

“Stealthing Uncovered: The Law and Psychology behind Categorizing A Modern Day “Sex Trend”

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ABSTRACT

Crimes of sexual nature are often considered targeted against a particular gender, that is, done with the intent to discriminate the victim’s gender. However, stealthing a sex trend amidst the bustling culture of online dating highlights the question of “whether all sexual crimes are gendered crimes?”. The Authors aim to meta-analyse studies on stealthing to determine the aetiology of the crime and rethink the laws presently dealing with sexual conduct. The research dissects sexual violence from gendered one and underlines the issue of societal subjectivity in law making.

PART I: INTRODUCTION

“He’d literally proven himself to be unworthy of my trust. . . . There is no situation in which this is something I agreed to do”¹. “He saw the risk as zero for himself and took no interest in what it might be for me That hurt”².

The modern day online-dating and hook up culture brings forth the double-edged sword called “stealthing”, the distressful accounts of which have been highlighted by victims across several globally observed platforms³. The act of stealthing is the non-consensual condom removal during intercourse by men, where the other partner (man/woman) agreed to have

¹ Alexandra Brodsky, “*Rape Adjacent : Imagining Legal Responses to Non-Consensual Condom Removal*”, 32 Colum. J. Gender &L, p.187 (2017); See Also Alexandra Brodsky, Telephone Interview with “Sara” (Feb. 24, 2016) (transcript on file with author)

² Ibid, See Also Alexandra Brodsky, Email from “Irin” to author (Feb. 21, 2016) (on file with author).

³ Ibid; Vonny Leclerc, “*Lets Not Kid Ourselves that Stealthing is a Trend. It’s Rape*”, THE NATIONAL (June 13, 2020) <https://www.thenational.scot/politics/15256580.vonny-moyes-lets-not-kid-ourselves-that-stealthing-is-a-trend-it-is-rape/>; Huges, “The Most Terrifying Aspect of Stealthing?, The Online Encouragement”, THE POOL , Retrieved from: <https://Www.The-Pool.Com/News-Views/Opinion/2017/19/ Sali-Hughes-On-Stealthing-And-The-Rise-Of-Online-Forums> (Last accessed June 14,2020); Jean Edelstein, “*Dating after #Metoo : He secretly took off his condom during sex- it’s a thing*”, THE GUARDIAN (May 27,2018),Retrieved From : <https://www.theguardian.com/lifeandstyle/ 2018/may/09/dating-after-metoo-he-secretly-took-off-his-condom-during-sex-its-a-thing> (last Accessed June 13, 2020); Maulin, “*Stealthing Isn’t Sex trend, Its sexual assault- and it happened to me*”, SUPPORT THE GUARDIAN (May 22, 2017), Retrieved from : <https://www.theguardian.com/commentisfree/2017/may/22/stealthing-sex-trend-sexual-assault-crime> (Last accessed June 14, 2020); Julia Reiss, “*I’ve Been Stealth,- But Was It Sexual Assault?*”, CONGRESSMAN RO KHANNA (March 16, 2018), Retrieved from : <https://khanna.house.gov/media/in-the-news/ive-been-stealthed-was-it-sexual-assault> (Last accessed June 14 2020); Jasmine Stone, “*Stealthing, Lets Have That Talk*”, 2 OCEANS VIBE NEWS (May 24, 2017), Retrieved from: <https://www.2oceansvibe.com/2017/05/24/Stealthing-Lets-Have-That-Talk/#Ixxz5ea4wlhiv> (Last accessed June 14, 2020)

protected sex only⁴. The pathbreaking paper by Brodsky in 2017 called stealthing as rather a violation of contract than rape⁵ which the Authors differ to agree.

Making agreements to have mutual protected sex as ‘contractually binding’ in the first place, is equivalent to legalising slave trade. Intrinsicly because, human dignity cannot be the cost of agreement, where self-worth attached to bodily dignity is at a risk of being contractual hostage⁶. Therefore, stealthing cannot be called a violation of a legal contract. This brings us to a major dilemma, (i) is stealthing a gendered crime? ;(ii) which law gives valid protection to the victims of stealthing? Consequentially to understand the possible scheme of legislative policy for this trend, the Authors dwell into a larger question: If it is a crime, why is it committed? Part II shall essentially be dealing with the cause-effect psychology of stealthing.

PART II: THE “WHY” OF STEALTHING – PSYCHOLOGICAL ANALYSIS

The psychosociological data about Stealthing comes from correlative studies, “correlative” data does not imply causation rather co-occurrence of things such as alcohol use, various psychological states, occupations or situations with Stealthing with measurable statistical significance that is undoubtedly worth investigating.

II.a. Stealthing from a psychological researcher’s point of view

Alcohol consumption correlates quite strongly with sexual abuse and sexual misconduct⁷. An alarming number of studies indicate this. The age group within which sexual misconduct and alcohol consumption are strongly correlated has a large range (conservatively speaking 16-45) but the main bulk of cases occur between people aged 18-25⁸, this age range is the same as that of most college going students. The data on Stealthing would indicate that its more likely to happen with alcohol consumption than not⁹ in between 18-25 years of age. Studies have suggested an increased likelihood in men to engage in Stealthing, not label it as sexual assault and show less concern for the act committed while under the influence of alcohol¹⁰. This was done in a study¹¹ experimentally by measuring the frequency of “sexual aggression congruent emotions/motivations” or the occurrence of arousal with emotions like anger or

⁴ BRODSKY, supra note 1 at 185

⁵ Ibid, at 206

⁶ MICHAEL J. SANDEL, *JUSTICE: A READER* 127-153, (2007), See Also Timmermann, Jens. "Kantian Duties to the Self, Explained and Defended." *Philosophy* 81, no. 317 (2006): 508. Retrieved from: . www.jstor.org/stable/4127406 (Last Accessed June 14, 2020); GREAT BRITAIN, & WARNOCK, M. (1984). *Report of the Committee of Inquiry into Human Fertilisation and Embryology*. London, H.M.S.O.; DANIEL FRIEDMANN, DAPHNE BARAK-EREZ, *HUMAN RIGHTS IN PRIVATE LAW* (3rd ed. 2003)

⁷ Antonia Abbey , “Alcohol-related sexual assault: a common problem among college students”, *Journal of Studies on Alcohol*, Supplement s14, 118-128,(2002)

⁸ Ibid

⁹ Rosie L. Latimer, *Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia*, [ncbi.nlm.nih.gov](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6306234/#), 2018 Dec 26, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6306234/#>

¹⁰ Davis, K. C. , *The Influence Of Alcohol Expectancies And Intoxication On Men's Aggressive Unprotected Sexual Intentions. Experimental And Clinical Psychopharmacology*, 18(5), 418–428, (2010), <https://doi.apa.org/record/2010-21046-004?doi=1>

¹¹ Ibid

hate before and after the consumption of alcohol. The results suggested that in men with higher levels of traits such as sexual aggressiveness, history of aggression towards women and the tendency towards nonconsensual condom removal had the same traits which were demonstrably and measurably higher after alcohol consumption¹²

Another study has suggested that men who have greater hostility toward women and a more severe history of sexual aggression are more likely to engage in non-consensual condom removal behaviour after consuming alcohol¹³. What's more alarming is that from 626 participants¹⁴, it was reported that people had been engaging in Stealthing as early as 14 with the age at the time of interview being 21-30. The participants were from an urban area of the Pacific Northwest in America.

State impulsivity is a measure of a tendency to act on emotions without forethought, measuring it gives us the likelihood of you giving in to how you feel without thinking about its consequences in most situations. Self-efficacy is the degree to which an individual believes in their actions and how much they can do to change themselves or their perspective, people with low self-efficacy tend to have low self-restraint and show a decreased potential to change and grow intentionally, they see themselves as unable to intervene with themselves. Research shows that state impulsivity is higher¹⁵ and self-efficacy is lower¹⁶ in those men that exhibit higher amounts of condom use resistance (CUR)¹⁷, which is a well-documented social phenomenon.

Condom related erection loss¹⁸, which primarily occurs in men who find condoms uncomfortable to wear and men who have psychologically based Erectile Dysfunction¹⁹ or recurrent episodes of ED seem to be relevant. These men are more likely to engage in CUR or inconsistent use of condoms during sex or removal of it prior to completion than men who do not have such issues.²⁰

II.b. Psychological Underpinning to Stealthing

From the Victim's perception, it has been recorded that women who have experienced Stealthing are 3 times more likely to classify it as assault than women who have not²¹. We

¹² Ibid

¹³ Davis KC., "Stealthing": Factors Associated With Young Men's Non-consensual Condom Removal", Health Psychol.;38(11):997-1000., (2019), <https://pubmed.ncbi.nlm.nih.gov/31259595/>

¹⁴ Ibid

¹⁵ Davis, K.C., Danube, C.L., Neilson, E.C. et al. , "Distal And Proximal Influences On Men's Intentions To Resist Condoms: Alcohol, Sexual Aggression History, Impulsivity, And Social-Cognitive Factors", AIDS Behav 20, 147-157 (2016)., <https://doi.org/10.1007/s10461-015-1132-9>

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Graham Cynthia A., Crosby Richard, Yarber William L., Sanders Stephanie A., McBride Kimberly, Milhausen Robin R., Arno Janet N. "Erection loss in association with condom use among young men attending a public STI clinic: potential correlates and implications for risk behaviour" Sexual Health 3, 255-260, (2006), <https://doi.org/10.1071/SH06026>

¹⁹ Ibid

²⁰ Ibid

²¹ LATIMER, supra note 10

know that in 20 percent of reported cases of sexual abuse victims will make excuses for their abusers and try not classify what has happened as a crime²². We have also seen that people are more likely to have explicit discussions about sexual preference when they have met online than in person²³, this may be because most dating apps are often used to for casual sexual encounters, so sex is more or less planned.

The following is a deductive summation of these facts, victims of Stealthing perceive it as bodily violation, being put at risk for STIs, pregnancy, as a breach of trust and in some cases as an act of hostility. This is including the less frequent cases of Stealthing where the only explanation is an antisocial behaviour such as non-consensual impregnation. We may conclude then that it is likely that women perceive Stealthing as a form non-consensual sex, tend toward not reporting the encounter to the authorities, attempt to hide 'victim-criminal narrative' (more likely out of fear of social branding as "victim" or due to a prolonged abusive relationship) and when Stealthing has not been experienced are 3 times less likely to call it assault²⁴.

The Perpetrator/Stealther- Men who engage in Stealthing seem to show a higher probability toward a variety of traits such as high condom use resistance, higher than average sexual aggressiveness, a history aggression/anger towards women, high impulsivity and low self-efficacy²⁵. Studies show that the likelihood of sexual abuse or misconduct in general and Stealthing is exacerbated by alcohol consumption prior to sex. We also know that there is a higher degree of Stealthing in sexual encounters with prostitutes²⁶. To men Stealthing is most often a method of self-gratification which is done with an awareness that their partner does not want this which in some cases seems to be part of the gratification. It can have to do with certain people enjoying the unwillingness of their partner. A predisposition toward Stealthing is statistically indicative of some measurable deviant traits as have been discussed but it is clear that more experimental studies and research is required to conclude whether Stealthing is a behaviour connected with a discrete pathology.

Sex offender rehabilitation is a research grey area, for two reasons; A small research sample size, not enough long-term studies have been done tracing effectiveness of various styles of therapy in sex offenders²⁷ (Research specifically about Stealthing being entirely absent), and Therapy with sex offenders has proven to be clinically relevant as it does seem to reduce recidivism or repeat offending^{28,29}. Even so given current social/political attitudes towards sex offender rehabilitation, lack of any clear clinical approach or path to sex offender

²² Ibid

²³ Ibid

²⁴ Ibid

²⁵ DAVIS KC, supra note 14

²⁶ LATIMER, supra note 10

²⁷ Brooks-Gordon, B., & Bilby, C., *Psychological interventions for treatment of adult sex offenders*, BMJ (Clinical research ed.), 333(7557), 5–6., (2006). , <https://doi.org/10.1136/bmj.333.7557.5>

²⁸ Ibid

²⁹ Cognitive Behavioural Therapy has been particularly effective among others

rehabilitation, the prospects of rehabilitation are bleak at best, for the time being and must be left to more time and research.

PART III: THE LEGAL PARADOX – SOCIETY OVER SCIENCE?

The psychological studies are evidence to the wider public harm stealthing has created by ways of STIs, forced impregnation and most importantly violation of one's bodily dignity. Therefore, the authors answer the first question of whether the act of stealthing is gendered in negative essentially because this trend to "stealth" is an act of manifesting sexual aggression to seek gratification at the cost of another's sexual autonomy³⁰. However, the answer to the second question as to laws available for the victim enables us rethink the manner in which stealthing could be classified.

III.a. Sexual violence v. Gendered Violence

The universal understanding of Human rights today, has interpreted sexual autonomy to be within the right to live with dignity³¹ and thus inalienable for every individual³². Sexual autonomy may be described as one's right to choose how and with whom one expresses sexually³³. Thus sexual consent of an individual becomes an instrumental tool to exercise this sexual autonomy³⁴. However, the act of stealthing disregards one's sexual consent to only have protected sex and in turn violates one's sexual autonomy. Additionally, accounts of stealthing in cases of homosexual intercourse³⁵ further establish that sexual violence through stealthing doesn't have a "gendered" target of victims. The studies discussed earlier in the paper conclude that the stealthier's ultimate intention is to gain selfish gratification from and by violation of the partner's sexual autonomy. Stealthing, hence is different from what may be called gendered violence, where most scholars believe that stealthing is part of the Men's Rights Movement to reclaim patriarchy and in doing so commit discrimination and hostility towards women³⁶.

While dominance and control over power remains a similar notch between stealthing and rape, stealthing is triggered from low self-esteem in form of sexual violence, while the

³⁰ MM Blanco, "Sex Trend or Sexual Assault? The Dangers of "Stealthing" and the Concept of Conditional Consent," *Penn State Law Review*: Vol. 123 : Is. 1 , Article 14, pp 234-235 (2018)

³¹ *K.S. Puttaswamy v. Union Of India*, 2017 (10) SCC, page 367 -368; *Navtej Singh Johar v. Union of India* (2018) 10 SCC page 109 (para 138, 139,140); Micheal Kirby, "Human Rights Gay Rights", Future Leaders (2016)

³² Ronald Dworkin, *Taking Rights Seriously*, Duckworth, (1977)

³³ NICOLA LACEY, *UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY* p. 104 (1998)

³⁴ Jack Vidler, *Ostensible consent and the limits of sexual autonomy*, *Macquarie Law Journal* 17, pg 110 (2017); Bagwell-Gray, Meredith E., et al. "Intimate Partner Sexual Violence: A Review of Terms, Definitions, and Prevalence.", *Trauma, Violence & Abuse*, vol. 16, no. 3, pp. 316-335 (2015), Retrieved from : *JSTOR*, www.jstor.org/stable/26638362. (Last Accessed 14 June 2020)

³⁵ LECLREC, supra note 3; See Also Amanda Weiss, *Criminalising Sexual transmission of HIV* , U. CHI. LEGAL F. 389, 389 (2006); BRODSKY, Supra note 4

³⁶ BRODSKY, supra note 1 at 188-189; See Also Devrupa Rakshit, *Stealthing: The Reprehensible Practice of Tossing Consent out of the Window*, *LIVE WIRE GENDER & SEXUALITY* (Jan 13, 2020) , <https://livewire.thewire.in/gender-and-sexuality/stealthing-consent-rape-condoms/>

reasons of rape varies in a broader spectrum triggered by hostility³⁷, hatred and humiliation³⁸ towards the victim from the opposite gender. While it is established that stealthing is a crime of sexual violence and not gendered one, the authors are posed with the dilemma of societal differences in terms of affixing this sexual violence under the laws of sexual assault, rape and stealthing.

II.b. Dilemma of Crime Classification

The larger issue arises as to finding a definite classification for this crime of sexual violence called stealthing. The courts of law across the globe has taken diverse approach in order to criminalise it. In 2014, Supreme Court of Canada held the convict guilty if “aggravated sexual assault” where stealthing was committed³⁹. Conversely in the 2017 Swiss stealthing case, the court of Lausanne pressed the charges of rape but on appeal were revised to convicting on the charge of “defilement”⁴⁰. The German Court in the 2018 case considered this a crime of sexual assault though the charge pressed was for rape⁴¹. A similar tilt of approach was seen in Australia’s case of stealthing by a surgeon on a date with a doctor⁴². Interestingly, in 2011 the UK High Court in *Assange v. Swedish Prosecution Authorities*⁴³ widened the meaning of consent to include “conditional consent” wherein, “true consent” makes it necessary to respect the conditions upon which such a consent to have sex was given⁴⁴. Thus, the court held the accused guilty of rape.

The debate as to whether stealthing is rape or sexual assault intrinsically lies in the factors which different states consider while framing the laws. While empirical studies establish strong link between sexual violence and disregard of sexual consent, for Swiss Criminal code, the technicalities of how the sexual act was committed assumes prime importance⁴⁵. Thus, whether or not consent to such condom removal was given is not deliberated. On the other hand, U.K laws do seem to consider presence consent and gender neutrality while drawing the boundaries of sex crimes⁴⁶.

³⁷ D. KELLY WEISBERG, *APPLICATION OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES*, Philadelphia: Temple University Press, Introduction to section on rape, 412 (1996)

³⁸ NAOMI SCHEMAN, ‘RAPE’ ENCYCLOPAEDIA OF ETHICS, p.236 (2nd ed. 2001)

³⁹ Cohen Lask, Danielle Reece-Greenhalgh, *Stealthing, Consent and the Law: Are perpetrators protected?*, CORKER BINNING (June 29, 2017) <https://www.corkerbinning.com/stealthing-consent-and-the-law-are-perpetrators-protected/> (Last Accessed June 15, 2020)

⁴⁰ *Ibid*, See Also Michael Shields, *Corrected - Swiss court upholds sentence in "stealthing" condom case*, REUTERS, May 9, 2017

⁴¹ Matthew Robinson, *Police officer found guilty of condom 'stealthing' in landmark trial*, CNN HEALTH December 20, 2018

⁴² Dr Brianna Chesser, *Case in Victoria could set new legal precedent for stealthing*, RMIT AUSTRALIA (August 16, 2019) , Retrieved from : <https://www.rmit.edu.au/news/all-news/2019/aug/stealthing-legal-precedent> (Last accessed June 15, 2020)

⁴³ [2011] EWHC Admin 2849

⁴⁴ *Ibid* at 84

⁴⁵ Swiss Criminal Code, Art. 190- 198 (1937)

⁴⁶ Home Office Sex Offences Review, *Setting the Boundaries: Reforming the law on sex offences* , para 2.8.5, at 15 (2000); *R. v. Wilson*, (1993) 14 Crim. App. 627, 631 (U.K.) ;*R. v. Hiscock*, (1992) 13 Crim. App. 24, 26 (U.K.); *R. v. Sheen*, (1987) 9 Crim. App.

The problem to classifying stealthing as a crime intrinsically lies in a state's understanding of sex and consent. While countries like UK are evolving to incorporate updated threshold of consent, countries like Australia are stuck on to seeing consent as that which is unconditional/free agreement⁴⁷.

PART IV: CONCLUSION

Through the lens of uncovering stealthing, the authors conclude that Law and Human Psychology are in constant debacle over the question of Crime, gender and sexual conduct. The act of stealthing is beyond the technical approach that courts undertake to distinguish elements of a crime, rather stealthing is a unique case where courts may be compelled to understand the role science plays in decoding sexual behaviour from criminal ones. The relationship of sexual violence and individual autonomy has challenged the policy behind "gendered crimes".

⁴⁷ CHESSER, *supra* note 42