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SPOTLIGHT ON STEALTHING

By Captain Catherine Mumford



The growing awareness of stealthing as an act of sexual coercion or violence coupled with the litigation in our allied countries and the push to pass civil recourse for stealthing victims shows that stealthing cases in military or civilian courts are on the horizon.

Introduction

Sexually active communities are home to a myriad of colorful terms, language, and labels, which are used to identify safe practices and commonalities, as well as dangerous, violent, or coercive situations one may encounter. One such term, “stealthing,” has been in use since 2014 to describe a dangerous, potentially violent, sexually coercive situation in which (1) consent to sexual activity is conditional upon the use of a physical sexual barrier (e.g., a condom); and (2) the physical sexual barrier is either removed or sabotaged by one partner without the knowledge or consent of the other.^[1]

The act of stealthing itself is not a new phenomenon. However, putting a name to the action allows, for the first time, easier identification of victims and data gathering. Unfortunately,

use of the slang term also promotes stealthing tactics and condom avoidance among some young men.^[2] Stealthing began drawing national and international attention, and subsequent legislative and litigation changes, after then-Yale student/now-women’s rights advocate Alexandra Brodsky published an article in the *Columbia Journal of Gender and Law* in 2017, titled, “*Rape-Adjacent*: *Imagining Legal Responses to Nonconsensual Condom Removal*.”^[3] Stealthing has been described as “rape adjacent,” “a grave violation of dignity and bodily autonomy,” “disempowering,” and “a demeaning violation of a sexual agreement.”^[4] Through this and other research, victims of stealthing describe immediate and deep fears regarding sexually-transmitted diseases and infections.^[5] Female victims face the additional fear of an

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unwanted pregnancy and often rush to find emergency contraceptives.[6] With the subsequent tide of social, medical, and legal research following Brodsky’s article, stealthing became a readily-identifiable term for advocacy groups targeting both legislative and litigative recourse for victims.

While legal avenues for addressing stealthing are limited, recent criminal convictions for stealthing in Canada, New Zealand, Germany, and the United Kingdom show how criminal courts are addressing and analyzing stealthing as rape or sexual assault.[7] In the United States, California recently passed a law providing civil penalties for stealthing,[8] and the 117th Congress introduced both the Consent is Key Act (H.R. 7928) and the Stealthing Act of 2022 (H.R. 7920)—authorizing funding for states who wish to provide civil penalties for stealthing victims and creating a federal civil action for stealthing, respectively.[9]

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These cases and policy changes show a trend toward acknowledging and addressing stealthing as sexual assault under both criminal and civil law. Understanding this trend and identifying potential litigation risks is imperative for judge advocates, as prospective stealthing cases likely meet the criteria for sexual assault without consent under the 2019 edition of the Uniform Code of Military Justice (UCMJ).[10]

International Stealthing Cases

How international courts handle stealthing, particularly jurisdictions that do not have stealthing-specific statutes, lays the foundation for future cases and outcomes, whether in civilian or military jurisdiction. Sexual assault cases are notoriously fact specific. However, the legal analysis framework for determining consent remains consistent

throughout. For example, courts in Canada, New Zealand, and the United Kingdom have all paid close attention to whether the proper use of a condom was a key factor in consent to sexual activity for the victim and whether the non-negotiable use of a condom was made clear before sexual activity began.[11] Courts in New Zealand and the United Kingdom, where the victim was a sex worker, analogized use of a condom is to consent as stated terms are to a business arrangement.[12] Additionally, a German court held that nonconsensual condom sabotage was akin to stealthing, based on the understanding that contraception is a factor in consenting to sexual acts.[13] In each case, discussed further below, courts analyzed stealthing under the legal framework of consent, rather than fraudulent representation or other theories of sexual coercion.

In Canada, the Supreme Court in *R. v. Kirkpatrick* held the use of a condom was inseparable from consent to the sexual activity in question where the victim presented evidence that she would not have consented to sexual activity without a condom. [14] Writing for the majority, Justice Sheilah L. Martin stated, “it cannot be that ‘no, not without a condom’ means ‘yes, without a condom.’”[15]

In New Zealand, the *Campos v. R* trial court found Campos guilty of rape.[16] Here, Campos removed or attempted to remove the condom twice, which the Court found as clear evidence of Campos’ criminal intent to breach the basis upon which consent was given.[17] The United Kingdom took this further in *R. v. Hogben*, in which the use of a condom during sex with a sex worker was held as akin to a business arrangement, with the terms of consent agreed to beforehand.[18]

Going further, condom removal is not the only set of facts that constitute stealthing, as the Bielefeld trial court in Germany held in 2022.[19] In this case, a woman sabotaged a box of condoms in a man’s home, hoping to become pregnant.[20] Judge Astrid Salewski, in making the findings, focused particularly on informed consent, stating, “[t]he condoms were rendered unusable without the man’s knowledge or his consent [...] no means no here as well.”[21]

As the act of stealthing becomes more common knowledge worldwide, more victims are likely to come forward. The above cases set the stage as to how stealthing litigation is likely to play out, specifically with a particular focus on consent, stated terms of consent prior to sexual activity, and what knowledge (if any) the victim had regarding the effectiveness or presence of the condom during sexual activity.

U.S. Policy and Law

Stealthing is a topic that has gained recognition stateside in the past several years, all seemingly stemming from Alexandra Brodsky's law journal article in 2017. Cristina Garcia, a California assemblywoman, sponsored a first-of-its-kind legislation formally recognizing stealthing as a civil offense in October 2021.[22] Garcia stated she was inspired by Alexandra Brodsky's article and hoped the new law would lead to "a more nuanced understanding of the many different kinds of sexual violence." [23]

There is growing support for stealthing-specific legislation on both the federal and state level, and that trend is not likely to end anytime soon.

Inspired by the California laws, Representatives Carolyn Maloney, Norma J. Torres, and Ro Khanna, introduced the Consent is Key Act and the Stealthing Act of 2022 into the 117th Congress on 1 June 2022.[24] The Consent is Key Act offers increased federal funding for states who pass stealthing laws[25] while the Stealthing Act of 2022 separately creates a federal civil right of action for survivors of stealthing.[26] Regarding these House bills, Joyce M. Short, Founder and Director of the Consent Awareness Network, stated, "[e]mploying trickery in sexual contact flies in the face of the basic premise of 'consent' and should be considered a sexual assault against the victim." [27] Over thirty other federal representatives have voiced their support for both bills, which are now under review in the House committee.[28]

There is growing support for stealthing-specific legislation on both the federal and state level, and that trend is not likely to end anytime soon, especially where issues draw public attention and scrutiny. For example, sexual harassment was not its own a crime under the UCMJ until 2022,[29] after much scrutiny of the previous response and prevention framework.[30] As discussed below, military case law involving consent to sexual acts and the specific language of Article 120 of the UCMJ both provide a clear avenue for stealthing prosecution.

Stealthing and the UCMJ

Despite the UCMJ not having a specifically enumerated stealthing Article or sub-article, it is easy to contemplate a situation where stealthing can be charged in violation of Article 120, UCMJ, as a sexual assault without the consent of the victim.

The elements of sexual assault without consent are: (1) the accused committed a sexual act upon the victim;[31] and (2) the act was done without the consent of the victim.[32] Consent is defined as:

[A] freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance does not constitute consent. Submission resulting from the use of force, threat of force, or placing another person in fear also does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue does not constitute consent.[33]

Assuming all jurisdictional requirements are met for time, place, and status of the accused, let us consider a set of facts in which a sexual act occurs (i.e., heteronormative vaginal intercourse) where the use of a condom is an express condition to the sexual act for either party. The first element

of sexual assault, as listed above, would be met, and the court would have to focus on and decide whether stealthing is a violation of consent as defined above.

First, consent must be “freely given.” Military case law is incredibly instructive on this topic, specifically analyzing what “freely given” consent means across dozens of cases and among different sets of facts. For example, many cases spring from questions regarding disclosure of a person’s Human Immunodeficiency Virus (HIV) status before engaging in or consenting to sexual acts. In *United States v. Gutierrez*, 71 M.J. 61 (C.A.A.F. 2015), the Court held that to be freely given, consent must be informed, upholding previous similar holdings.^[34] In *United States v. Forbes*, 78 M.J. 279 (C.A.A.F. 2019), the Court affirmed *Gutierrez*, establishing informed consent must also be meaningful. *Forbes* and *Gutierrez* were charged under the 2016 UCMJ, which rooted sexual assault in bodily harm rather than consent.^[35] However, the focus on whether consent can be freely given without meaningful knowledge of the status and risks associated with those sexual acts is applicable to a potential stealthing case under the 2019 UCMJ.

Removing or sabotaging a condom without the knowledge or permission of the other party fundamentally alters the terms upon which consent was given, thereby negating consent.

Going outside of HIV disclosure, military courts have held that consent to one sexual act does not equate to consent of other, even similar, sexual acts. In *United States v. Christopher*, No. 201600084, 2017 CCA LEXIS 601 (N-M Ct. Crim. App. Sep. 12, 2017), the victim was vaginally and anally penetrated, despite specifically consenting only to vaginal penetration. The court held the anal penetration was done without consent, amounting to a sexual assault.^[36]

Going further, consent is analyzed as both objective and subjective. In *United States v. Moore*, 78 M.J. 868 (A.F. Ct. Crim. App. 2019), the court held “all the surrounding circumstances

are to be considered in determining whether a person gave consent,” meaning that all communications, verbal agreements, and overt actions regarding the expectation of what the sexual acts were and how they would be specifically performed are relevant and material to understanding where there is consent and where there is not.

Simply put, consent must be specific, informed, and meaningful to be freely given. Removing or sabotaging a condom without the knowledge or permission of the other party fundamentally alters the terms upon which consent was given, thereby negating consent. Current military case law, supported by international cases and current trends in national policy, forms a basis to prosecute stealthing as sexual assault without consent in violation of Article 120 of the UCMJ. A victim who makes clear, ‘no condom, no sex,’ is really stating, ‘no condom, no consent.’

Additional Considerations for Stealthing Litigation

Any stealing case will, of course, have the same litigation considerations as any other sexual assault case, including expert testimony from medical personnel, expert testimony from a forensic psychologist, witness credibility issues, victim participation, the availability of affirmative defenses, and carefully tailored voir dire questions. However, judge advocates should pay close attention to additional evidentiary considerations, such as: whether the victim would have immediately withdrawn consent had they known the condom was removed or would not have consented to sex without a condom in the first place, much like in *Kirkpatrick*;^[37] whether the expectation of appropriate condom use was an obvious prerequisite to consent to engage in sexual acts, much like in *Campos* and *Hogben*;^[38] and how much (if any) knowledge the victim had regarding the effectiveness or removal of the condom, much like in the Bielefeld case.^[39]

Judge advocates should also be aware stealthing affects both male and female victims and is of particular concern for the Lesbian Gay Bisexual Transgender Plus (LGBT+) community as stealthing is a documented public health concern for men who have sex with men (MSM), contributing to the spread of HIV and other sexually transmitted infections.^[40]

Conclusion

The growing awareness of stealthing as an act of sexual coercion or violence coupled with the litigation in our allied countries and the push to pass civil recourse for stealthing victims shows that stealthing cases in military or civilian courts are on the horizon. Given current military case law and the definition of consent under the UCMJ, certain stealthing cases are likely to be litigated as sexual assault without consent in violation of Article 120 UCMJ. By understanding the current case law (both in military jurisdictions and internationally), available defenses, and potential evidentiary needs of the case, judge advocates will be better prepared to meet the needs of their clients, the Department of the Air Force, and military justice and discipline.

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Endnotes

- [1] Hugh Klein, *Generationing, Stealthing, and Gift Giving: The Intentional Transmission of HIV by HIV-Positive Men to their HIV-Negative Sex Partners*, 2 HEALTH PSYCH. RSCH. 1582 (2014).
- [2] Kelly Cue Davis et al., *Young Men's Condom Use Resistance Tactics: A Latent Profile Analysis*, 51 J. SEX RSCH. 454 (2014).
- [3] Alexandra Brodsky, "Rape-Adjacent": *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L., no. 2, 183 (2017).
- [4] *Id.*
- [5] *Id.*
- [6] *Id.*
- [7] See *R. v. Kirkpatrick*, [2022] S.C.C. 33 (Can.); *Campos v. R.*, [2022] NZCA 311 (N.Z.); Rebecca Staudenmaier, *Germany: Woman sentenced after sabotaging partner's condoms*, DEUTSCHE WELLE, (May 5, 2022), <https://www.dw.com/en/germany-woman-sentenced-for-poking-holes-in-partners-condoms/a-61689670>; *R. v. Hogben*, [2019] Bournemouth Crown Court (UK).
- [8] See CAL. CIV. CODE § 1708.5 (2021).
- [9] See Consent is Key Act, H.R. Res. 7928, 117th Cong. (2022) [hereinafter Consent is Key Act]; Stealthing Act, H.R. Res. 7920, 117th Cong. (2022) [hereinafter Stealthing Act].
- [10] See 10 U.S.C. § 920 (LexisNexis, Lexis Advance through Public Law 117-214, approved Oct. 19, 2022).
- [11] See *R. v. Kirkpatrick*, [2022] S.C.C. 33 (Can.); *Campos v. R.*, [2022] NZCA 311 (N.Z.); *R. v. Hogben*, [2019] Bournemouth Crown Court (UK).
- [12] See *Campos v. R.*, [2022] NZCA 311 (N.Z.); *R. v. Hogben*, [2019] Bournemouth Crown Court (UK).
- [13] See Staudenmaier, *supra* note 7; see also Gergana Krasteva, *Woman who poked holes in condoms to get pregnant convicted of 'stealthing'*, METRO NEWS UK, (May 6, 2022, 10:49 A.M.), <https://metro.co.uk/2022/05/06/germany-woman-who-poked-holes-in-condoms-convicted-of-stealthing-16597195/>.

- [14] See *R. v. Kirkpatrick*, [2022] S.C.C. 33 (Can.). As established during trial, Ross Kirkpatrick and the victim agreed to have sex conditioned upon Kirkpatrick wearing a condom. Kirkpatrick and the victim had vaginal sex twice in the same evening, once with a condom and once without. The victim was unaware a condom had not been used the second time until after intercourse ended. At trial, the judge granted Kirkpatrick's motion to dismiss for lack of evidence, finding that because the victim agreed to sexual intercourse and there was no evidence of fraudulent representation (e.g., that Kirkpatrick was wearing a condom when in fact he was not), insufficient evidence was presented to prove the Crown's case. The Crown appealed to British Columbia's Court of Appeal, which ordered a new trial, finding the dismissal was improper, in part because the victim presented evidence that she would not have consented to sex without the use of a condom and condom use was a necessary element of the agreement to engage in sex. Kirkpatrick then appealed to the Supreme Court of Canada, which dismissed the appeal and confirmed the order for a new trial.
- [15] *Id.*
- [16] See *Campos v. R.*, [2022] NZCA 311 (N.Z.) As established at trial, Jessie Campos was engaged in the services of a sex worker who explicitly told Campos condom use during her services was non-negotiable. Campos removed the condom he was wearing twice. The second time, he physically restrained the victim and penetrated her without a condom. In affirming the trial court's findings of one charge of rape, the Appeal Court particularly focused on the fact that the victim only ever consented to sex with the proper use of a condom and the deliberate actions of removing the condom not once, but twice, clearly show criminal intent and a breach of the basis upon which consent was given.
- [17] *Id.*
- [18] See *R. v. Hogben*, [2019] Bournemouth Crown Court (UK). As established at trial, Hogben was engaged in consensual sex with a sex worker whose terms expressly stated condom use was non-negotiable for her services. When the victim realized Hogben removed the condom, she protested and attempted to physically evade him. Hogben prevented her, threatening her with violence. After the victim reported the incident to the police, Hogben sent the victim threatening text messages, including death threats. The Court held the use of a condom during sex was akin to a professional arrangement, with terms of consent agreed to beforehand, which terms were reiterated on the victim's website where she advertised her services. Hogben was found guilty of rape and two counts of assault and sentenced to twelve years' confinement.
- [19] See Staudenmaier, *supra* note 7.
- [20] *Id.*
- [21] *Id.*
- [22] CAL. CIV. CODE § 1708.5 (2021).
- [23] Joe Hernandez, *California is the 1st state to ban 'stealthing,' nonconsensual condom removal*, NPR, (Oct. 7, 2021, 9:37 P.M.), <https://www.npr.org/2021/10/07/1040160313/california-stealthing-nonconsensual-condom-removal>.
- [24] See Consent is Key Act; Stealthing Act.
- [25] Press Release, Release: Reps. Khanna, Torres, and Maloney Introduce Stealthing Act and Consent is Key Act to Combat Sexual Violence (June 1, 2022), <https://khanna.house.gov/media/press-releases/release-reps-khanna-torres-and-maloney-introduce-consent-key-and-stealthing-act>; see Consent is Key Act.
- [26] Stealthing Act.
- [27] See Press Release, *supra* note 26.
- [28] See Consent is Key Act; Stealthing Act.
- [29] See Press Release, The White House, Executive Order on 2022 Amendments to the Manual for Courts-Martial, United States (Jan. 26, 2022), <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/01/26/executive-order-on-2022-amendments-to-the-manual-for-courts-martial-united-states>. Sexual Harassment previously fell under Article 92 UCMJ as dereliction of duty or failure to obey a lawful order or regulation, or Article 93 UCMJ as maltreatment, See 10 U.S.C. § 892-893 (LexisNexis, Lexis Advance through Public Law 117-214, approved Oct. 19, 2022);
- [30] See Press Release, U.S. Dep't of Def., Department of Defense Releases Fiscal Year 2021 Annual Report on Sexual Assault in the Military (Sept. 1, 2022); see also Julia Rollinson et al., *Sexual Harassment and Sexual Assault in Military Settings, A Review of Associated Mental Health Conditions, Treatments, and Access to Care*, RAND CORP., (2023), https://www.rand.org/pubs/research_briefs/RBA668-1.html.
- [31] Sexual act means (A) the penetration, however slight, of the penis into the vulva or anus or mouth; or (B) contact between the mouth and the penis, vulva, scrotum, or anus; or (C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person. See 10 U.S.C. § 920(g) (LexisNexis, Lexis Advance through Public Law 117-214, approved Oct. 19, 2022).
- [32] *Id.* At § 920(b)(2).
- [33] *Id.* at § 920(g)(7).

- [34] See *United States v. Bygrave*, 46 M.J. 491, 493 (C.A.A.F. 1997); *United States v. Joseph*, 37 M.J. 392, 395 (C.M.A. 1993) (informed consent can convert what might otherwise be an offensive touching to non-offensive touching).
- [35] See 10 U.S.C. § 920 (LexisNexis, Lexis Advance through Public Law 117-214, approved Oct. 19, 2022).
- [36] See *United States v. Christopher*, No. 201600084, 2017 CCA LEXIS 601 (N-M Ct. Crim. App. Sep. 12, 2017).
- [37] See *R. v. Kirkpatrick*, [2022] S.C.C. 33 (Can.).
- [38] See *Campos v. R.*, [2022] NZCA 311 (N.Z.); *R. v. Hogben*, [2019] Bournemouth Crown Court (UK).
- [39] See *Staudenmaier*, *supra* note 7.
- [40] See *Klein*, *supra* note 1.