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Taking the Lead: A Strategic Analysis of Stealthing and the Best Route for Potential Civil Plaintiffs to Recover

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TAKING THE LEAD: A STRATEGIC ANALYSIS OF STEALTHING AND THE BEST ROUTE FOR POTENTIAL CIVIL PLAINTIFFS TO RECOVER

INTRODUCTION

A pervasive trend invading the sexual interactions between men and women, and homosexual men, is "stealthing" or "nonconsensual condom removal."[1] Stealthing garnered national and legal attention following Alexandra Brodsky's article and study concerning the practice published in 2017.[2] A typical stealthing case involves an initial,

1. *See* Alexandra Brodsky, *"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 188–89 (2017). Alexandra Brodsky, a Yale law student at the time of conducting her study and current Kazan Budd Staff Attorney at Public Justice, investigated the issue of nonconsensual condom removal and analyzed potential legal remedies for the conduct.

2. Nara Schoenberg, *Bringing 'Stealthing'—Nonconsensual Condom Removal—Out of the Shadows*, CHI. TRIB. (Apr. 27, 2017, 4:46 PM), https://www.chicagotribune.com/lifestyles/sc-stealthing-condom-removal-family-0427-20170427-story.html [https://perma.cc/5MAG-33XM].

consensual sexual relationship between two parties predicated on the use of contraception.[3] During the act, the partner removes the condom without the knowledge or consent of their sexual partner.[4] Brodsky's research uncovered internet forums and subsets of men who believe that stealthing is rooted in male superiority and a right to "spread his seed."[5] Due to a lack of reporting or understanding about the nature of the conduct, the exact number of victims is unknown but reports suggest that as many as one-third of women and one-fifth of men have been stealthed.[6] While victims are uncertain about how to describe what happened to them in a legal sense, the feelings of violation and the increased risks are comparable to rape.[7]

It is difficult to make sense of the disturbing practice and its motivations; however, perpetrators of the assault are widespread and notorious in their encouragement of stealthing.[8] Supporters have gone so far as to create named social organizations online, such as the Bareback Brotherhood, and purchase bracelets or indicate the organization in their Twitter bios as a badge of pride to other members.[9] In a realm where protection from sexually transmitted disease is almost entirely in the hands of the male partner, the phenomenon should be of particular concern as it constitutes a complete disregard for the victim's health.[10]

Despite its widespread impact, there has yet to be a criminal or civil case concerning nonconsensual condom removal brought in the United States, and the legislature has not proactively criminalized

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3. *See* Brodsky, *supra* note 1, at 184 n.6. For the purposes of this Note, "predicated on the use of contraception" includes both when it is explicitly conditioned or when it is initially used but removed without the knowledge of the other. The rationale behind not distinguishing lies in the implicit belief that a condom will remain used when initially put on and the reliance that it will not be removed.

4. *Id.* at 184.

5. *Id.* at 188–89.

6. Melissa Cunningham, *One in Three Women Victim to 'Stealth' Condom Removal*, THE AGE (June 3, 2019, 4:46 PM), https://www.theage.com.au/national/victoria/one-in-three-women-victim-to-stealth-condom-removal-20190603-p51ty5.html [https://perma.cc/5B94-HQHS].

7. Brodsky, *supra* note 1, at 184.

8. *Id.*

9. George Forgan-Smith, *Consent, Choice, & Bareback Sex*, THE HEALTHY BEAR (June 7, 2012), https://thehealthybear.com/consent-choice-bareback-sex [https://perma.cc/5E4R-UZ2R].

10. *See* Jenny A. Higgins, Susie Hoffman & Shari L. Dworkin, *Rethinking Gender, Heterosexual Men, and Women's Vulnerability to HIV/AIDS*, 100 AM. J. PUB. HEALTH 435, 436 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2820057/pdf/435.pdf [https://perma.cc/G8WD-2RUS] ("Feminist researchers also argued repeatedly and convincingly that gender inequality places women in unequal power positions that make pressing for condom use difficult, if not impossible, with these gendered power dynamics also increasing vulnerability to HIV . . . . by leading them to place a premium on love and romantic relationships.").

the conduct.[11] The motives of the perpetrator as well as the harm suffered by the victims provide a compelling basis for a legal remedy, but it is difficult to predict how courts will respond when confronted with a stealthing case.[12] Brodsky focused her legal analysis on the various routes that court systems may take and ultimately advocated for the creation of a new tort to address the trend.[13] She bases this on legitimate concerns about bias that she fears will be exacerbated by existing legal doctrine.[14]

There are several advantages associated with creating a new tort to specifically address stealthing as opposed to incorporating the conduct under an existing form of liability. First, if the new tort is sufficiently outlined and delineated, it would likely leave less room for debate in courts over which cases apply and which do not, given that the legal requirements will be specifically catered to the issue.[15] Secondly, and perhaps more importantly, are the societal reform benefits from specifically recognizing the trend as warranting liability.[16] Often, the law changes to conform with changing social norms,[17] but it can also operate in the reverse[18]: recognizing and codifying stealth laws sends a clear message to society that such an act is wrong and offenders will be punished.[19] Further, it sends a clear message to *victims* that they have a cognizable claim.[20] In Brodsky's research, she discovered that many women did not understand the nature of what happened to them or how to describe it.[21] If courts or legislators establish that stealthing is sexual misconduct and a

11. *See* Brodsky, *supra* note 1, at 184 n.4; *see, e.g.*, Sofia Lotto Persio, *What is Stealthing and Why Do Lawmakers in California and Wisconsin Want it Classified as Rape?*, NEWSWEEK (May 17, 2017, 1:22 PM), https://www.newsweek.com/what-stealthing-lawmakers-california-and-wisconsin-want-answer-be-rape-610986 [https://perma.cc/E2SX-FL9V].

12. *See* Brodsky, *supra* note 1, at 208–10 (discussing various possible legal remedies for stealthing victims, but as there is no existing case law, we cannot be certain what potential avenue will prove successful). This Note will ultimately advocate that the tort of battery is the most viable claim for stealthing victims.

13. *Id.*

14. *See* Michael Nedelman, *Some Call It 'Stealthing', Others Call It Sexual Assault*, CNN (Apr. 28, 2017, 3:11 PM), https://www.cnn.com/2017/04/27/health/stealthing-sexual-assault-condoms/index.html [https://perma.cc/FQE8-W92X].

15. *See* Brodsky, *supra* note 1, at 208–09.

16. *See id.* at 208.

17. *See, e.g.*, Kenneth S. Abraham & G. Edward White, *Torts Without Names, New Torts, and the Future of Liability for Intangible Harm*, 68 AM. UNIV. L. REV. 2089, 2096–97 (discussing how strict liability arose out of the changing attitude of the general public that a manufacturer profiting from the sale of products should also be responsible for injuries caused by said products).

18. *See* Nedelman, *supra* note 14.

19. *See* Brodsky, *supra* note 1, at 208.

20. *See id.* at 209.

21. *Id.* at 183–84.

violation worthy of a specific remedy, it informs victims and perpetrators alike of the illegality of the conduct. In this way, an official recognition of stealthing could serve as an instrument of social change as opposed to a byproduct of it.

While a unique problem may deserve a unique remedy, the creation of a new tort to address stealthing will add additional hurdles to an already uphill battle.[22] At the expense of viable claims, victims of stealthing will already be forced to combat gender biases, judicial notions of sexual privacy, and a lack of established precedent as they seek relief for their client.[23] By pursuing recognition of a novel cause of action, stealthing victims will additionally have to wrangle with an extraordinary judicial reluctance to expand the law beyond its current parameters.[24]

In arguing a case of first impression, the advocate is taking the lead and attempting to convince a judge that the injury their client has suffered requires recognition.[25] The strategic choices and arguments that a litigator makes will determine whether the claim moves forward or is dismissed. While there is a natural desire to recognize a legal wrong and violation by pinpointing the conduct and unequivocally stating this is wrong, this desire should be second to a far more pressing motivation—providing victims with the best route for compensation.[26] The primary goal for advocates of stealthing victims should be to obtain a legal remedy for their client with a secondary, long-term goal of gaining widespread recognition of the violation as being deserving of a *specific* cause of action.

Though Brodsky's pursuit of a new cause of action to address stealthing is admirable, it ignores the nature of the dance between an advocate and the judiciary. When two dancers take the floor, the leader is responsible for insuring that their partner glides along with them—a task made easier when their partner knows the steps, the song, the direction. It is not as simple as taking your partner and forcing them into your movements as any hesitancy in their steps will cause both of you to stumble. In the same vein, stealthing advocates should rely on the existing law to obtain relief on behalf of their client and prevent the judiciary from moving on their own, binding the courts by their own precedent.

This Note will suggest that the best way to insure both the short-term and long-term goals is not through the creation of a new tort

22. *See infra* Section I.B.
23. *See infra* Section I.B.
24. *See* Abraham & White, *supra* note 17, at 2101–02 n.43.
25. *See id.* at 2095.
26. *See* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1563–65 (1997).

to address stealthing, but by using the existing precedent of battery as the legal basis for stealthing claims.[27] In Part I, this Note will discuss the prerequisites for recognition of any new tort as well as the specific hurdles that sexual misconduct claimants will face. Part II will then discuss the existing legal options available to stealthing claimants and ultimately argue that battery is the best cause of action for stealthing claimants to bring their claims under.

I. THE HURDLES THAT STEALTHING PLAINTIFFS MUST JUMP THROUGH IN OBTAINING RECOGNITION OF A NEW CAUSE OF ACTION

"[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[28] While Blackstone's mantra should provide a strong argument for the recognition of new causes of action as new legal wrongs reveal themselves, in reality, courts are not receptive to the creation of new torts.[29] Judges and scholars alike are antagonistic to new causes of action or imposing new forms of liability, believing that tort law should not be developed by looking forward to social change, but backward through the development of case law.[30] Prosser, a principal developer of tort law, decried "bleeding heart" attempts to "empower[] the disenfranchised" or shift power through tort law.[31] This belief mirrors the conservative approach courts have taken to the creation of new causes of action; courts typically reserve social change for the legislature, whereas their job is to remedy injuries already protected by existing law.[32]

As a result, a new, named tort has not been created in "nearly a century" and claims that have found a place within tort law did so as a result of major, societal and political shifts.[33] For example, the realm of products liability developed as a result of the monumental evolution of the manufacturing and distribution process, particularly in the manufacturing of automobiles.[34] Strict liability and

27. *But see* Brodsky, *supra* note 1, at 201. Brodsky argues that the biases affecting a judge's sympathy to stealthing victims may also inhibit their recognition of the dignitary harm necessary to a battery claim, which, in her eyes, makes a new tort the more viable option. *Id.* However, this Note will suggest that these same biases impact new causes of action more harshly than they would impact a battery claimant.

28. Marbury v. Madison, 5 U.S. 137, 163 (1803) (quoting Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, VOL. 3: OF PRIVATE WRONGS).

29. *See* Abraham & White, *supra* note 17, at 2091–92.

30. Bernstein, *supra* note 26, at 1552.

31. *Id.* at 1553.

32. *See* James C. Stuchell, *Tradition, Distortion, and Creation: Three Approaches to "Battered Woman's Syndrome" In Tort*, 8 REGENT U. L. REV. 83, 114–15 (1997).

33. Abraham & White, *supra* note 17, at 2091–93.

34. *See* Francis J. O'Brien, *The History of Products Liability*, 62 TUL. L. REV. 313, 314 (1988).

negligence evolved to meet the demands of a new world where highway accidents were extremely common and it became clear that the country was shifting to an increasingly mobile world, requiring the courts to provide redress for unwitting consumers who were in a poor position to protect themselves.[35] Similarly, as the stigma around mental distress dissolved and diagnosing mental illness became more common, the law supplied a remedy for intangible harm that had been previously avoided.[36] The courts erected the tort of intentional infliction of emotional distress to address the gap and new acceptance of pure emotional harm.[37]

In the age of the #MeToo movement and sexual freedom, sexual misconduct and its legality is being debated with vigor.[38] Whereas in generations prior, sexual harassment in the workplace was ignored or accepted as a necessary evil to human interaction, present-day victims have a stronger voice than ever to litigate their claims.[39] Following Brodsky's article, stealthing itself has found a place in the national conversation as the United States debates sexual misconduct and how to prevent its continued permeation into our society.[40] If intentional infliction of emotional distress found a doorway into courtrooms through a better understanding of emotional harm, the door for litigants of novel forms of sexual misconduct has been thrown open by the current generation's passion for reform in the area.[41] However, social salience and desire alone are not enough to achieve judicial recognition of a new tort; a new cause of action must present several additional factors before implementation can even be possible.[42]

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35. *See id.* at 317–18.

36. *See* Stuchell, *supra* note 32, at 112 (discussing the development of the tort of intentional infliction of emotion distress).

37. Abraham & White, *supra* note 17, at 2095–96.

38. *See* Alia E. Dastagir, *It's Been Two Years Since the #MeToo Movement Exploded. Now What?*, USA TODAY (Oct. 28, 2019, 3:58 PM), https://www.usatoday.com/story/news/nation/2019/09/30/me-too-movement-women-sexual-assault-harvey-weinstein-brett-kavanaugh/1966463001 [https://perma.cc/5KK7-FMNP].

39. *See* Jane E. Larson, "*Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 443 (1993).

40. *See* Persio, *supra* note 11.

41. Abraham & White, *supra* note 17, at 2096. The current discussion about sexual misconduct and its adverse impact on women's social and professional standing is comparable to the societal shift that preceded recognition of the action of intentional and negligent infliction of emotional distress. *Id.* at 2095.

42. *See id.* at 2097–106. Abraham and White establish a framework for analyzing potential new torts and outline several requirements that should be met before a cause of action warrants recognition as a new tort. *Id.* at 2094–95. These requirements are social salience, normative weight, justiciability, essentiality, and practicality. *Id.* at 2090.

A. Factors Related to General Recognition of a New Tort

There are several factors critical to the recognition of any new cause of action. First, it is in the interest of both society and the equal administration of justice that potential defendants be aware of the *per se* wrongness of their conduct.[43] Thus, a new cause of action should be something that society already acknowledges as wrong, whether it be evolving changes in societal notions or a general recognition that the conduct is inappropriate.[44] Second, a new cause of action must be justiciable and provide concrete standards for a court to apply.[45] Third, there should be enough cases arising under the cause of action to provide a framework for the courts to use moving forward.[46] Lastly, the creation of a new tort is only warranted when the conduct is not addressed by law or through an existing tort.[47]

1. Normative Weight

While the current social climate surrounding sexual misconduct may already be enough to satisfy the factor of social salience evident in the realization of new torts, the general conduct associated with stealthing further establishes significant normative weight.[48] A critical aspect of our civil and criminal law systems is that potential defendants are on notice about the potential liability of their conduct.[49] For this reason, we impose standards like extreme or outrageousness in the context of intentional infliction of emotional distress to prevent imposing liability against people who were unaware of the inappropriateness of their conduct.[50]

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43. *See id.* at 2095. The crux of the argument proposed by Abraham & White is ensuring that new causes of action are created because they are already recognized as legal wrongs in society. Abraham & White, *supra* note 17, at 2091–93. Though not explicitly stated, there is an implication that this is to protect undeserving and unintentionally wrongful conduct from liability. *Id.* at 2095. Societal or normative knowledge of the wrongfulness of a particular conduct puts a potential defendant on notice that what he is doing is wrong and may put him at risk of liability. *Id.*

44. *Id.* at 2095–98.

45. *Id.* at 2100.

46. *Id.* at 2104.

47. Abraham & White, *supra* note 17, at 2099, 2103.

48. The United States has long established that there is an individual right to bodily autonomy and the right to refuse touching; it is difficult to argue that a defendant doesn't understand that their behavior is inappropriate when they act in opposition to the express conditions of their sexual partner. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992); RESTATEMENT (SECOND) OF TORTS § 13 (1965).

49. *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 330 (2003).

50. *See* Abraham & White, *supra* note 17, at 2097. It would be difficult to argue that conduct a judge or jury finds to be extreme or outrageous would not be sufficiently outrageous to put the defendant on notice that they are violating a right.

At its core, stealthing is a violation of bodily autonomy.[51] The United States has long established that there is an individual right to bodily autonomy and the right to refuse certain contact.[52] A person's autonomy in refusing contact is uncontroverted and extends from even the most extreme nonconsensual contact, like rape, to the most minimal.[53] A violation of bodily autonomy is exacerbated in stealthing cases because the contact involves sexual intercourse, which potentially exposes the victim to life-altering sexually transmitted diseases and pregnancy.[54] Further, a material misrepresentation comparable with removing the condom after promising or implying its use constitutes an actionable claim in other contexts.[55] The intentional intrusion of bodily autonomy as well as the deliberate deception required of stealthing perpetrators is enough to put a defendant on notice of the *per se* wrongness of their conduct; just as they know they should not smack someone, or lie to them, they know they should not stealth someone.[56]

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51. *Infra* Conclusion; *see also* Brodsky, *supra* note 1, at 186.

52. *Infra* Conclusion; *see also* Brodsky, *supra* note 1, at 186.

53. *See* RESTATEMENT (SECOND) OF TORTS § 18.

54. *See* Olivia Nankinga, Cyprian Misinde, & Betty Kwagala, *Gender Relations, Sexual Behavior, and Risk of Contracting Sexually Transmitted Infections Among Women in Union in Uganda*, BMC PUB. HEALTH at 2 (2016), https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186/s12889-016-3103-0. In addition to a biological predisposition to an increased likelihood of contracting an STI, traditional gender roles significantly inhibit a woman's ability to negotiate within sexual relationships. *Id.* at 6.

55. *See* 37 AM. JUR. 2d *Fraud and Deceit* § 27 (2013) (The elements for fraudulent misrepresentation require "that the defendant ma[k]e a false representation of a *material* fact with knowledge of its falsity") (emphasis added). Courts have recognized a material misrepresentation in the sale of a house where the soil condition was unable to sustain vegetation or a defect in a car before trading it in. *See* Griffith v. Byers Const. Co., 510 P.2d 198, 205 (Kan. 1973). One could argue that the removal of a condom against the consent of another clearly constitutes a material misrepresentation, assuming that the victim would not have consented to sex if they had known the intent to use a condom was fabricated; however, courts have ignored the materiality of such misrepresentations in other sexual interactions. *See, e.g.*, Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620–21 (Cal. App. 1980). It is difficult to reconcile the law's recognition of the impact of fraudulent misrepresentations as it pertains to business transactions involving purely pecuniary losses with its ignorance of the crime's impact in sexual relationships, absent physical harm. *Compare* Griffith v. Byers Const. Co., 510 P.2d 198, 205 (Kan. 1973) *and* Lindberg Cadillac Co. v. Aron, 371 S.W.2d 651, 653 (Mo. Ct. App. 1963) *with* Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620–21 (Cal. Ct. App. 1980); *see also* Larson, *supra* note 39, at 412 ("To put it plainly, a man may do things to get a woman's agreement to sex that would be illegal were he to take her money in the same way.").

56. RESTATEMENT (SECOND) OF TORTS § 870 cmt. h. Both the physical intrusion and the deception implicated in stealthing claims are addressed in the torts of fraudulent misrepresentation and battery. By separating the two areas of conduct from one another, a defendant should know that both behaviors are inappropriate and could expose him to potential liability. It would be difficult to argue that a defendant did not understand it was wrong to punch a victim or lie to them about a material defect in a home, just as it would be difficult to maintain that they were unaware that it was wrong to remove contraception against the consent of their sexual partner.

2. Justiciability

A new cause of action must provide the court with discrete, concrete, and contained standards for application; otherwise, stealthing victims will be vulnerable to dismissal under 12(b)(6), the first line of defense for perpetrators.[57] Courts will ask, where does the tort begin and where does the tort end?[58] Litigants who fail to answer this question and leave questions for the determination of the court will be subject to dismissal, a death knell to victims of novel causes of action.[59]

Advocates for stealthing victims will have difficulty articulating the standards of the proposed tort.[60] Victims of stealthing have suffered violations of both their interest in bodily autonomy and freedom from misrepresentation, and balancing these two interests could lead to confusion in the courts.[61] In presenting the cause of action, should the plaintiff focus on the physical violation or the deception? The former could lead courts to focus primarily on the physical harm instead of allowing room for the intangible harm that arises from the violation itself. However, if the focus is instead placed on the deception involved, it could be extended beyond the bounds of stealthing.[62] For example, a court could extend liability for failing to reveal marital status, gender identity, race, or religion.[63] The proper balance to strike is one that accounts for the intangible harm associated with the violation of the victim's consent, while also avoiding overregulation of sexual relationships.[64] This may prove difficult to convey to a court

57. Abraham & White, *supra* note 17, at 2100; Fed. R. Civ. P. 12(b)(6). In order to limit the potential for claims that would generate questions of boundaries and formation, concrete standards for the proposed conduct must be suggested.

58. *See* Abraham & White, *supra* note 17, at 2100.

59. *See id.*

60. *See id.* at 2140.

61. *See, e.g.*, Abraham & White, *supra* note 17, at 2101 (comparing two proposed torts—suppression of protected speech and spoilation of evidence—and highlighting the value of more definitive language).

62. Brodsky, *supra* note 1, at 194–95.

63. *See* Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1277–78 (2015); Florence Ashley, *Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies, and Messy Identities*, 41 DALHOUSIE L.J. 339, 343 (2018); Athena Katsampes, *A Rape by Any Other Name? The Problem of Defining Acts of Protection Deception and the University as a Solution*, 24 VA. J. SOC. POL'Y & L. 157, 165 (2017). Courts have repeatedly declined to recognize the tort of sexual fraud, but when they have recognized sexual battery through deception, it has been imposed inequitably against minority groups. Buchanan, *supra* note 63, at 1342. Particularly, it has resulted in criminalization of failing to disclose HIV status even when there is no risk of exposure, against transgender individuals for failing to disclose their gender status, and religious minorities. *Id.* at 1306–07.

64. *See* Brodsky, *supra* note 1, at 193.

in a matter of first impression and leaving questions about what the tort encompasses may lead to extremely rigid standards that would limit its availability to future plaintiffs.[65]

Outside of contextualization, there are also significant evidentiary hurdles associated with stealthing.[66] Inherently, stealthing claims will almost always lack witnesses and outside of cases with physical harm (STD transmission or pregnancy), there may be no evidence at all, aside from the word of the victim and the defendant.[67] A lack of evidence outside of testimony by the parties and difficulty defining the tort will not inspire the judiciary to override the separation of powers and rule on a matter without existing precedent.[68]

3. "Critical Mass" Caseload

Tangential to the requirement that a new cause of action arise only out of a need and not out of a desire for social change, a new cause of action should present a legal issue likely to result in a large caseload.[69] Through the common law system and the use of precedent in developing our legal rules, a significant case load is necessary to fully develop a tort and insure its consistent application.[70] A judge is going to be unwilling to rule in favor of a novel cause of action that appears to be a one-off instance of conduct as opposed to yielding the necessary caseload to develop the tort.[71] In order to provide a viable avenue for future victims, representation has to be not only possible, but also inexpensive.[72] A plaintiff's attorney will likely take a stealthing case under a contingent-fee basis and concerns about the expense of litigating a novel claim could either prevent them from advocating for the victim entirely or charging a premium.[73]

Contributing to confusion about what stealthing actually is and whether it constitutes a violation is the fact that there has not been

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65. Abraham & White, *supra* note 17, at 2100–01.
66. *See* Larson, *supra* note 39, at 451.
67. Larson states:

> Because sexual interaction typically occurs in private, and rarely yields direct corroborative evidence . . . it is often difficult to adjudicate charges of sexual wrongdoing . . . . Often, the result is what has come to be known as a 'swearing contest'—a credibility battle pitting the unsupported testimony of the complainant against that of the defendant.

See Larson, *supra* note 39, at 451.
68. *See id.* at 441.
69. Abraham & White, *supra* note 17, at 2104.
70. *See id.*
71. *Id.* at 2105.
72. *Id.* at 2105–06.
73. *Id.*

a single civil or criminal case brought in the United States addressing either question.[74] However, reports and cases outside the United States and the conclusions of Brodsky's study suggest that the problem is pervasive enough to warrant a cause of action.[75] As knowledge of stealthing and its implications expands, it is foreseeable that a significant number of claims could be brought in order to prompt judicial recognition and attorney representation.[76]

4. Novelty

Despite attempts by female legislators to introduce legislation criminalizing stealthing, none have been successful.[77] This lack of legislative recognition could encourage judicial action, but if the conduct at issue is already conceivably addressed by a pre-existing tort, courts may be unwilling to expand liability.[78] The courts' primary function is to enforce the law, not to create it, and the judiciary sidesteps this by recognizing a new cause of action only when there is an obvious need.[79] If conduct is already addressed through statutory means or through an existing cause of action, courts will not intervene.[80]

Many forms of sexual misconduct are found in elements of other causes of action.[81] Sexual harassment cases can make arguments under the existing framework of assault, sexual deception cases under fraud, and battered women's syndrome finds its place within a combination of existing torts.[82] Stealthing, likewise, implicates

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74. Brodsky, *supra* note 1, at 184 n.4.

75. *See, e.g.*, Brianna Chesser, *Case in Victoria Could Set New Legal Precedent for Stealthing*, RMIT UNIVERSITY (Aug. 16, 2019), https://www.rmit.edu.au/news/all-news/2019/aug/stealthing-legal-precedent [https://perma.cc/RLB3-LZUD] (discussing similar questions about conceptualization of stealthing in Australian law).

76. *See* Katie Mettler, *Wis. Lawmaker Wants to Outlaw 'Stealthing'—Nonconsensual Condom Removal—as Sexual Assault*, WASH. POST (May 17, 2017, 5:49 AM), https://www.washingtonpost.com/news/morning-mix/wp/2017/05/17/wis-lawmaker-wants-to-outlaw-stealthing-nonconsensual-condom-removal-as-sexual-assault [https://perma.cc/PQW9-JWW4].

77. Persio, *supra* note 11.

78. *See* Abraham & White, *supra* note 17, at 2139–43.

79. *See id.* at 2103.

80. *See id.*

81. *See* Ellen Bublick, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, NAT'L ONLINE RESOURCE CTR. ON VIOLENCE AGAINST WOMEN (Sept. 2009) 1–3, https://vawnet.org/sites/default/files/materials/files/2016-09/AR_CivilTortActions.pdf [https://perma.cc/TDH3-ZTSY].

82. *See* Giovine v. Giovine, 663 A.2d 109, 114 (N.J. Super. Ct. App. Div. 1995) (finding that a woman diagnosed with battered woman's syndrome should be entitled to bring a tort action against her spouse for injuries sustained throughout their marriage); Alice Montgomery, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE L. REV. 879, 898–900 (1980) (arguing that unwanted physical contact

elements of intentional infliction of emotional distress, assault, fraud, and especially, battery.[83] Courts may take a view that stealthing is merely a "gap-filler" tort, carving out liability for conduct not covered by the existing torts, and is thus unnecessary.[84] This view has proven antagonistic to intentional infliction of emotional distress claims and as a result, application of the tort has been inconsistent and the burdens of proof are extremely difficult for plaintiffs to meet.[85] Litigants who seek a new cause of action must meaningfully distinguish the conduct and harm associated with stealthing from other torts, or otherwise risk dismissal.

In assessing the above preconditions for general recognition of new causes of action in the context of stealthing—that is, normative weight, justiciability, adequate case load, and novelty—advocates for a new tort already face an uphill battle.[86] While the time is certainly ripe for novel causes of action to address sexual misconduct, the hurdles of justiciability and novelty are significant.[87] The conduct and interests encompassed by the act of stealthing are simultaneously unique, provoking difficulty in determining the conduct that falls within its category, and too similar to existing causes of action and the interests implicated under other torts. It seems unlikely a court will extend a hand to recognize a new cause of action willingly.[88]

B. Hurdles Specific to Recognition of Novel Causes of Action Related to Sexual Misconduct

The preconditions annunciated above are required for recognition of any new tort; stealthing, however, concerns sexual misconduct

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and verbal sexual harassment "constitute a cause of action for assault"); *see* Larson, *supra* note 39, at 402–04.

83. *Infra* Conclusion.

84. *See* Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 1009 (2008). Stealthing implicates elements of both battery, assault, fraudulent misrepresentation, and intentional infliction of emotional distress. Courts will be unwilling to expand liability to cover conduct that they believe is implicated in other torts. *See* Abraham & White, *supra* note 17, at 2143. The pervasive notion of intentional infliction of emotional distress as a gap-filler tort may similarly be imposed upon stealthing claims, leading to inconsistent implementation or prohibitive standards. Fraker, *supra* note 84, at 1009.

85. *See id.* at 1026.

86. *See* Brodsky, *supra* note 1, at 209–10.

87. Abraham & White, *supra* note 17, at 2143. In their discussion of potential new torts to address sexual misconduct, Abraham & White discuss the impact of the #MeToo movement and the current cultural momentum that could lead to the introduction of a new tort. *Id.* However, this may not be enough to overcome the evidentiary hurdles to achieve recognition of a new tort.

88. Brodsky, *supra* note 1, at 208–09.

that sets alight the hoops that litigants must jump through in order to obtain relief. If victims manage to overcome the hurdles associated with general recognition of new causes of action, they must then combat inescapable gender biases, misconceptions of intangible harm, and constitutional notions of privacy that specifically permeate sexual misconduct claims.

1. Gender Biases

Unconscious gender biases and a judiciary that is more than 60% male has a detrimental impact on female plaintiffs and their ability to recover damages for harms suffered, particularly when the claim concerns sexual behavior.[89] The reality is that judges are human and the decisions that they make, regardless of the best of intentions, are tied to their own identity and experiences.[90] When the accumulative identity of the judiciary is confined to the experiences of the white, male, and Christian, causes of action and claims that implicate conduct outside of their relative experiences will slip through the cracks.[91] Both civil law and criminal law have historically been unfavorable to women perceived as being sexual, so, in the case of stealthing, where the victim had originally consented to sex with a condom, we can expect gender biases to be especially burdensome.[92]

The basis for this bias seemingly arises from the idea that women should avoid situations where their "virtue" would be lost and that it is the victim's responsibility to protect themselves instead of the

89. *See* Grace Knobler, *Women's Underrepresentation in the Judiciary*, REPRESENT WOMEN (Nov. 21, 2017), https://www.representwomen.org/women_s_underrepresentation_in_the_judiciary [https://perma.cc/4RTE-QEP8]; *see also* Helen Hershkoff, *Some Questions About #MeToo and Judicial Decision Making*, 43 HARBINGER 128, 134–36 (2019), https://socialchangenyu.com/wp-content/uploads/2019/06/Helen-Hershkoff_RLSC-The-Harbinger_43.2.pdf [https://perma.cc/ZP45-M6S4].

90. Kathleen E. Mahoney, *The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice*, 32 WILLAMETTE L. REV. 785, 793–94 (1996) (quoting Justice Cardozo: "[T]he predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man [sic] . . . . The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass judges by.").

91. *Id.* at 791.

92. *See, e.g.*, Larson, *supra* note 39, at 419 (describing Judge Richard Posner's attempt to characterize sex obtained by fraud as more a crime of lying than one of invasion of a woman's bodily integrity); *see also* Antonia Elise Miller, *Inherent (Gender) Unreasonableness of the Concept of Reasonableness in the Context of Manslaughter Committed in the Heat of Passion*, 17 WM. & MARY J. WOMEN & L. 249, 249–50, 254–55 (2010) (discussing the effect of gender biases in voluntary manslaughter suits and its disparate impact on women); Leslie Bender, *Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 585–86 (1993) (discussing the marginalization of women's injuries in tort law and the influence of male perspective in tort doctrine).

perpetrator's responsibility not to harm.[93] Another perverse notion that often permeates the judiciary's treatment of women is the idea of the "lying wom[a]n."[94] The predominantly male judiciary, confined to their own experiences, struggles to understand the emotions involved for female victims of sexual misconduct, and concludes that they are lying or exaggerating their claims of assault.[95]

In tort law, gender biases are repeatedly reflected through the failure to adequately compensate gender-related injuries, the relegation of causes of action that disparately impact women to family court or criminal court, or outright dismissal.[96] For example, the extreme emotional consequences of a miscarriage are ignored in favor of hyper-focusing on the injury and interspousal abuse is treated as a family issue, precluding vindication in the civil courts.[97] Or consider the reasonable person standard, which has prompted a refusal to award damages in the case of sexual harassment under the belief that the conduct is not sufficiently outrageous enough to warrant liability under intentional infliction of emotional distress.[98]

The harm suffered by stealthing victims goes beyond cases where pregnancy or STD transmission occurs. Victims report significant fears of their occurrence, as well as feelings of violation and betrayal of trust.[99] In order to provide redress for all victims of stealthing, advocates should seek recognition of intangible harm as well as physical harm. Tort law and the judges handling tort cases have consistently prioritized physical harm over emotional harm, restricting liability for emotional harms to the most outrageous conduct and limiting damages for pure emotional distress.[100] By emphasizing physical harm over emotional harm, courts have continued to marginalize women in the civil court system.[101]

Of particular relevance to the topic of this Note is a string of cases from California and the Superior Court of New Jersey regarding false misrepresentations in sexual relationships and the proposed tort of sexual fraud.[102] In a cross-claim against the mother of his

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93. Larson, *supra* note 39, at 388.

94. *Id.* at 446–47.

95. *See id.*

96. Bender, *supra* note 92, at 585–86.

97. *Id.* at 578, 585.

98. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 55, 57–58 (1989). In a particularly direct instance of misogynistic thought, the court in *Fardell v. Potts* held that at law "there was no such thing as a reasonable woman." *Id.* (quoting 41 N.H. 317 (1860)).

99. *See* Brodsky, *supra* note 1, at 187.

100. Bender, *supra* note 92, at 585–86.

101. *Id.* at 578.

102. The following four casing are outlined chronologically below: Stephen K. v. Roni L., 164 Cal. Rptr. 618 (Cal. Ct. App 1980); Barbara A. v. John G., 193 Cal. Rptr. 422 (Cal.

daughter, Stephen K. filed claims of fraud, negligent misrepresentation, and negligence after she falsely represented that she was taking birth control.[103] The court ruled against him, declining to step into bedroom and supervise the promises of adults, citing the constitutional right to privacy.[104] Three years after this decision, the same court held in *Barbara A. v. John G.* that the right to privacy was not absolute and that the plaintiff properly pleaded a claim for battery after she suffered an ectopic pregnancy following the defendant's claims that he was infertile.[105] The divergent opinions hinged on the physical harm to the plaintiff in *Barbara A.* compared to the birth of a healthy child and the perceived benefits of children in *Stephen K.*[106] Following the rationale of *Barbara A.*, the Second District of California once more held that the right of privacy was not absolute and reversed summary judgment of the plaintiff's claims for damages after her sexual partner represented that he was free from venereal disease, but infested her with herpes.[107]

After this in-court split on the right to privacy, the California Court of Appeal in the Fourth District heard a case where the plaintiff was encouraged to terminate her pregnancy through promises of the baby's father that he would impregnate her within the year.[108] The court held that the two previous cases were irreconcilable and followed the ruling in *Stephen K.* that the practice of birth control was better left to the individuals.[109] The court acknowledged the inconsistent ruling and rooted its judgment in the fact that the public policy considerations made in cases like *Kathleen K. v. Robert B.* were absent here.[110] Lastly, the Superior Court of New Jersey attempted to reconcile issues of privacy in sexual misconduct through the aid of the aforementioned California courts' decisions.[111] In a matter of first impression, the court held that public policy concerns precluded a mother from recovering damages arising out of the false representation by the defendant that he had had a vasectomy.[112] The court based its determination on the fact that public policy did not support a claim for the wrongful birth of a child, and that it precluded

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Ct. App. 1983); Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Cal. Ct. App. 1984); Perry v. Atkinson, 240 Cal. Rptr. 402 (Cal. Ct. App. 1987); C.A.M. v. R.A.W., 568 A.2d 557 (N.J. Super. Ct. App. Div. 1990).

103. *Stephen K.*, 164 Cal. Rptr. at 619.

104. *Id.* at 620.

105. *Barbara A.*, 193 Cal. Rptr. at 426, 430.

106. *Compare id.* at 430, *with Stephen K.*, 164 Cal. Rptr. at 620.

107. *Kathleen K.*, 198 Cal. Rptr. at 274, 276.

108. Perry v. Atkinson, 240 Cal. Rptr. 402, 403 (Cal. Ct. App. 1987).

109. *Id.* at 406.

110. *Id.*

111. *See* C.A.M. v. R.A.W., 568 A.2d 556, 559–60 (N.J. Super. Ct. App. Div. 1990).

112. *Id.* at 561.

inquiry by the courts into any representations "made before or during that relationship."[113]

The rationale of the courts in the above cases exemplify the hyper-focus and deference courts place on injury in sexual misconduct claims. Liability was limited to particular classifications of physical injury, such as an ectopic pregnancy or the contraction of herpes, while the birth of a healthy child and the termination of pregnancy were considered outside judicial scope.[114] This limitation reflects the judiciary's inability to understand the emotional and economic harm that arises from raising and giving birth to a child you did not want, *and* the emotional consequences of terminating a child you *did* want.[115] It also fails to account for the harm that results from the violation itself; that is, the subsequent fear of harm and mistrust that arises from deceptive sexual practices.[116]

Stealthing victims, if confident enough in their resolve to bring a claim against the perpetrator, will face intense scrutiny over their behavior by a judiciary who does not understand or does not want to understand the nature of what has happened to them.[117] The stereotype and misogynistic bias that the sexual woman who consents to sex with a condom gets what she deserves will invade the merits of the plaintiff's case.[118] Additionally, the he-said-she-said reality of evidence in the typical stealthing case will predispose biased judges into the belief that the victim is lying about what happened behind closed doors.[119] Even if the plaintiff is able to overcome the biases against them, they will then be forced to overcome another bias against intangible harm.[120] An advocate for stealthing

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113. *Id.*

114. *See supra* notes 103–13 and accompanying text.

115. *But see* Paula C. Murray & Brenda J. Winslett, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779, 829 (1986) ("[W]here the mother survives without casualty there is still some loss. She must spread her society, comfort, care, protection and support over a larger [family] group. If this change in the family status can be measured economically it should be as compensable as [physical injury].").

116. *See Rape Trauma Syndrome*, KING COUNTY SEXUAL ASSAULT RESOURCE CENTER, https://www.kcsarc.org/sites/default/files/Resources%20-%20Rape%20Trauma%20Syndrome.pdf [https://perma.cc/T7NV-LAHC].

117. *See* Eileen Skinnider, *Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-based Violence Against Women and Girls*, U.N. OFFICE ON DRUGS AND CRIME (2019), https://www.unodc.org/documents/mexicoandcentralamerica/2020/PrevencionDelito/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_ebook.pdf [https://perma.cc/5GAH-AFZT].

118. *See* Larson, *supra* note 39, at 429.

119. *Id.* at 451.

120. *See Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, AMNESTY INT'L (Mar. 1, 2011), https://www.amnesty.org/download/Documents/32000/ior530012011en.pdf [https://perma.cc/P4C9-R8NN].

victims will have to adequately argue to the court the emotional difference and significance of removing the condom as opposed to the sex they consented to, an argument made more difficult when the judiciary is unlikely to even have the potential to experience—much less, have actually experienced—nonconsensual condom removal.[121]

2. Constitutional Right to Privacy

Just as gender biases continue to prevent recovery to victims of sexual misconduct, constitutional notions of privacy and a reluctance of the judiciary to step into the confines of the bedroom has foreclosed recognition of sexual misconduct under new causes of action.[122] In an effort to prevent the continued intrusion of ideological forces and governmental control into the sexual lives of American citizens, the Supreme Court has repeatedly affirmed the right of privacy, particularly with regard to sexual intimacy.[123] The Court established that regulation of sexual conduct goes beyond controlling behavior; it touches upon the most private human conduct and the government should refrain from institutionalizing boundaries absent an injury to another person.[124] As a result of the strong conviction of the Supreme Court that sexual intimacy and its consequences should remain free from governmental interference, the right to contraception, the right to abortion, and the right to marry for homosexual men and women, are now established in binding precedent and in the lives of American citizens.[125]

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121. *See* Konrad Czechowski, Erin Leigh Courtice, Jonathan Samosh, Jared Davies & Krystelle Shaughnessy, *"That's Not What Was Originally Agreed To": Perceptions, Outcomes and the Legal Contextualization of Non-consensual Condom Removal in a Canadian Sample*, 14 PLoS ONE 2–3 (July 10, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6619686 [https://perma.cc/Z26C-UN9W].

122. *See* Murray & Winslett, *supra* note 115, at 789–92, 798.

123. *See, e.g.*, Carey v. Population Services International, 431 U.S. 678, 685 (1977) (noting that the Court had historically recognized a right to personal privacy in the context of marriage, procreation, and contraception); Eisenstadt v. Baird, 405 U.S. 438, 454, 461 (1972) (arguing that the decision of whether and when to have a child is a matter beyond the scope of governmental interference); Griswold v. Connecticut, 381 U.S. 479, 483–86, 499 (1965) (holding that the intimacies of a marriage are not to be regulated by the State).

124. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

125. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that a woman's right to an abortion is guaranteed by the fourteenth amendment and the fundamental right to privacy); Griswold v. Connecticut, 381 U.S. at 483–86 (holding that a law prohibiting married couples from using contraception was an unconstitutional violation of the right of privacy); Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (holding that the right of choice regarding marriage is inherent in the concept of individual autonomy). These cases represent landmark decisions that resulted in widespread social change. The right to an abortion resulted in significant gains for women and *Obergefell v. Hodges* gave homosexual men and women across the country the right to marry. The early jurisprudence surrounding

Judicial deference to the right of privacy in matters of sexual conduct was intended as a shield against unwarranted governmental intrusion;[126] however, this rigid contemplation of sexual privacy acts as a sword against novel causes of action arising out of the very right the Court was seeking to protect: personal autonomy. Courts are reluctant to recognize new forms of sexual violations at the unfortunate expense of the victim, citing the fundamental right of privacy as preventing judicial interference into the behavior.[127] As a result, deceit, manipulation and harassment have either gone unredressed by the courts or worse, treated as a necessary element to human interaction.[128]

While the right of privacy and its construction in the Supreme Court has led to significant social development in hot-topic issues like abortion and gay marriage, the unfortunate byproduct is that assertions of the right of privacy provide a basis for dismissal despite the merits in sexual misconduct causes of action.[129] Although *Lawrence v. Texas* held that the right to privacy is not immune to intrusion when there is an injury to another person, the nature of what the court deems an injury often determines whether the right to privacy applies or not, precluding liability when the court decides that the injury is not sufficient.[130] Consider again *Stephen K.*, where the court dismissed a claim against a woman who lied about using birth control and held that for courts to "supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct . . . would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy."[131] The above California and New Jersey cases illustrate that the right of privacy stands ready at the helm for defendants of sexual misconduct

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the right to privacy exemplifies the noble weaponization of the due process clause against unwarranted governmental intrusion and as a valuable method of social change.

126. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

127. *See* Conley v. Romeri, 806 N.E.2d 933, 936–37 (2004) (quoting Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980)). In its decision not to recognize a claim of sexual fraud brought by a plaintiff against her sexual partner who falsely represented that he could not have children: "[I]t is nothing more than asking the court to supervise the promises made between two *consenting* adults as to the circumstances of their private sexual conduct" (emphasis added). *Id.* at 937; *see also* Larson, *supra* note 39, at 404–05.

128. *See* Larson, *supra* note 39, at 443.

129. *Compare* Larson, *supra* note 39, at 447–48 (describing the concept of the "lying woman," which often affects the judiciary's treatment of women), *with* Finley, *supra* note 98, at 58 (describing the impact that the reasonable person standard has had on the rewarding of damages, or lack thereof, to female plaintiffs in sexual harassment cases), *and supra* notes 103–13 and accompanying text (a string of cases from California and New Jersey regarding false misrepresentations in sexual relationships and sexual fraud).

130. *See* Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980).

131. *Id.* at 620.

allegations and that courts will recognize it at the expense of victims who have suffered violations of their personal autonomy, because the injury is not one they recognize or deem important.[132]

The existing precedent related to sexual fraud make clear that any biases against stealthing claimants can be masqueraded as recognition of the constitutional right to privacy.[133] Courts can rationalize their reluctance to recognize the harm suffered by victims of stealthing not as avoiding providing victims recovery for violations they do not understand or claimants they do not approve of, but rather as just a continued recognition that courts should stay out of the bedroom. The weaponization of the constitutional right to privacy to avoid addressing sexual misconduct continues the victimization of women and allows the judiciary to sidestep the critical area of governance they have been tasked with: imposing liability for misconduct.[134]

II. THE TORT OF BATTERY PROVIDES THE BEST FRAMEWORK FOR PLAINTIFFS

If able to overcome their own doubts about the viability of their claims, victims of nonconsensual condom removal will face an uphill battle in achieving judicial recognition. While notions of true reform, equality, and justice inspire advocates to pursue a new tort to address stealthing, this is not the best route for victims.[135] The systemic biases evident in tort law and the court system require advocates to plan their approach strategically and pursuing a novel cause of action predisposes a claim to dismissal. The best approach for advocates and victims is to contextualize the conduct of stealthing within a framework that is accessible to the judiciary.[136] In order to avoid implicating the right of privacy, the focus should be less on the deception and the promises between the parties, and more on the change in physical conduct. Additionally, assuming the victim has not suffered any lasting physical harm, plaintiffs should pursue a legal remedy that provides damages for emotional harm. The use of binding precedent will force biased judges to recognize stealthing violations and limit their discretion in denying recovery. For these reasons, the best choice is an existing tort.

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132. *See* Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620–21 (Cal. Ct. App. 1980).

133. *See, e.g.*, *id.* at 621.

134. *See Guide to Judiciary Policy, Vol. 2: Ethics and Judicial Conduct*, *Ch.2*, UNITED STATES COURTS, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/9BC3-BTXR].

135. *But see* Brodsky, *supra* note 1, at 209–10.

136. *Id.* at 208–09.

Stealthing implicates conduct addressed through a variety of torts and areas of the law. Arguments could be advanced under theories of fraud, intentional infliction of emotional distress, and battery.[137] Ultimately, the goal of stealthing advocates should be to identify a cause of action that provides recovery for both the physical and emotional harm associated, does not impose unduly difficult standards, and adequately compensates the injury suffered. In weighing which cause of action will provide the best remedy for plaintiffs, we should consider: (1) who does the cause of action provide a remedy for; (2) what conduct will be held liable; and (3) what level of damages could a plaintiff receive?

A. Fraudulent Misrepresentation

The tort of fraudulent misrepresentation holds a defendant liable for physical harm if they make a false misrepresentation of fact, opinion, or intention in order to induce another to act in reliance upon it and the plaintiff "justifiably relies."[138] The elements of the tort and the comments reflected in the Restatement would support a cause of action for stealthing under fraudulent misrepresentation; however, liability for fraudulent misrepresentation is expressly limited to physical harm.[139] This would fail to provide a remedy for any emotional harm suffered by the majority of plaintiffs.

B. Intentional Infliction of Emotional Distress

The Restatement (Second) of Torts § 46 provides a mechanism for recovery of pure emotional harm.[140] The plaintiff must prove that the defendant engaged in "extreme and outrageous conduct" that "intentionally or recklessly cause[d] severe emotional distress," and for bodily harm, if such harm results from it.[141] In the context of stealthing, these requirements may prove preclusive to claims. The experiences of the male judiciary will inhibit an understanding of the conduct—the removal of a condom—as extreme or outrageous conduct.[142] Judges may have trouble believing that a reasonable

137. Brodsky, *supra* note 1, at 199–201.
138. RESTATEMENT (SECOND) OF TORTS § 557A (1965).
139. *Id.*
140. RESTATEMENT (SECOND) OF TORTS § 46 (1965).
141. *Id.*
142. *See* Brodsky, *supra* note 1, at 200–01 (noting that not all judges or jury members are likely to recognize the degree of violation that stealthing involves); Finley, *supra* note 98, at 55 (discussing the impact of the male perspective in assessing the reasonable person in the context of sexual harassment cases). We can expect the impact of male bias

person would find the difference between sex with a condom and sex without a condom to be so extreme or outrageous as to go beyond the bounds of human decency.[143] This could result in liability only being imposed in the case of a defendant who knowingly has an STD or is intentionally attempting to get the plaintiff pregnant, significantly limiting the amount of plaintiffs able to recover. Further, the elements of intentional infliction of emotional distress require that the distress suffered by the victim be severe.[144] Again, a lack of judicial understanding of the feelings of violation associated with the removal of the condom will be prohibitive in assessing the severity of the plaintiff's emotional distress.[145]

The tort of intentional infliction of emotional distress does not sufficiently cover cases likely to be brought by stealthing victims. The rigid requirements of the tort provide legal backing for judicial dismissal by judges influenced by their own experiences and biases toward the conduct.[146] Further, as argued below, when another tort more adequately addresses the injury suffered, courts will not impose liability under the "gap-filler" tort of IIED.[147] Under IIED, only the most severe and outrageous cases of stealthing will make it past the pleading stage.

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to be especially prevalent in the case of stealthing because due to the relatively unknown nature of it, men and judges have not had the opportunity to even observe the conduct happening to anyone in their lives. *See* Marwa Ahmad, Benjamin Becerra, Dyanna Hernandez, Paulchris Okpala, Amber Olney & Monideepa Becerra, *"You Do It without Their Knowledge": Assessing Knowledge and Perception of Stealthing among College Students*, 17 INT'L J. ENVIRON. RES. PUBLIC HEALTH 1, 2 (May 18, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7277099/pdf/ijerph-17-03527.pdf [https://perma.cc/EJ7C-MN46].

143. RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965); Brodsky, *supra* note 1, at 200–01.

144. *See* McPherson v. McPherson, 712 A.2d 1043, 1045–46 (Me. 1998) (holding that only the knowing transmission of an STD supported a cause of action for negligent transmission of a sexually transmitted disease); *see also Intentional Infliction of Emotional Distress*, WORKPLACE FAIRNESS, https://www.workplacefairness.org/harassment-intentional-infliction [https://perma.cc/5AFN-X7TT].

145. *See* Bender, *supra* note 92, at 577–78. Bender highlights the impact of the male perspective on judicial understanding of fright-induced harms, particularly injuries that are female-centric, such as a miscarriage. *Id.* at 578.

146. *See* Fraker, *supra* note 84, at 993–95. The requirements of severity and extreme or outrageous conduct are not clearly defined or delineated, allowing the judiciary broad discretion in its application to the facts of each case. *Id.* at 994–95. This discretion will allow a biased judge to ignore valid claims due to his preconceived ideas of what is or is not outrageous. For stealthing claimants, a cause of action with specific parameters that limits the judge's discretion is preferable.

147. *Id.* at 1009; *see* Sara Ruliffson, *R.I.P. I.I.E.D.: The Supreme Court of Texas Severely Limits the Tort of Intentional Infliction of Emotional Distress*, 58 BAYLOR L. REV. 587, 594–96 (2006) (discussing the Texas Supreme Court's reversal of an award under intentional infliction of emotional distress and explaining that "[the tort] does not operate where the other torts address the wrong committed.").

C. Battery

At its core, the act of stealthing is the intentional removal of a condom absent the consent or knowledge of their sexual partner.[148] The tort of battery recognizes the individual right to be free from unwanted physical contact and intrusion of bodily autonomy.[149] According to the Restatement

> an actor is subject to liability to another for battery if:
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
> a harmful contact with the person of the other directly or indirectly results.[150]

The elements and pre-existing case law of battery make it the most applicable cause of action for stealthing victims as it covers all potential scenarios of stealthing conduct, whether lasting physical harm results or not, and does not impose liability inequitably against unintentional conduct.[151]

1. Intent

Whereas some stealthing perpetrators may intend to cause bodily harm through the intentional transmission of an STD,[152] the majority of stealthing defendants, while not intending to cause physical harm, still act in disregard of the plaintiff's interest in bodily autonomy.[153] The requisite intent required for battery is not the intent to cause bodily harm or offense; all that is required is that the defendant intend the unpermitted contact.[154] The intent requirement of

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148. *See* R. KEITH PERKINS, *Domestic Tort Actions Against First Party Offenders*, *in* DOMESTIC TORTS: CIVIL ACTIONS ARISING FROM CRIMINAL CONDUCT WITHIN FAMILY RELATIONSHIPS § 4:6 (2018).

149. *See* RESTATEMENT (SECOND) OF TORTS § 13 (1965).

150. *Id.*

151. *See id.* § 16(1) cmt. a.

152. *See* Forgan-Smith, *supra* note 9.

153. *See* Harris O'Malley, *Why We Need to Talk About Stealthing*, PAGING DR. NERDLOVE (May 1, 2017), https://www.doctornerdlove.com/why-we-need-to-talk-about-stealthing [https://perma.cc/RQJ2-L2MC].

154. *See* RESTATEMENT (SECOND) OF TORTS § 20 (1965). For example, in the classic tort case of *White v. University of Idaho*, where a piano teacher intended to lightly touch the plaintiff on the back, but caused her significant bodily harm, the teacher was found to be liable to the plaintiff for battery. *See* 768 P.2d. 827, 828 (Idaho Ct. App. 1989).

battery aids courts in evaluating stealthing claims in two ways. First, it imposes liability on the defendant regardless of whether he intended harm or offense to the plaintiff.[155] This allows recovery for victims of stealthing where the motives of the defendant are not necessarily malicious, whether it be a desire for 'increased pleasure' or a belief that it is their 'male right,' but still constitute a conscious disregard for their bodily autonomy.[156] Second, it also prevents liability from being imposed against defendants who lack an intent to cause the contact.[157] A simple negligence action could impose liability against defendants who do not intend to remove the condom but it breaks or slips off, resulting in transmission of an STD or pregnancy.[158] This would be perverse to traditional notions of justice, potentially leading to the over-policing of sexual interactions and less condom use overall.[159] Thus, the intent requirement extends liability to antisocial behavior absent harm or immediate offense, but also declines to intrude too far into the sexual relationships between men and women and impose liability for purely negligent conduct.

2. Harmful or Offensive Contact

The elements of battery also provide a remedy beyond individuals who have suffered harmful contact by expanding liability to cover all offensive contact.[160] Rooted in the rationale that the law is meant to prevent self-help and retaliation, the law recognizes the

155. *See* RESTATEMENT (SECOND) OF TORTS § 16(1), cmt. a (1965).

156. *See* O'Malley, *supra* note 153.

157. *Compare* RESTATEMENT (SECOND) OF TORTS § 892B(2) cmt. e, illus. 5 (1979), *with McPherson*, 712 A.2d at 1046–47. While the court will hold a defendant liable for battery after transmission of an STD when they knew or should have known that they were a carrier, it refuses to impose liability when they are ignorant of the fact that they are infected. *See McPherson*, 712 A.2d at 1046. In the stealthing context, this rationale would prevent liability from being imposed on a defendant who did not realize the condom had broken or slipped off.

158. *But see McPherson*, 712 A.2d at 1046 (refusing to impose liability for battery in the case of an unknowing transmission of HPV or hold the defendant liable for negligent transmission of a sexually transmitted disease in the absence of the defendant's knowledge of his infection).

159. *See* Higgins et al., *supra* note 10 and accompanying text. If liability were to be imposed against defendants who suffer from a condom break or other defect, absent any intent on their part or any risk of STD transmission, the courts would be intruding into the consensual sexual interactions between men and women. Further, the risk of liability could have the adverse consequence of men refusing to wear condoms entirely out of fear that they could be sued. In light of the relative lack of power of women to negotiate condom use, the result of this could actually exacerbate the problem.

160. *See* RESTATEMENT (SECOND) OF TORTS § 19 (1965).

reprehensibility of intentionally causing offensive contact.[161] Liability is imposed regardless of whether the plaintiff was aware of the offensive contact at the time, emphasizing the importance of the dignitary interest involved.[162] According to the Restatement, a "contact is offensive if it offends a reasonable sense of personal dignity."[163] If the contact violates current social notions in the manner in which it is conducted, it qualifies as offensive contact.[164]

Stealthing plaintiffs can frame their arguments about the offense in two ways: as a general violation of personal dignity or as a violation of their consent. Under the first argument, stealthing is offensive because each individual has the right to freedom from unwanted intentional contact.[165] In the context of sexual conduct, the intrusion on personal dignity is exacerbated as intercourse places us at our most vulnerable; the violation of trust involved in stealthing creates a prima facie case of offensive contact.[166]

Under a consent argument, advocates should use traditional notions of consent by arguing that *any* violation of a plaintiff's will is offensive contact. It is *per se* offensive to violate the conditions established by the victim.[167] In *Richmond v. Fisk*, the defendant made contact with the plaintiff when he shook him awake despite being forbidden from entering the room and was held liable for trespass to person (battery).[168] In the same sense that waking up a person against their express wishes is offensive, the act of removing a condom against a sexual partner who conditions consent upon its use is offensive.[169]

3. Consent

The primary issue facing stealthing plaintiffs and their advocates is the defense of consent and whether or not the act of

161. *See* Alcorn v. Mitchell, 63 Ill. 553, 554 (Ill. 1872) (noting that, to maintain societal cohesion, the law should step in when a person has experienced an offensive contact that could provoke a retaliative act).

162. *See* RESTATEMENT (SECOND) OF TORTS § 18 cmt. d (AM. L. INST. 1965).

163. *See id.* § 19.

164. *See id.* § 19 cmt. a.

165. *See id.* § 18 cmt. g.

166. *See* Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1626–27 (2012).

167. *See, e.g.*, Richmond v. Fisk, 160 N.E. 103, 103 (Mass. 1893).

168. *See id.*

169. *Compare id.* (explaining the offensiveness of waking a person against express wishes), *with* Ashley Mateo, *'Stealthing' Is a Dangerous Type of Sexual Abuse—Here's What You Need to Know About It*, HEALTH (Oct. 14, 2019), https://www.health.com/condition/sexual-assault/what-is-stealthing [https://perma.cc/PL3V-ZY8L] (describing the offensiveness of removing a condom without consent).

removing the condom "vitiates" consent to sex generally.[170] The basis of defendants' arguments will focus on the initial consent to sexual intercourse and argue that the plaintiff's consent to sex generally precludes recovery.[171] Whether or not the act of removing the condom vitiates consent is the primary hurdle that plaintiffs must overcome when bringing a stealthing claim under battery and the existing jurisprudence of battery provides the precedent necessary to sufficiently argue that consent was not present.[172]

As the sole adjudication of a stealthing claim on record, *Assange v. Swedish Prosecution Authority* stands as the prime example of what litigants can expect a stealthing trial to look like in terms of the arguments made and the opinion adopted by the court.[173] In *Assange v. Swedish Prosecution Authority*, Wikileaks founder Julian Assange had sexual relations with a woman referred to as AA.[174] During this encounter, Assange purposefully broke the condom, despite her making it clear that protection was required, and ejaculated inside her.[175] The High Court of the United Kingdom focused on the fact that Assange knew that her consent was conditioned on the use of a condom and willfully disregarded this when he broke it without her knowledge.[176] Assange argued that AA's consent to the act of sexual intercourse in general precluded liability because there is no liability when the contact is consensual.[177] The court decided this argument was without merit and used a conditional consent standard to formulate their judgment.[178] They ultimately held that consent to sexual intercourse with a condom is not the same as consent to sexual intercourse without the condom, and the removal of it amounted to rape.[179]

While this case is both outside the United States' jurisdiction and is a criminal case, the arguments made by the defense and adopted

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170. *See* Brodsky, *supra* note 1, at 190.

171. *See, e.g.*, Assange v. Swedish Prosecution Auth. [2011] EWHC (QB) 2849 (Eng.) at [126], *available at* http://www.gdr-elsj.eu/wp-content/uploads/2012/06/High-Court-2-Novembre-2011-assange-approved-judgment-1.pdf [https://perma.cc/F3FX-B2QG] (stating the defense's argument that the defendant had a reasonable belief in consent because the accusing party had agreed to have sex with him at the outset).

172. *See* Brodsky, *supra* note 1, at 190–92.

173. Assange, EWHC (QB) 2849 at [84] (offering an example of arguments as to consent put forth by the defense); *see also id.* at [95–96] (finding that the removal of a condom when sexual intercourse was conditioned on the use of a condom was a crime).

174. *Id.* at [1].

175. *Id.* at [93].

176. *Id.* at [95].

177. *Id.* at [79].

178. Assange, EWHC (QB) 2849 at [86].

179. *Id.* at [116].

by the court illustrate the same arguments likely to be used in United States litigation. In *Assange*, the United Kingdom court focused on the concept of conditional consent and its requirement that consent is predicated on the conditions agreed upon being maintained throughout.[180] The concept of conditional consent adopted by the United Kingdom court finds its United States' sister in the consent requirements present in medical battery jurisprudence.[181] Stealthing plaintiffs will be able to utilize the relevant medical battery jurisprudence under the concepts of scope of consent, substantial mistake, and conditional consent.[182]

A doctor commits a medical battery when they violate the patient's consent in three scenarios: (1) when the doctor has received consent for one procedure, but subsequently performs a substantially different procedure; (2) the patient has consented to the procedure but has made a substantial mistake as to the interest invaded or the extent of the harm; and (3) when the patient expressly placed conditions upon the operation and the doctor acts outside the scope of those conditions.[183]

Under the first theory, the plaintiff must show that the procedure actually performed constitutes a substantial change to the consented procedure.[184] In *Conte v. Girard Orthopaedic Surgeons Medical Group, Inc.*, the plaintiff-patient had consented to a procedure that he believed would result in the repair of his shoulder.[185] However, during the procedure, the defendant-doctor decided not to proceed with the repair because of concerns that it would make the injury worse.[186] The plaintiff predicated his argument on the fact that the surgery he received, one that would not repair his shoulder, was a substantially different surgery than the one he consented to, one that would repair his shoulder.[187] The court was not persuaded, reasoning that the doctor had acted within the *scope of consent* because the doctor performed *less* than he was authorized to do.[188]

There is no consent to a medical procedure if the basis for the patient's consent is a *substantial mistake* concerning the nature of

180. *Id.* at [86].
181. *Compare id.* at [102], *with* discussion *infra* note 184 and accompanying text.
182. *See infra* notes 184–85, 200, 205, and accompanying text.
183. *See, e.g.*, Conte v. Girard Orthopaedic Surgeons Med. Grp., Inc., 132 Cal. Rptr. 2d 855, 859 (Cal. Ct. App. 2003); Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 440 (Ariz. 2003); Piedra v. Dugan, 21 Cal. Rptr. 3d 36, 48 (Cal. Ct. App. 2004).
184. *See, e.g.*, *Conte*, 132 Cal. Rptr. 2d at 859–60.
185. *See id.* at 857.
186. *See id.* at 858.
187. *See id.* at 860.
188. *See id.*

the operation and the risks involved, induced by the misrepresentation of the doctor.[189] In *Duncan v. Scottsdale Imaging, Ltd.*, the plaintiff was set to undergo sedation and told the nurse that she would only accept Demerol or morphine, and no other drug, an instruction which the nurse assured her would be followed.[190] The patient repeatedly refused the use of fentanyl and only consented to the procedure when the nurse promised that morphine would be used.[191] Despite this, the nurse administered fentanyl to the patient, leading to serious complications.[192] Although the court discussed both lack of informed consent (which sounds in negligence) and conditional consent, the court ultimately held that the patient's consent was obtained by misrepresentation and constituted a substantial mistake, vitiating consent.[193]

If the patient is advancing an argument that they placed conditions or restrictions on their consent, known as a conditional consent theory, they must prove that: (1) "[the] consent was conditional; [(2)] the doctor intentionally violated the condition while providing treatment; and [(3)] the patient suffered harm as a result of the doctor's violation of the condition."[194] When a sixteen-year-old scoliosis patient required surgery to correct her spine, she conditioned her consent to the use of only family donated blood in the operation.[195] The surgeon acted in violation of this express condition by giving her nonfamily donated blood, resulting in the contraction of HIV.[196] The court ultimately did not hold Dr. King liable; however, it was not on the basis of lack of conditional consent but rather the fact that Dr. King was unaware of the condition.[197] Stealthing claimants can argue that the act of removing the condom vitiated their consent to sexual intercourse through the utilization of any of the three theories discussed above. The viability of each is dependent on the facts of the particular case.[198]

Under the scope-of-consent theory, plaintiffs should argue that sex without a condom exceeds the scope of what was consented to.[199] Unprotected sex goes significantly beyond the scope of protected sex,

189. *See* RESTATEMENT (SECOND) OF TORTS § 892B (AM. L. INST. 1979).
190. *See* Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 437 (Ariz. 2003).
191. *See id.*
192. *See id.*
193. *See id.* at 441.
194. *See* Piedra v. Dugan, 21 Cal. Rptr. 3d 36, 50 (Cal. Ct. App. 2004).
195. *See* Ashcraft v. King, 278 Cal. Rptr. 900, 901 (Cal Ct. App. 1991).
196. *See id.* at 902.
197. *See id.*
198. *See supra* notes 185–99 and accompanying text.
199. *See* Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 440 (Ariz. 2003) ("[A]nything greater or different than . . . [what was] consented to becomes a battery.").

placing the plaintiff at an increased risk of infection and pregnancy.[200] In the case of stealthing, by removing the condom the defendant has intentionally deviated from the consent given and performed a substantially different act than protected sex.[201] Defendants will argue that sex with a condom is not substantially different than sex without, pointing to the low use of condoms in the general population.[202] However, the increased risk intimacy associated with unprotected sex makes this argument akin to arguing that consent to a hand-to-hand fight is consent to a fight with brass knuckles.[203]

Under a substantial mistake theory, stealthing plaintiffs will argue that they never would have consented to sexual intercourse in the first place if not for the defendant's misrepresentation that a condom will be worn.[204] The plaintiff clearly made a substantial mistake concerning the nature of the invasion to her interests and the harm expected; she believed she was having protected sex when, in fact, she was not. The defendant knew that, and the plaintiff was acting in reliance on their misrepresentation and would have been properly apprised of the risks but for the defendant's conduct.[205] Again, defendants may argue that the belief in condom use does not constitute a 'substantial mistake'; however, in the context of sexual intercourse, the difference between sex with a condom and sex without a condom is large.[206] While this theory has been most clearly advanced in the context of medical battery, it directly follows the language of § 892B and has been enforced in other areas of battery jurisprudence.[207]

The most likely argument advanced by defendants will be that the difference between unprotected and protected sex is so minimal that it cannot be a substantial mistake and is merely a collateral

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200. *See* Shane Murphy & Cameron White, *What Are the Real Risks of Condomless Sex? What Everyone Should Know*, HEALTHLINE (Jan. 27, 2020), https://www.healthline.com/health/hiv/risks-sex-without-condoms#number-of-partners [https://perma.cc/JM83-RAD5].

201. *See, e.g.*, Conte v. Girard Orthopaedic Surgeons Med. Grp., Inc., 132 Cal. Rptr. 2d 855, 859–60 (Cal. Ct. App. 2003) (holding that a doctor who obtains consent for one procedure but subsequently performs another is liable for medical battery).

202. *See* Steven Reinberg, *Only About One-Third of Americans Use Condoms: CDC*, WEBMD (Aug. 10, 2017), https://www.webmd.com/sex/news/20170810/only-about-one-third-of-americans-use-condoms-cdc#1 [https://perma.cc/X9J6-GYHS].

203. *See* RESTATEMENT (SECOND) OF TORTS § 892A illus. 9 (1979).

204. *See* RESTATEMENT (SECOND) OF TORTS § 892B(4) cmt. h (1979) (noting that receiving consent does not protect an individual from liability resulting from exceeding that consent).

205. *See, e.g.*, Duncan v. Scottsdale Med. Imaging, Ltd., 70 P.3d 435, 440 (Ariz. 2003).

206. *See* Reinberg, *supra* note 202 (discussing the public health benefits of using condoms).

207. *See* RESTATEMENT (SECOND) OF TORTS § 892B (1979); *see, e.g.*, *Duncan*, 70 P.3d at 440; Neal v. Neal, 873 P.2d 871, 877 (Idaho, 1994).

matter to sexual intercourse.[208] This argument should not prevail and available precedent in battery jurisprudence refutes this argument.[209] In *Neal v. Neal*, plaintiff alleged a prima facie case of battery against her husband when she became aware that he was sexually involved with another woman.[210] She advanced the theory of battery on the basis that she would not have consented to sex with her husband had she been aware of the affair, as the contact would have been offensive.[211] The Supreme Court of Idaho ruled that her husband's misrepresentation of fidelity potentially induced her into sexual intercourse, overturning the district court's verdict that his fidelity was merely a collateral matter and not a substantial mistake.[212]

The language of the Restatement and *Neal v. Neal* provide the necessary precedents plaintiffs need to prove the element of battery that the contact be nonconsensual and combat defendants' primary argument.[213] If the infidelity of a sexual partner constitutes a substantial mistake concerning the nature of the contact or the harm to be expected from it, something only indirectly related to the physical contact itself, nonconsensual condom removal must be considered a substantial mistake.[214] It directly relates to the physical act itself and constitutes an increased risk of physical harm or offense, creating a substantial mistake relating to the nature of the invasion of her interests.[215]

While the above two theories potentially cover instances of stealthing where the plaintiff did not expressly require the use of a condom, the conditional consent doctrine is implicated when the plaintiff has made an express condition of the use of a condom and harm results as a result of violating that condition.[216] Although the conditional consent theory requires heightened pleading of an express

208. *See, e.g.*, Neal v. Neal, 873 P.2d 881, 889–90 (Idaho Ct. App. 1993).

209. *Compare id.* at 890 (holding that defendant's representation that he had been faithful to his wife despite engaging in an extramarital affair was merely a collateral matter that did not vitiate consent to sex), *with id.* at 877 (reversing the lower court opinion and holding that consent predicated on facts known at the time does not destroy exceptions for consent induced by a fraudulent act).

210. *See id.* at 876.

211. *See Neal*, P.2d at 876.

212. *See id.* at 877.

213. *See infra* notes 183–89 and accompanying text.

214. *But see* Athena Katsampes, *A Rape By Any Other Name? The Problem of Defining Acts of Protection Deception and the University as a Solution*, 24 VA. J. SOC. POL'Y & L. 157, 165 (2017) (discussing the drawbacks of codifying deception as a means of negation of dissent).

215. *See* Mateo, *supra* note 169.

216. *See* Piedra v. Dugan, 21 Cal. Rptr. 3d 36, 50 (Cal. Ct. App. 2004) (keeping in mind that, unlike Dr. Dugan, the defendant in a stealthing case intentionally deviates from the terms of consent).

condition and harm to the plaintiff, elements absent in the above theories, this theory would avoid the arguments advanced by the defendant that there is not a substantial difference between unprotected and protected sex.[217] It is immaterial in conditional consent cases whether or not the change is substantial; there is an individual right to place conditions on the consent given.[218] This theory leaves less discretion to the judge to rule based on their notions of the violation.[219]

By utilizing the medical battery, Restatement, and general battery jurisprudence, plaintiffs will present the conduct of stealthing through a lens that judges not only understand, but will be bound to follow.[220] The conversation about whether the removal of a condom vitiates the consent to sex will be posed as a general question: when one person intentionally and without consent changes the nature of what is being done to the other person, should they be held liable? The sexual relationship between the parties, and the inherent biases and constitutional notions of privacy, become just a contextual factor and the crux of the complaint is centered around personal autonomy and the ability of the individual to define the terms of their consent. By utilizing medical battery standards, an area where doctors are given significant deference by the judiciary, stealthing victims can use this protection to their advantage.[221] If we hold doctors liable for extending the scope of a patients consent, even in the high-intensity realm of the medical profession, how could we decline to extend liability to the antisocial conduct of removing contraception?[222] If a judge were to dismiss the action, they would no longer be dismissing a novel cause of action—it would be an outright rejection of precedent and standards established for decades.

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217. *See id.*

218. *See* Ashcraft v. King, 278 Cal. Rptr. 900, 905 (Cal Ct. App. 1991).

219. *Compare* Neal v. Neal, 873 P.2d 881, 890 (finding that the defendant's representation of his faithfulness to his wife was a collateral matter that did not rise to a substantial mistake), *with* Assange v. Swedish Prosecution Auth. [2011] EWHC (QB) 2849 (Eng.) at [102], *available at* http://www.gdr-elsj.eu/wp-content/uploads/2012/06/High-Court-2-Novembre-2011-assange-approved-judgment-1.pdf [https://perma.cc/F3FX-B2QG] (holding that AA had a right to place conditions on the consent given using the conditional consent theory).

220. *See* Debra Cassens Weiss, *Is 'stealthing' sexual assault? New tort should allow damages, law review article argues*, ABA J. (Apr. 27, 2017, 7:30 AM), https://www.abajournal.com/news/article/new_tort_should_cover_stealthing_law_review_article_says [https://perma.cc/ZN3Z-5C6K] (describing the current system's reliance on judges willingness to fit harm into pre-existing legal areas).

221. *See, e.g.*, Ashcraft v. King, 278 Cal. Rptr. 900, 903–04 (Cal Ct. App. 1991) (explaining conditional consent in the context of medical battery).

222. *See* Kellie Scott, *Stealthing in 'I May Destroy You' can happen to anyone. Here's what you should know*, ABC EVERYDAY (Sept. 15, 2020), https://www.abc.net.au/everyday/why-stealthing-is-a-violation-of-consent/12639172 [https://perma.cc/C32X-4BUV].

CONCLUSION

Following the #MeToo movement, the question has become: what do we do next?[223] How do we adapt and change our laws to address issues that for decades have affected women, but are only now surfacing and demanding patient's attention? Efforts have focused on effectuating lasting legal reform through the introduction of legislative policies targeting sexual misconduct.[224] These efforts have either been stalled or outright rejected by a legislature or judiciary restricted by a conservative, male perspective.[225] The stalemate between the desire for reform and a system that is either slow to change, or outright antagonistic to it, begs the real question: what can we do *now*?

So often, it appears that in order to change society, we have to adapt the law.[226] However, the law and existing precedent present a unique opportunity for advocates to lead the country in the correct direction without the country realizing that they are being led at all. In framing stealthing claims under the existing tort of battery, judges will be directed away from their worst inclinations and biases, forcing them to recognize the veracity of the claims. They will no longer be able to avoid facing the reality that women face daily because, through contextualizing stealthing under battery, the conversation becomes one that we could all face: a physical invasion of our interest in bodily autonomy. A rejection of this interest would be in opposition to the very foundation of our common law system and a judge faced with a stealthing case will have to choose between disrupting the current flow of precedent or allowing the claim to move forward.

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223. *See* Laurie Girand, *What's Next for the #MeToo Movement?*, GRIT DAILY (Apr. 17, 2020), https://gritdaily.com/whats-next-for-the-metoo-movement [https://perma.cc/RL5U-83D6].

224. *See, e.g.*, Andrea Johnson, Kathryn Menefee, & Ramya Sekaran, *Progress in Advancing Me Too Workplace Reforms in #20StatesBy2020*, NAT'L WOMEN'S L. CTR. (Dec. 2019), https://nwlc.org/wp-content/uploads/2019/07/final_2020States_Report-12.20.19-v2.pdf [https://perma.cc/567B-46QH] (describing legislative reforms in protection against workplace harassment as a result of the #MeToo movement).

225. *See, e.g.*, Michelle Cottle, *Why Sexual-Harassment Legislation Stalled in the Senate*, THE ATLANTIC (Apr. 17, 2018), https://www.theatlantic.com/politics/archive/2018/04/sexual-harassment-bill-senate/558176 [https://perma.cc/N8FN-AX5S].

226. *See, e.g.*, Eva Shang, *6 Lawsuits That Can Drive Social Change and Protect Personal Rights*, FORBES (Jan. 11, 2018, 11:41 AM), https://www.forbes.com/sites/under30network/2018/01/11/6-lawsuits-that-can-drive-social-change-and-protect-personal-rights/?sh=37d12c6621b3 [https://perma.cc/8FY2-4A3G].

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