
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 1033 **Hearing Date:** July 11, 2017
Author: Cristina Garcia
Version: June 29, 2017
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Sexual Battery: Condoms*

HISTORY

Source: Author

Prior Legislation: None

Support: California Women’s Law Center; City of West Hollywood; Planned Parenthood

Opposition: American Civil Liberties Union; California for Attorneys for Criminal Justice;
California Right to Life Committee

Assembly Floor Vote: Not applicable

PURPOSE

The purpose of this bill is to make it felony sexual battery to without consent removes a condom during sexual intercourse, intentionally uses a condom that has been tampered with, tampers with a condom that is used in the act of sexual intercourse or knowingly misrepresents to the other person that some form of contraception other than a condom is being used.

Existing law provides that any person who touches an intimate part of another person if the touching is against the will of the person touched and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse is guilty of a misdemeanor sexual battery punishable by a fine not exceeding \$2,000 or by imprisonment not exceeding six months or by both fine and imprisonment. (Penal Code § 243.4 (e)(1))

Existing law provides that any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for 2, 3 or 4 years or in a county jail for not exceeding one year, or by a fine not exceeding \$10,000 or by both the fine and imprisonment. (Penal Code § 245(a)(4))

Existing law provides that rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under specified circumstances including: where the person is at the time of the act unconscious of the act. Unconscious of the nature of the act includes “was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraud in fact.” (Penal Code § 261 (a)(4)(C))

Existing law provides that rape of a person who is the spouse of the perpetrator is an act of sexual intercourse under specified circumstances including: where the person is at the time of the act unconscious of the act. Unconscious of the nature of the act includes “was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator’s fraud in fact.” (Penal Code § 262(a)(3)(C))

This bill provides that an act of sexual intercourse accomplished under any of the following circumstances is a felony punishable by imprisonment in the state prison for two, three, or four years, and a fine not exceeding ten thousand dollars (\$10,000):

- (1) The person using a condom intentionally and without consent removes the condom prior to or during the act.
- (2) The person using a condom intentionally and without consent tampers with the condom and that condom is used during the act.
- (3) The person intentionally and without consent uses a condom during the act that the person knows has been tampered with.
- (4) A person intentionally and without consent tampers with a condom or knows the condom has been tampered with, provides the condom to the other person for use by the other person during the act, and the condom is used by the other person during the act.
- (5) A person knowingly misrepresents to the other person that the first person is using a form of contraception other than a condom.

COMMENTS

1. Need for This Bill

According to the author:

“Stealthing”, a new name for an ancient, sneaky practice, is the nonconsensual intentional removal or tampering with the condom during sexual intercourse and its occurrence is on the rise. If a condom is used there is an expectation that the condom will stay on unless there is explicit consent to take it off. Some realize their partner had removed the condom at the moment of re-penetration; others may not realize until the partner ejaculated, and some may never find out. Regardless of when, or if, the victim learns of this breach of trust, this practice exposes them to physical risks of pregnancy and disease, and is a grave violation of one’s dignity and autonomy.

There are online communities who defend stealthing as a male “right,” particularly a right of every man to “spread his seed”. Online blogs and forums “train” other men about stealthing best practices, and offer support and advice in their pursuit of nonconsensual condom removal during sex. Deeply rooted in centuries of rape culture based on dominance and control, particularly of women by men, stealthing is gaining attention in the media by both straight and gay men.

What is rape? Penetration, by a body part or a foreign object, without consent. When you remove a condom without permission, there is no consent and there is penetration. It’s clear, “stealthing” is rape. However, current California law does

not acknowledge the act of “stealthing” which is why AB 1033 is necessary. AB 1033 makes the nonconsensual intentional removal or tampering with a condom during sexual intercourse a form of rape.

2. Felony Sexual Battery

Most sexual batteries are either a wobbler or a misdemeanor. Sexual battery of a person while he or she is restrained is a wobbler (Penal Code § 243.4 (a)). Sexual battery of a person who is institutionalized or seriously disabled or medically incapacitated is a wobbler. (Penal Code § 243 (b)). Sexual battery when a person misleads the victim that the touching is for a professional purpose is a wobbler. (Penal Code § 234.4 (c)) Misdemeanor battery includes touching a person against their will for the purpose of sexual arousal. (Penal Code § 234.4 (e))

This bill would create a felony sexual battery punishable by 2, 3 or 4 years in state prison and a fine not exceeding \$10,000 (approximately \$41,000 with penalty assessments) for the following offenses:

- (1) The person using a condom intentionally and without consent removes the condom prior to or during the act.
- (2) The person using a condom intentionally and without consent tampers with the condom and that condom is used during the act.
- (3) The person intentionally and without consent uses a condom during the act that the person knows has been tampered with.
- (4) A person intentionally and without consent tampers with a condom or knows the condom has been tampered with, provides the condom to the other person for use by the other person during the act, and the condom is used by the other person during the act.
- (5) A person knowingly misrepresents to the other person that the first person is using a form of contraception other than a condom.

Should these offenses have a higher penalty than the existing sexual battery offenses? Are these offenses deserving a higher penalty than the sexual battery of a person who is being restrained or medically incapacitated or inappropriately touched by a doctor or other professional?

3. Issue of Proof not Available Laws

While the author is correct in that “stealthing” is not specifically covered by existing law, if evidence exists then the behavior could be prosecuted under existing sections relating to misdemeanor sexual battery (Penal Code § 243.4 (e)(1)); felony rape where a person is unconscious of the nature of the act (Penal Code 261 (a)(4)(c)); felony spousal rape where a person is unconscious of the nature of the act (Penal Code § 262(3)(c)); and assault with force likely to create great bodily injury, as pregnancy has been found to be great bodily injury, and an actual pregnancy would not be necessary (Penal Code § 245 (a) (4)).

The issue is not available crimes, it is that evidence of the conduct will be hard to find. Was the condom taken off or did it fall off? Was the condom tampered with or did it fail? Was the woman not on birth control or did that fail? Was the sex even contingent on the use of a condom or other birth control?

As the California Attorneys for Criminal Justice notes:

The “intent, “tampered with” and “knows has been tampered with” requirements are extremely vague. There is not actual requirement of “bad intent” in AB 1033, only intent to “tamper with.” It is easy to imagine a case where the person may adjust a condom during sex, with a neutral intent, with an undesired result of accidental insemination. Pursuant to the language of the bill, this adjustment would constitute a sexual battery. Furthermore, the language does not clarify who can be convicted of the act- the person wearing the condom? The person having sex with the person wearing the condom? Both parties would be technically using the condom during a consensual act. Nor does the bill language require that consent is contingent on an understanding that a condom be used.

Should the bill clarify who can be prosecuted? Should the bill clarify that consent had to be contingent on the use of a condom or the use of birth control?

- END -