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

*Anmol Kaur Bawa
Symbiosis Law School,
Pune

**Kshitij Kumar
Kalinga State University

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 platforms\(^3\). 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).

protected sex only\textsuperscript{4}. The pathbreaking paper by Brodsky in 2017 called stealthing as rather a violation of contract than rape\textsuperscript{5} 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. Intrinsically because, human dignity cannot be the cost of agreement, where self-worth attached to bodily dignity is at a risk of being contractual hostage\textsuperscript{6}. 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 misconduct\textsuperscript{7}. 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 18-25\textsuperscript{8}, 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 not\textsuperscript{9} 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 alcohol\textsuperscript{10}. This was done in a study\textsuperscript{11} experimentally by measuring the frequency of “sexual aggression congruent emotions/motivations” or the occurrence of arousal with emotions like anger or

\textsuperscript{4} BRODSKY, supra note 1 at 185  
\textsuperscript{5} Ibid, at 206  
\textsuperscript{8} Ibid  
\textsuperscript{9} Rosie L. Latimer, Non-consensual condom removal, reported by patients at a sexual health clinic in Melbourne, Australia, ncbi.nlm.nih.gov, 2018 Dec 26, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6306234/#  
\textsuperscript{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 consumption\(^\text{12}\).

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 alcohol\(^\text{13}\). What’s more alarming is that from 626 participants\(^\text{14}\), 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 higher\(^\text{15}\) and self-efficacy is lower\(^\text{16}\) in those men that exhibit higher amounts of condom use resistance (CUR)\(^\text{17}\), which is a well-documented social phenomenon.

Condom related erection loss\(^\text{18}\), which primarily occurs in men who find condoms uncomfortable to wear and men who have psychologically based Erectile Dysfunction\(^\text{19}\) 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\(^\text{20}\).

**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 not\(^\text{21}\). We

---

\(^{12}\) Ibid  
\(^{14}\) Ibid  
\(^{16}\) Ibid  
\(^{17}\) Ibid  
\(^{19}\) 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 crime. We have also seen that people are more likely to have explicit discussions about sexual preference when they have met online than in person, 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 assault.

The Perpetrator/Stealth- 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-efficacy. 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 prostitutes. 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 offenders (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. 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
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 questioned 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 autonomy. However, the answer to the second question as to laws available for the victim enables us rethink the manner in which stealing 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 dignity and thus inalienable for every individual. Sexual autonomy may be described as one’s right to choose how and with whom one expresses sexually. Thus sexual consent of an individual becomes an instrumental tool to exercise this sexual autonomy. 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 intercourse 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 thief’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 stealing is part of the Men’s Rights Movement to reclaim patriarchy and in doing so commit discrimination and hostility towards women.

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
reasons of rape varies in a broader spectrum triggered by hostility\textsuperscript{37}, hatred and humiliation\textsuperscript{38} 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.

\section*{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 committed\textsuperscript{39}. 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”\textsuperscript{40}. The German Court in the 2018 case considered this a crime of sexual assault though the charge pressed was for rape\textsuperscript{41}. A similar tilt of approach was seen in Australia’s case of stealthing by a surgeon on a date with a doctor\textsuperscript{42}. Interestingly, in 2011 the UK High Court in Assange v. Swedish Prosecution Authorities\textsuperscript{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 given\textsuperscript{44}. 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 importance\textsuperscript{45}. 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 crimes\textsuperscript{46}.

\begin{thebibliography}{99}
\bibitem{Scheiman} NAOMI SCHEMAN, \textit{‘RAPE’ ENCYCLOPAEDIA OF ETHICS}, p.236 ( 2\textsuperscript{nd} ed. 2001)
\bibitem{Ibid} Ibid, \textit{See Also} Michael Shields, \textit{Corrected - Swiss court upholds sentence in "stealthing" condom case}, REUTERS, May 9, 2017
\bibitem{Robinson} Matthew Robinson, \textit{Police officer found guilty of condom ‘stealthing’ in landmark trial}, CNN HEALTH December 20, 2018
\bibitem{EWHC} [2011] EWHC Admin 2849
\bibitem{Ibid at 84} Ibid at 84
\bibitem{Swiss Code} Swiss Criminal Code, Art. 190- 198 (1937)
\end{thebibliography}
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 agreement.

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