators generally are aware that their sexual partners likely would not consent to the removal of the condom; instead, they remove it "stealthily" during intercourse, and their partners often do not learn of the removal until the perpetrator ejaculates – if

¹ See Evid. Code, §§ 782, 1103(c); SB 569 (Robbins, Ch. 569, Stats. 1974).

² See SB 59 (McCorquodale, Ch. 1188, Stats. 1994).

³ See Evid. Code, § 1103(c)(2); AB 1926 (Wildman, Ch. 127, Stats. 1997.)

⁴ See Pen. Code, §§ 261 & 262, 1203.065 (perpetrators of non-spousal rape, but not spousal rape, are ineligible for a suspended sentence); see also, e.g., Bus. & Prof. Code, §§ 4982, 4989.54, 4990.90 (various clinical licenses may be suspended or denied for rape of a non-spouse, but not rape of a spouse). Three bills were introduced this session to, among other things, eliminate the distinction between spousal and non-spousal rape. (See SB 530 (Cortese, 2021); AB 812 (Cristina Garcia, 2021); AB 1171 (Cristina Garcia, 2021).)

ever.⁵ It is unclear whether NCCR is a new “trend” or whether it is a longstanding practice that has only recently gained attention as part of an increased awareness of the importance of consent.⁶ Whichever it is, research indicates that NCCR is depressingly common, particularly in heterosexual sexual encounters: studies suggest that anywhere from one in ten to one in three sexually active persons has had an intimate partner remove a condom without consent.⁷ For male perpetrators of NCCR, NCCR correlates with higher rates of STIs, unwanted pregnancies by their partners, and a history of sexual aggression and hostility towards women.⁸ For the victims of NCCR, NCCR correlates with higher risk of STIs and unwanted pregnancy, as well as negative mental health outcomes.⁹

Other countries have recognized that sex that violates a condition of consent, such as NCCR, is a form of nonconsensual sex and therefore a form of sexual assault. Courts in the United Kingdom have held that NCCR can be the basis for sexual assault charges.¹⁰ Germany first successfully prosecuted a man for sexual assault for NCCR in 2018.¹¹ And this year, a man in New Zealand was found guilty of rape when he removed a condom after his sexual partner made it clear that the condom was a condition of consent.¹²

⁵ Brodsky, *Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal*, *Columbia Journal of Gender and Law*, 32 (2017), at pp. 188-189 (hereafter Brodsky). Brodsky’s article goes into greater detail about the prevalence and popularity of internet sites that promote NCCR and the misogynistic narratives surrounding the practice. (See *ibid.*) Research shows, however, that men having sex with men are also the victims of NCCR. (Latimer, et al., *Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia*, *PLOS ONE* (Dec. 2018) (hereafter Latimer).)

⁶ Czechowski, et al., “*That’s not what we originally agreed to*: Perceptions, outcomes, and legal contextualization of non-consensual condom removal in a Canadian sample, *PLOS ONE* (2019) at p. 14 (hereafter Czechowski).

⁷ E.g., Boadle, Gierer, & Buzwell, *Young Women Subjected to Nonconsensual Condom Removal: Prevalence, Risk Factors, and Sexual Self-Perceptions*, *Violence Against Women*, 1-20 (Aug. 2020), at pp. 8-9 (hereafter Boadle); Czechowski, *supra*, fn. 5; Latimer, *supra*, fn. 4; see also Kelly Cue Davis, “*Stealth*ing”: Factors Associated with Young Men’s Condom Removal (2019) 38 *Health Psychology* 997 (in a study of male inconsistent condom users, nearly 10 percent reported engaging in NCCR) (hereafter Davis).

⁸ Davis, *supra*, fn. 6.

⁹ Brodsky, *supra*, fn. 4 at pp. 205-206; Latimer, *supra*, fn. 4.

¹⁰ See Crown Prosecution Service, *Legal Guidance, Rape and Sexual Offences, Ch. 6: Consent* (Oct. 19, 2020), <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> [last visited Jun. 4, 2021]; *Julian Assange v. Swedish Prosecution Authority* (Q.B. 2011) EWHC 2849 (Admin), ¶¶ 85-91 (“It would plainly be open to a jury to hold that, if AA had made clear that she would only consent to sexual intercourse if Mr 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 without her consent. 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 to an offence under the Sexual Offences Act 2003.”).

¹¹ Robinson, *Police officer found guilty of condom ‘stealth’ in landmark trial*, *CNN.com* (Dec. 20, 2018), <https://edition.cnn.com/2018/12/20/health/stealth-germany-sexual-assault-scli-intl/index.html> [last visited Jun. 4, 2021].

¹² Chesser, *New Zealand’s first successful ‘stealth’ prosecution leads the way for Australia and elsewhere*, *The Conversation* (Apr. 27, 2021), <https://theconversation.com/new-zealands-first-successful-stealth-prosecution-leads-the-way-for-law-changes-in-australia-and-elsewhere-159323> [last visited Jun. 4, 2021].

3. This bill clarifies that NCCR is a civil sexual battery, so that a victim of NCCR can recover damages from the perpetrator

This bill does not, as other countries have done, expressly criminalize NCCR as a form of sexual assault or sexual battery.¹³ Instead, this bill takes the more modest step of expressly including NCCR within the civil tort of sexual battery, thereby allowing a victim of NCCR to bring a civil suit for damages against the perpetrator. While the civil sexual battery statute arguably could be read to include NCCR already, this bill will provide clarity and avoid the need to litigate over whether NCCR is a sexual battery as a matter of law. Moreover, expressly including NCCR within the sexual battery statute will make clear to potential perpetrators that NCCR is a violation of a sexual partner's rights and, hopefully, dissuade them from committing NCCR in the first place.

The bill's language makes liability for NCCR as a sexual battery contingent on three main elements: (1) contact between an intimate part of a person and the sexual organ of another person, (2) from which a condom has been removed, (3) without the victim's consent. While the bill's use of the word "removed" generally implies an intent to remove the condom, the formulation of the bill makes clear that it is the intentional sexual contact that *follows* the nonconsensual condom removal that gives rise to a battery. Thus, while reports of NCCR generally involve a person deliberately removing a condom with the intent of proceeding with sex without a condom, this bill would also apply to what might be deemed "opportunistic" NCCR, e.g., a person who realizes a condom has inadvertently fallen off but continues with the sexual act without informing their partner of the change in circumstances. The bill would not, however, capture situations where neither partner is aware that the condom is no longer in place, because civil battery necessarily requires an intent to harm or with a willful disregard of the plaintiff's rights.¹⁴ The bill therefore ensures that all deliberate sexual contact made without a condom, when the perpetrator knows that their partner did not consent to condomless contact, falls within the sexual battery tort, while excluding inadvertent condomless contact.

The bill is gender-neutral, so while NCCR is documented as overwhelmingly perpetrated by men, persons of any gender could be liable for intentionally making sexual contact after a condom has been nonconsensually removed. The author's recent amendments also removed language that required the condom to be removed from a penis, thereby ensuring that there is no loophole for NCCR of vaginal condoms.

Overall, this bill is a commonsense measure to ensure that victims of NCCR have a civil remedy for the damages caused when a sexual partner intentionally violates the terms of their consent and their bodily autonomy.

¹³ NCCR likely already constitutes misdemeanor sexual battery, because it is the touching of an intimate part of another that is against the will of the person touched and is for the specific purpose of sexual arousal or gratification of the toucher. (*See* Pen. Code, § 243.4(e)(1).) The Committee, however, is not aware of any instance of NCCR being prosecuted under this statute.

¹⁴ *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 613; *see* CACI No. 1320 (2021 ed.) ("Intent").

4. Arguments in support

According to bill supporter UCLA Sexperts:

“Stealthing” is a California public health concern because of how it directly increases STI rates. Before the pandemic of COVID-19, the California State Health Department found in 2017 that there was a 45 percent increase in total cases of chlamydia, gonorrhea, and syphilis from 2012. From 2008-2017, syphilis rates have continued to increase amongst all genders, resulting in a 743 percent increase in cases amongst women and 268 percent amongst men. The use of a condom during sex is a well-known barrier method for STI prevention, but because many victims of “stealthing” do not realize they have experienced this form of sexual assault, they do not stop engaging in the sexual act after the condom has been removed.

“Stealthing” is not only a physical health concern in California, but it is trauma-inducing for the victims, affecting their later sexual experiences, mental health, and social relationships with friends and family. Sexperts defines “sex” as an act requiring two or more parties, an act that has the potential to spread STIs, and an act that demands consent. Without consent, sex cannot take place. “Stealthing” violates our standards of a healthy, positive sexual experience and can have long-lasting effects on the wellbeing of the victims of such an assault.

SUPPORT

Erotic Service Providers Legal Education and Research Project
Two individuals
UCLA Sexperts

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 1997 (Cristina Garcia, 2018) would have made it a crime to remove or damage a sexually protective device during sex without consent, where the other person agreed to have sex on the condition that the sexually protective device was used. AB 1997 died in the Assembly Public Safety Committee.

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AB 1033 (Cristina Garcia, 2017) would have expressly added NCCR and nonconsensual condom-tampering to the definition of criminal sexual battery. AB 1033 died in the Senate Appropriations Committee.

PRIOR VOTES:

Assembly Floor (Ayes 74, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 0)
