

CONCURRENCE IN SENATE AMENDMENTS

AB 453 (Cristina Garcia)

As Amended May 28, 2021

Majority vote

SUMMARY

Expands what actions constitute a sexual battery, under the Civil Code, to include an act that causes contact between a penis, from which a condom has been removed, and the intimate part of another who did not verbally consent to the condom being removed.

Senate Amendments

Change "penis" to "sexual organ" and specify that a person commits a sexual battery who causes contact between an intimate part of the person and a sexual organ of another from which the person removed a condom without verbal consent.

COMMENTS

The Problem of "Stealthing." A number of recent studies on the problem of "stealthing" – and, more generally, male resistance to the use of condoms during sexual intercourse – suggest that the problem is more widespread than one might expect. For example, one study found that almost 10% of male participants "reported engaging in nonconsensual condom removal since the age of 14 years, with an average of 3.62 times and a range of 1-21 times." (See Kelly Cue Davis, *"Stealthing": Factors Associated with Young Men's Condom Removal* (2019) 38 Health Psychology 997.) Similarly, 12% of women, aged 21-30, reported that they had been the victim of stealthing. (See Kelly Cue Davis, et.al., *Young Women's Experiences with Coercive and Noncoercive Condom Use Resistance: Examination of an Understudied Sexual Risk Behavior*, (2019) 29 Women's Health Issues 231.) Indeed, there are apparently online communities where men discuss techniques of surreptitious condom removal. The issue has also been explored in popular culture. "I May Destroy You," a BBC series that explores issues of dating and consent, recently included an episode depicting a stealthing scene. (Paisley Gilmore, *I May Destroy You "stealthing" scene perfectly highlights issues around condoms and consent*, Cosmopolitan, June 17, 2020, at <https://www.cosmopolitan.com/uk/>) Alexandra Brodsky, a Fellow at the National Women's Law Center, has argued that nonconsensual condom removal during sexual intercourse exposes victims to physical risks of pregnancy and disease. In addition, as interviews with victims and survivors of stealthing make clear, the phenomenon is experienced by its victims as "a grave violation of dignity and autonomy." Brodsky advocates for the creation of a new tort of "stealthing" in order to provide victims with a more viable cause of action and to better reflect the seriousness of the harms caused by nonconsensual condom removal. (See Alexandra Brodsky, *"Rape Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal*, (2017) 32 Columbia J. of Gender & Law 183.) Although this bill does not create a new tort, per se, it does clarify that the existing tort of sexual battery, under the Civil Code, includes nonconsensual condom removal.

Sexual battery under existing criminal and civil law. The California Penal Code makes various forms of sexual battery a crime, with most forms constituting either a misdemeanor or a "wobbler" (which can be charged as either a felony, or a misdemeanor). Most relevant to this bill, misdemeanor sexual battery includes touching the "intimate parts" of another person, without that person's consent, for the purpose of sexual arousal, sexual gratification, or sexual

abuse. A person found guilty of misdemeanor sexual battery is subject to a fine not exceeding \$2,000, or by imprisonment not exceeding six months, or by both fine and imprisonment. (Penal Code Section 243.4(e)(1).) In 2017, the author's AB 1033 attempted to make nonconsensual condom removal a crime under the Penal Code. In its analysis of that bill, the Senate Public Safety Committee concluded that, while the author was correct that "stealthing" is not specifically mentioned or described in existing law, the act could nonetheless be prosecuted under existing law as misdemeanor sexual battery. The problem, according to the Senate Public Safety Committee analysis, is not that existing law does not cover such conduct; rather, if there is a lack of prosecution in this area, it is likely because evidence of such conduct is extremely difficult to establish. In this inherently private act, it would be difficult to determine, after the fact, whether the condom has been removed consensually, intentionally without consent, or accidentally. (See Senate Public Safety Committee, *Analysis of AB 1033*, July 11, 2017.) AB 1033 was held in the Senate Appropriations Committee.

This bill, rather than amend the Penal Code, would amend the existing Civil Code section that permits a victim of sexual battery to bring a civil action for damages. This bill would specify that a person commits a sexual battery if that person causes 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 if the person causes contact between an intimate part of the person and a sexual organ of another from which the person removed the condom without verbal consent. While the existing Civil Code section does not specifically identify nonconsensual condom removal as a form of sexual battery, one could argue that the language of existing law is sufficiently broad to cover such an act. Specifically, existing law defines civil sexual battery as an act that results in a harmful or sexually offensive contact with the intimate part of another, or by the perpetrator's use of their own intimate part to make a harmful or sexually offensive contact with another. Where two people have consented to sexual intercourse *with* the use of a condom, they have not consented to sexual intercourse *without* a condom. Therefore, the intentional removal of a condom, without the consent of the other person, would arguably create a harmful or sexually offensive contact with the intimate part of another. Nonetheless, to the extent that there is any ambiguity as to whether nonconsensual condom removal would rise to the level of sexual battery in existing law, this bill would remove that ambiguity by expressly stating that nonconsensual condom removal constitutes sexual battery.

According to the Author

According to the author, "stealthing" is a "new name for an ancient, sneaky practice." Specifically, the term refers to the nonconsensual and intentional removal of a condom during sexual intercourse. The author contends that the "occurrence [of stealthing] is on the rise." In addition to exposing the victim to physical risks of pregnancy and disease, it is also a grave violation of one's dignity and autonomy. The author believes that existing law does not clearly define sexual battery to include stealthing.

Arguments in Support

The Erotic Service Providers Legal Educational Research Project (ESPLERP) supports this bill as "trailblazing legislation that adds nonconsensual condom removal" to the definition of what constitutes a sexual battery. ESPLERP believes that "this legislation is particularly important to sex workers who would gain a new level of protection whereby we could pursue a case of sexual battery when clients non-consensually remove a condom during consensual sex." ESPLERP contends that nonconsensual condom removal, or "stealthing," is "a grave violation of dignity and autonomy that could lead to unwanted pregnancy or a sexually transmitted infection putting

our health at risk not to mention putting us out of work while addressing these health conditions and loss of income."

Arguments in Opposition

No opposition on file.

FISCAL COMMENTS

According to the Senate Appropriations Committee, this bill presents unknown, potentially significant workload cost pressures to the courts to adjudicate alleged violations of this measure. While the superior courts are not funded on a workload basis, an increase in workload could result in delayed court services and would put pressure on the General Fund to increase the amount appropriated to backfill for trial court operations. For illustrative purposes, the Governor's proposed 2021-2022 Budget would appropriate \$118.3 million from the General Fund to backfill continued reduction in fine and fee revenue for trial court operations.

VOTES:

ASM JUDICIARY: 11-0-0

YES: Stone, Gallagher, Chau, Chiu, Davies, Lorena Gonzalez, Holden, Kalra, Kiley, Maienschein, Reyes

ASSEMBLY FLOOR: 74-0-5

YES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Bonta, Burke, Carrillo, Cervantes, Chau, Chen, Chiu, Choi, Cooley, Cooper, Cunningham, Megan Dahle, Davies, Flora, Fong, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kiley, Lackey, Lee, Levine, Low, Maienschein, Mathis, McCarty, Medina, Mullin, Muratsuchi, Nazarian, Nguyen, O'Donnell, Patterson, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Seyarto, Smith, Stone, Ting, Valladares, Villapudua, Voepel, Waldron, Ward, Akilah Weber, Wicks, Wood, Rendon
ABS, ABST OR NV: Bigelow, Calderon, Daly, Frazier, Mayes

SENATE FLOOR: 37-0-3

YES: Allen, Archuleta, Atkins, Bates, Becker, Borgeas, Bradford, Caballero, Cortese, Dodd, Durazo, Eggman, Glazer, Gonzalez, Grove, Hertzberg, Hueso, Hurtado, Jones, Kamlager, Laird, Leyva, McGuire, Melendez, Min, Newman, Nielsen, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Umberg, Wieckowski, Wiener, Wilk
ABS, ABST OR NV: Dahle, Limón, Stern

UPDATED

VERSION: May 28, 2021

CONSULTANT: Thomas Clark / JUD. / (916) 319-2334

FN: 0001442