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**A New Offence of Stealthing? The Tension Between its Harm
and the Practical Barriers When Reporting it**

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Abstract

This paper assesses whether stealthing should be its own criminal offence or whether it can remain within the offence of rape. The recent decisions of Campos v R and R v Campos, were the first stealthing cases in New Zealand. We thus want to analyse if following Campos and having stealthing within the offence of rape, should be the prevailing law in New Zealand. Furthermore, as these cases had stealthing occur in the context of sex work, the question is whether Campos can scale well to stealthing when it is not in a commercial setting. The paper discusses two conflicting arguments to answer this question. Firstly, it is apparent that the harm of stealthing is almost identical to the harm of rape and therefore perhaps stealthing should be punished as rape. This is reinforced through the principle of fair labelling as, due to the harms being so similar, it perhaps is not necessary to distinguish the acts. In contrast however, it is found that practically many barriers exist which mean that victims of stealthing are reluctant to report the crimes. These are barriers internally within the victim, within authorities who investigate stealthing claims, and with juries. To mitigate these barriers, we need a new offence of stealthing. This is as a new offence brings societal awareness on stealthing, which will therefore eliminate rape myths, as they are a large part of many of these barriers. Despite both justifications to our question being conflicting, what is decided is that the practical barriers are of too much importance to ignore. Therefore this essay advocates for a new offence. However as different barriers require different actions, a new offence with a maximum sentence of 14 years is decided as a middle ground to help mitigate as many barriers as possible.

Keywords : “Stealthing”, “Campos v R” “Rape Myths” “Harm”, “Reporting Sexual Violence”

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I Introduction

Despite being a long-established act since the ideas of contraceptive sexual intercourse have existed, stealthing has become a more recently spoken about phenomena legally.¹ Stealthing occurs when an individual removes a condom during sexual intercourse without the other person's knowledge or consent, after the initial intercourse was consented to. Due to the recent cases of *R v Campos* and *Campos v R*, where the act of stealthing for the first time in New Zealand was discussed, stealthing has become topical.² In *Campos*, the offender was convicted under s 128 (1) (a) of the Crimes Act 1961, for stealthing a sex worker.³ *Campos* prima facie indicates a potential way forward by prosecuting stealthing under the offence of rape. However, *Campos* may not be broad enough to encompass all stealthing scenarios. This essay seeks to answer whether *Campos* and the current law has all of the tools to sufficiently prosecute stealthing or if we require a new offence entirely.

However, this question is difficult due to the genuine tension between different justifications which attempt to answer our question. The harm of stealthing proves to be very similar to the harm of rape, thus advocating for *Campos* to remain as the law. This is reinforced through the principle of fair labelling as stealthing and rape are not distinct enough to be labelled differently. However, in contrast, practical barriers within the criminal justice system imply that a new offence of stealthing may be the only way to effect change and mitigate some of these barriers. This is as a new offence helps trample rape myths, which are the reason for many of these barriers. This is as these barriers have lead to minimal sexual violence and stealthing cases being reported by victims. Ultimately, the position of this essay is that the practical barriers require a more urgent response and hence stealthing should be its own offence. This is especially as some barriers exist mainly for non sex workers and thus we need change from *Campos* to protect these people. Subsequently this creates a new avenue to obtaining stealthing convictions in New Zealand rather than through *Campos*. Furthermore, this offence will have a maximum sentence of 14 years. This acts as a middle ground, as different barriers require different methods to mitigate them.

¹ Sumayya Ebrahim "I'm Not Sure This is Rape, But: An Exposition of the Stealthing Trend" (2019) at 1.

² *Campos v R* [2022] NZCA 311.

³ *R v Campos* [2020] DCR 507 at [38].

II *Campos v R*

The defendant, Mr Campos engaged in the service of a sex worker.⁴ The sex worker reminded Campos that a condom was required during the entire sexual act, by law and a condition of her service.⁵ During the intercourse, Campos attempted to remove the condom, and in response the complainant closed her legs and told Campos to wear the condom.⁶ However upon resuming, Campos removed the condom and ejaculated inside the complainant.⁷ The complainant immediately ran away in distress to tell the manager what had occurred.⁸ Mr Campos was charged for three years and nine months for the charge of sexual violation by rape,⁹ after the judge considered other mitigating factors to reduce the sentence.¹⁰

There was a clear transactional understanding in this case. A fee was paid by Campos to the complainant for sexual services. The complainant highlighted the rules and conditions under which the service could be obtained, and emphasised the non-negotiable use of the condom.¹¹ Even after Campos had attempted to take off the condom, this condition of sex was repeated to him.¹² This element of vocalising the conditions of sex is common in commercial sex work contexts. However, this clarity is less frequent in more social sexual scenarios. Thus, perhaps this case is not appropriate to be used for all stealthing scenarios. This is due to a sex worker being involved, and thus the terms of consent being expressly articulated to the perpetrator multiple times. Further, due to the number of times Campos was reminded to wear protection, there seems to be a high degree of premeditation in his acts. The case thus exists on one end of a spectrum in expressing consent. On the other end would be a more casual scenario with little vocalising and the initiation of sexual contact through non verbal queues. We hence wonder if *Campos* is so far along the spectrum that it can be analogous to all forms of stealthing?

⁴ Above n 2, at [7] per Moore J.

⁵ Above n 2, at [7] per Moore J.

⁶ Above n 2, at [10] per Moore J.

⁷ Above n 2, at [11] per Moore J.

⁸ Above n 2, at [12] per Moore J.

⁹ Above n 2, at [38] per Moore J.

¹⁰ Above n 2, at [23] per Moore J.

¹¹ Above n 2, at [7] per Moore J.

¹² Above n 2, at [10] per Moore J.

III What is Stealthing?

Stealthing occurs when, during consensual sexual intercourse, the condom-wearer removes the condom from his penis without the consent of his sexual partner.¹³ Though the sexual conduct with a condom was initially consensual, the removal of the condom, and the deception and breach of trust in doing so, transforms the interaction, which is no longer consensual, into an entirely different act.¹⁴ As a matter of logic, ever since the use of contraceptive sex began, the possibility for stealthing has existed, and we can hence assume stealthing has in fact long occurred. However, it has only recently been conceptualised as criminal, and was first prosecuted in 2015 in Switzerland.¹⁵

With this act being new to New Zealand discussion, few statistics exist. However Australia, which is culturally and legally similar to New Zealand, provides a useful case study. A study from the Melbourne Sexual Health Centre showed that 32% of women entering into the centre reported having been stealthed.¹⁶ Even though the study was conducted by a health centre and thus it is more likely sexual victims were participants, the study indicates that stealthing in Australian society, and likely, by extension, New Zealand society, is more prevalent than we think..

IV What are the Harms of Stealthing?

Stealthing transforms what was initially a consensual sexual interaction into one that is no longer consensual. As such, the act of surreptitiously and unilaterally removing one's condom during sex violates the sexual autonomy of the unknowing sexual partner who consented only to sex with a condom. Consent, in the legal sense, is defined as a free choice from someone with the cognitive capacity to give it.¹⁷ As the condom is taken off without the victim's knowledge, they

¹³ Brianna Chesser & April Zahra "Stealthing: A Criminal Offence?" (2019) 31 CICJ 217 at 217.

¹⁴ Alexandra Brodsky "Rape-Adjacent: Imagining Legal Responses to Non-Consensual Condom Removal" (2007) 32 Colum.J.Gender & L. 183 at 191.

¹⁵ Ebrahim, above n 1, at 3.

¹⁶ Rosie L. Latimer, Lenka A. Vodstrel, Christopher K. Fairley, Vincent J. Cornelisse, Eric P. F. Chow, Tim R. H. Read, Catriona S. Bradshaw "Non-Consensual Condom Removal, Reported by Patients At a Sexual Health Clinic in Melbourne, Australia" (2018) Plos One 1 at 5.

¹⁷ *R v Winchester* [2011] QCA 374 at [79].

lose the ability and opportunity to give informed consent, a basic right. Due to this lack of consent and subsequent stealthing, many adverse mental and physical consequences could also arise.

Firstly, a victim is now deprived of bodily autonomy; that is, the choice to use one's body in a way which they feel like, without distorting external factors.¹⁸ Stealthing thus deprives autonomy as it undermines a victim's reproductive choices. Centrally, the perpetrator is prioritising his own pleasure and preferences to the exclusion of the person he is having sex with, in an overbearing manner.¹⁹ Sexual Autonomy is recognised as a fundamental right that criminal sex laws aim to protect, as stated in the Beijing Declaration and Cairo Consensus, both important international discussions on sexual rights and welfare.²⁰ Therefore, when a person is stealthed without consent, that person loses one of the most central rights that exist, bodily autonomy.

Many victims experience stealthing as a trauma, and may experience negative mental health consequences, such as anxiety and fear, which are similar symptoms to PTSD.²¹ By placing their trust in another through consenting to a sexual act with them, the breaking of this trust also hurts the victim so much that they often mistrust future partners very easily.²² This long-term harm was characterised by Palmer in 1991 as 'chronic shock'.²³ This term describes the result of a traumatic experience that leads victims to internalise feelings of worthlessness, leading to long-term mental health effects. Chronic shock or long-lasting psychological consequences are often for victims of sexual aggression more generally, who experience increased rates of depression, substance abuse and self-harm.²⁴ Therefore we can see how a single act can have long-term debilitating effects on an individual, affecting their future relationships, self-esteem and overall mental health.²⁵

¹⁸ Stuart P. Green " *Criminalizing Sex: A Unified Liberal Theory*" (Oxford University Press) at ch 1.

¹⁹ David Archard "The Wrong of Rape" (2007) 57 *The Philosophical Quarterly* 374 at 383.

²⁰ Ebrahim, above n 1, at 1.

²¹ Sharon M. Wasco *Conceptualising the Harm Done by Rape* (University of Illinois, Chicago, 2003) at 317.

²² Kimmy Khanh Nguyen, Cody Weeks & Douglas Stenstrom " *Investigating the Effects of Stealthing Justifications on Rape Perceptions*" (2021) 27 *Violence Against Women* 790 at 792.

²³ Wasco, above n 20, at 317.

²⁴ Nguyen, Weeks & Stenstrom, above n 23, at 791.

²⁵ Chesser & Zahra, above 11, at 217.

Stealthing can also cause significant physical harm also. Firstly the risk of contracting sexually transmitted infections (STI), especially incurable infections such as HIV or herpes.²⁶ Secondly, in cases involving a male offender and female victim, unwanted pregnancy is another potential harm.²⁷ And even when stealthing does not lead to STI transmission or pregnancy, due to the severity of the consequences, some victims have had extreme mental stress that the consequences may occur.²⁸ Overall, a multitude of unanticipated and unplanned consequences arise for the victim, which subsequently affects their life immensely.

A How Do the Harms of Rape Compare to the Harm of Stealthing?

Stealthing and rape are both acts of sexual violence. As such, it is important to analyse their respective harms to see if they are sufficiently similar to both be accurately captured by the same umbrella offence.

Rape is regarded as an extremely serious offence and thus has some of the most severe consequences. For example in the United Kingdom, being a grave crime, rape has a maximum punishment of life imprisonment.²⁹ In New Zealand, person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis, without person B's consent and without having reasonably believed that person B consented.³⁰ This is extremely broad and thus has captured a variety of different scenarios.

The harms of stealthing mirror the potential harms of rape: in an instance of non-consensual penetrative sex, an offender tramples the sexual autonomy of their victim; in a case of stealthing, an offender having obtained initial consent for sex using a condom but then secretly and unilaterally removes it without discussing it with his sexual partner, violates their sexual autonomy in a similar way. Furthermore "rape is an experience which shakes the foundation of the lives of victims" as per a report by Young New Zealand,³¹ as it extends beyond the event,

²⁶ Nguyen, Weeks & Stenstrom, above n 23, at 791.

²⁷ Chesser & Zahra, above 11, at 218.

²⁸ Above n 3, at [14] per Harrop J.

²⁹ Sexual Offences Act 2003 (UK), s 1 (4).

³⁰ Crimes Act 1961 s128 (2).

³¹ Andrew Ashworth *Principles of Criminal Law* (6th Edition, Oxford University Press, 2009) at 325.

through its longer term mental and physical harms, similar to stealthing.³² Hence, the same consequences, such as pregnancy, mistrust between partners and mental health come from the fact that the eventual non-consensual penetrative sex occurs in both acts. Thus when just looking at harm, stealthing should be included within the offence of rape due to their similarities.

B Survivors of Stealthing

An insightful exercise in ascertaining the appropriate level of harm compared to stealthing may be in analysing the subjective experiences of stealthing victims. Note that the following accounts of victims come in a variety of instances: some are anonymous, and some are not; some were individual accounts and some were overviews from a variety of victims. What will become apparent however is that many of these accounts are stated due to rape myths, which remains an underlying issue in New Zealand society.

Several accounts and studies advocated that stealthing should not be treated as rape. One family member of a victim described how the act wasn't rape, "he just took the condom off".³³ Instead the act is viewed by some as "akin to rape" or "rape-adjacent".³⁴ These attitudes and comments however, are likely due to rape myths which exist all over society. For example, that rape is almost impossible and can commonly be prevented by women unless it is aggressively done.³⁵ And thus due to these stereotypes, some victims do not recognise stealthing as similar enough to this extreme example of a violent stranger rapist, to call it rape. However rape encompasses a wide variety of situations, which can be vastly different from the aggressive stranger, such as an act in which the victim was too intoxicated to have been able to consent to sex, and the rapist commenced sex anyway.³⁶ Similarly, even though a perpetrator "just took the condom off", the resulting non consensual penetration of a penis, fits in with the other scenarios of rape which the offence encapsulates. It is not just an aggressive stranger who surprises a victim by jumping out

³² Wasco, above n 20, at 312.

³³ Ebrahim, above n 1, at 8.

³⁴ Brodsky, above n 12, at 188.

³⁵ Julia R. Schwendinger & Herman Schwendinger *Rape Myths: In Legal, Theoretical, and Everyday Practice* (1974) at 20.

³⁶ Crimes Act 1961 s 128A (2).

of a bush and raping them. And therefore, while these accounts of survivors are useful, due to common rape myths, they may not portray what the victims actually felt from the act.

In 2008, before the legal term of stealthing had been introduced by law, victims of sexual assaults involving penetration were known to have preferred that the offender was convicted of rape, as no lower convictions existed that adequately reflected the harm suffered.³⁷ This reaction was not subject to knowledge on what we know of stealthing now, and thus is very helpful. It reinforces the argument that the harm of stealthing and conventional rape is close enough that they may warrant the same offence. Women felt like they were raped but did not know how to describe it.³⁸ As they had consented, despite being violated, they felt complicated feelings where they “sorta felt like I was raped”.³⁹ Once again we see that despite accepting that the act is not exactly rape, the harm felt like rape to these victims. This is important as these accounts have been said despite common sexual violence and rape myths as discussed above. Based on these accounts, perhaps we should prosecute stealthing like rape as despite the acts being different, they result in similar levels of harm. If retribution is a central aim of criminal law, in order to punish the victim for the harm suffered, even if the acts are different, why should we punish the acts separately if they cause identical harm?⁴⁰

A trend seen through all of the accounts of victims, regardless of their conclusion on the harm, is confusion. One victim with the pseudonym Rebecca, described that she did not know what to call what had occurred to her.⁴¹ Another victim described that no matter how angry she was, she tried shrugging it off and even tried spinning it as a compliment to reconcile in her mind what had just occurred to her.⁴² This confusion also exists for non-violent rape victims, who due to myths often think that “real rape” must narrowly be violent.⁴³ Victims can sense that what occurred to them was awful and traumatic, however they sometimes lack the language and knowledge to describe what happened to them. This lack of knowledge, as well as prevalent

³⁷ James Chalmers & Fiona Leverick “Fair Labelling in Criminal Law” (2008) 71 *Mod.Law Rev* 217 at 236.

³⁸ Ebrahim, above n 1, at 7.

³⁹ Ebrahim, above n 1, at 7.

⁴⁰ Gerard V. Bradley “Retribution and the Secondary Aims of Punishment” (105) 44 *Am. J. Juris* 105 at 105.

⁴¹ Brodsky, above n 12, at 184.

⁴² Ebrahim, above n 1, at 7.

⁴³ Aya Gruber “Consent Confusion” (2017) 38 *Cardozo L. Rev.* 415 at 416.

societal myths about rape, combine to create this confusion, as what had occurred to them did not fit into the idea they knew as rape.

The resulting harm is almost identical between rape and stealthing. However, rape myths seem to confuse the feelings of victims. For some, stealthing felt like the harm of rape. For others, the act of stealthing did not fit into the violent stranger rape stereotype, even though they recognised its similarities by calling it “rape-adjacent”. As most victims are not aware of the different variations of rape, despite them feeling like they were raped, rape myths confused their feelings. The harm is definitely rape, and if rape myths had not existed, survivors would most likely identify that the harm and feelings mirror rape victims. Therefore as per this reasoning of harm, *Campos* seems to be a good way to prosecute stealthing. This is as, even if there is not a transactional understanding before the stealthing occurs like in *Campos*, the harm is so similar to rape, that the act should still be prosecuted as rape, regardless of if a sex worker was a victim or not.

C Fair Labelling

One principle used in conjunction with analysing harms in the criminal law is fair labelling. The aim of this principle is to subdivide and label distinctions in the law to represent the nature of their law-breaking.⁴⁴ As such, the label should fairly describe the nature of the criminal wrongdoing the offender has committed.⁴⁵ Therefore, fair labelling fits with the discussions on harm, as different harms can help distinguish different acts, when labelling them. However, there is a tension between the interests of fair labelling on the one hand, and the interest in avoiding the unnecessary proliferation of the criminal law, which we must also consider.

According to fair labelling, criminal acts which lead to different harms should be labelled differently as they are distinct from each other. This would indicate that stealthing should be within the existing offence of rape, due to the reasons discussed, as the harms are almost identical. However fair labelling encompasses more than just the harm of the act. Focusing on

⁴⁴ Ashworth, above n 30, at 78.

⁴⁵ Gruber, above n 42, at 554.

just the harm or wrongdoing would be arbitrary and not accurate to the wrongdoing as it does not consider other factors.⁴⁶ If the harm was the only criteria, murder and manslaughter would be the same offence as they cause the same harm. Instead, along with harm, culpability is an important factor in fairly labelling an illegal act, as it may be unfair to punish a perpetrator for an act with a different mens rea.⁴⁷ However as per this reasoning, stealthing would still remain within the offence of rape, with stealthing just like rape being an intentional act by the perpetrator. Even if the stealthing did not occur in a commercial sex work setting like *Campos*, where the terms were clearly laid out, stealthing always has the intentional removal of a condom without consent. Therefore, similar to rape, the intentional non consensual penetration exists, and subsequently the same culpability on the perpetrator should remain.

Another justification of fair labelling, is that acts with differences in moral gravity require different offences.⁴⁸ This is to uphold the criminal law aim of proportionality, where we fairly label an act to the label that is proportionate to the severity of the defendant's conduct.⁴⁹ Note that this does not mean that acts of similar moral gravities are the same. Sometimes acts can be morally similar but factually vastly different such as perjury,⁵⁰ and assisting escape from lawful custody.⁵¹ However this justification of proportionality seeks to help distinguish factually similar acts like stealthing and rape. The idea is that by giving proportionate labels to illegal acts, we reinforce social standards by punishing acts to a degree which is proportionate to its moral gravity and harm.⁵² Morality has a large subjective element, as people may have different views based on their own morals and thus it is often difficult to truly know the moral gravity of acts.⁵³ However, as per this justification, this essay argues that stealthing and rape should be within the same offence. As the harm they both cause is highly similar, we assume that the moral gravity of the acts are very similar. Hence stealthing should be labelled within the offence of rape.

⁴⁶ Andrew Cornford "Beyond Fair Labelling: Offence Differentiation in Criminal Law" (2022) 00 O.J.L.S. 1 at 19.

⁴⁷ Thomas Croft "Labelling Homicides" (2009) 17 Jb R & Ethik 355 at 365.

⁴⁸ Lucia Zedner & Julian V. Roberts *Fair Labelling and Social Solidarity* (Oxford University Press, 2012) at 78.

⁴⁹ Andrew Von Hirsch "Proportionality in the Philosophy of Punishment" (1992) 16 Crime & Just. 55 at 55.

⁵⁰ Crimes Act 1961 s 108.

⁵¹ Crimes Act 1961 s 121.

⁵² Ashworth, above n 30, at 78.

⁵³ Kevin McCaffree *What Morality Means* (Palgrave Macmillan, New York, 2015) at 115.

A risk of fair labelling is the unnecessary proliferation of offences in the criminal law.⁵⁴ With fair labelling aiming to create different offences if they are proportionally separate from other existing offences, the risk is that we create a new offence for every single variation of an offence. This makes the conviction process more challenging with more and different burdens of proof, and elements having to be argued and understood by prosecutors and juries.⁵⁵ Currently, rape encompasses a wide variety of scenarios, not just the aggressive stranger. Rape is simply when a penis penetrates the genitalia of another without consent or a reasonable belief of consent.⁵⁶ It can be by a stranger, by a spouse, or due to the presence of an abundance of alcohol.⁵⁷ Yes all of these scenarios are slightly different in nature, but in their harm and culpability, they are the same. While removing a condom and penetrating a victim without protection is highly similar to the harm and culpability to the above scenarios of rape, due to it being a positive act, it is different to when unprotected sex has ensued, but due to a withdrawal of consent, the act it becomes rape.⁵⁸ And therefore, stealthing naturally fits into this pool of different types of rape, due to their similar harms and culpabilities. Subsequently as stealthing fits within this group, it should not be labelled differently. That would be an unnecessary proliferation of the law. This aligns with the principle of minimum criminalisation which aims to limit the ambit of the criminal law to its minimum.⁵⁹ It fits in with the principle of efficiency of administration which advocates that it is unnecessary due to costs and resources used,⁶⁰ to have similar existing offences if they can easily be broken up by culpability at sentencing.⁶¹ Overall, even though there are slight differences in the nature of the acts, these differences are not great enough to warrant the addition of a new label. The label of rape can fairly describe a stealthing scenario.

⁵⁴ Cornford, above n 46, at 3.

⁵⁵ Cornford, above n 46, at 20.

⁵⁶ Crimes Act 1961 s 128 (2).

⁵⁷ Ministry of Justice “Rape Myths” Sexual Violence Victims Information <<https://sexualviolence.victimsinfo.govt.nz/en/all-myths/>>.

⁵⁸ Above n 2, at [27] per Moore J.

⁵⁹ Ashworth, above n 30, at 53.

⁶⁰ Ashworth, above n 30, at 53.

⁶¹ University of Otago “The Cost of Law-Making in New Zealand” (14 May 2012) Scoop <<https://www.scoop.co.nz/stories/PO1205/S00204/the-cost-of-law-making-in-new-zealand.htm>>.

V Practical Barriers Within Reporting Stealthing and Other Sexual Violences

A Current State of Reporting Stealthing and Sexual Violence

The proportion of sexual violence occurring in New Zealand in comparison to its reporting and conviction is concerning. As per the NZ Crime and Victim Survey in 2018, 23% of adults in our country have been subjected to at least one instance of sexual violence in their lives.⁶² That same survey showed that 94% of these were not reported to the police.⁶³ Out of the 31% of cases that were reported, only 11% were convicted and 6% received a prison sentence. And with many sexual violence victims telling no one, these results may be more flattering than they actually are.⁶⁴ This section seeks to explain the potential reasons for these statistics, as well as how we can mitigate these barriers. This essay argues that due to these low reporting rates, we need a new stealthing offence to mitigate these barriers, thus going away from *Campos* which currently exists as the law on stealthing. This is as, regardless of whether stealthing falls within the offence of rape or as a separate offence, this distinction is arbitrary if victims do not report what has happened to them. As a note, the above and much of the further discussion is based on statistics of sexual violence, as literature and statistics on stealthing is miniscule. However this essay believes that they will represent a relatively accurate representation of stealthing statistics, if they existed in New Zealand.

The current poor state of sexual violence and the justice provided in regards to it, is mainly due to the following practical barriers. Firstly, victims who for their own internal reasons commonly struggle to make a complaint. Secondly, in reporting to police and other authorities such as universities who have been known to inadequately deal with complaints. Finally, courts and juries who have a history of reluctance to prosecute in favour of victims. Victims often have to undergo a cost benefit analysis of whether to report the violence done to them, based on the

⁶² Respect Ed Aotearoa “*Statistics*” <<https://respected.org.nz/get-involved/statistics/>>.

⁶³ Ministry of Justice “*Latest Crime Survey Reveals Surprising High Levels of Unreported Sexual Violence*” (28 February 2022)

<<https://www.justice.govt.nz/about/news-and-media/news/latest-crime-survey-reveals-surprising-high-levels-of-unreported-sexual-violence/>>.

⁶⁴ Sandra L. Caron & Deborah Mitchell “*‘I’ve Never Told Anyone’ : A Qualitative Analysis of Interviews with College Women Who Experienced Sexual Assault and Remained Silent*” (2022) 28 *Violence Against Women* 1987 at 1990.

above factors and whether the benefits may outweigh them.⁶⁵ And therefore overall, the benefit to reporting a case often seems small due to these large barriers.

As a note, while every stealthing case is different, this essay assumes that a many of these barriers exist in more social settings, in comparison to sex work which is commercial. This is without any statistical evidence. This is because firstly like in Campos, sex workers are very likely to report stealthing as the adverse consequences the act has, such as pregnancy, can affect the future work of the sex workers. Secondly, as this is the occupation of the sex workers, they are less likely to be susceptible to rape myths which occupy the minds of other stealthing victims who are less educated on stealthing and it's effects. For example, the barrier of feeling ashamed for reporting a perpetrator, for an act not seen as serious as rape. Due to this while these barriers can also relate to sex workers, we assume that the majority are for non sexual workers. And as these grave barriers remain since Campos, it would indicate that Campos does not scale well to stealthing outside of a commercial context..

B Practical Barriers to Reporting Stealthing and Sexual Violence

1 Internal feelings of the victim

The most common barrier is that due to experiencing such a traumatic incident, victims are afraid to speak about it, as they are then reliving it. Victims have many different and often conflicting thoughts after being sexually violated which affect them reporting the incident. These depend on the person and the experience, however numerous themes have become apparent. According to Amy Hardy, a clinical psychologist at King's College London, during trauma, cognitive parts of the brain often shut down and thus go numb, creating a fragmented space for memory.⁶⁶ Furthermore, even if the victim remembers the entire occasion, many do not feel the need to revisit that pain. "If I just ignored it, it would not be real . . . it would just go away".⁶⁷ Thus the natural inclination is to keep the memory locked away, so there is no need to repeatedly describe

⁶⁵ Courtney E. Ahrens "Silent and silenced: The disclosure and non -disclosure of sexual assault" (University of Illinois Chicago, 1992).

⁶⁶ Sydney Karlos "Opinion: A Lesson on Why Victims of Sexual Assault Stay Silent" (May 8 2019) The Daily Aztec <<https://thedailyaztec.com/94723/el-alma/opinion-a-lesson-on-why-victims-of-sexual-assault-stay-silent/>>.

⁶⁷ Caron & Mitchell, above n 65, at 1998.

and answer questions about the incident. This reluctance is even more likely as often people's responses to hearing sexual violence experiences is to pity the victim.⁶⁸ With many victims already not wishing to relive the experience, pity is not ideal, as it is a constant reminder of the act. Secondly, many victims fear that if they tell friends or authorities about the assault, the perpetrator will find out and harm them.⁶⁹ So naturally with authorities, if the complaint gets taken seriously, the perpetrator is likely to find out, leading to this unnecessary additional fear in the eyes of the victim.⁷⁰ Thirdly, there is shame and humiliation to many of the victims. Victims think that they will be blamed and that their reputation as 'sluts' and liars' will affect their social lives.⁷¹ "It was a dark, embarrassing secret that still after almost 40 years makes me feel terrible," said an anonymous victim.⁷² Fourthly, a sense of internal blame for allowing such a thing to occur, toys with their minds.⁷³ So not only is their humiliation to the public, there is anger to one's self. Finally, many victims due to the prior relationship with the perpetrator don't wish for them to be prosecuted.⁷⁴ This will not be in all situations, however in the case of a boyfriend or a friend, this may occur. Prosecution may seem too far of a punishment, due to the prior relationship where the victim may feel awful for being the reason the perpetrator went to prison.

All of these barriers also tie in well to stealthing. The natural forgetting of the act by the brain is just as likely to occur with the harm of stealthing being just as severe as rape. Pity may not be on the same level in stealthing compared to a victim who was aggressively raped, however it is still highly likely as the act was very traumatic. The same fear and blame from perpetrators and society also exists, due to rape myths where others may call the victim weak for feeling violated by an act not traditionally seen as rape. This would apply more to non sex workers, as we presume that sex workers are more educated on rape myths are therefore would not feel the same level of internal blame than the average citizen. This feeling of blame is to be expected with uneducated victims of stealthing on rape myths, as they will not realise that the stealthing is not

⁶⁸ Catherine M. Reich, Gwendolyn D. Anderson & Richard Maclin "Why I Didn't Report: Reasons for Not Reporting Sexual Violence as Stated on Twitter" (2021) 31 *Journal of Aggression, Maltreatment & Trauma*.

⁶⁹ KMD Law "Why Sexual Assault Survivors are Afraid to Speak Up" (July 7 2021)

<<https://www.kmdl.com/blog/2021/july/why-sexual-assault-survivors-are-afraid-to-speak/>>.

⁷⁰ Caron & Mitchell, above n 65, at 2000.

⁷¹ Caron & Mitchell, above n 65, at 1997.

⁷² Reich, Anderson & Maclin, above n 69.

⁷³ Karlos, above n 67.

⁷⁴ Marjorie R. Sable, Fran Danis, Denise L. Mauzy & Sarah K. Gallagher "Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students" (2010) 55 *Journal of American College Health* 157 at 159.

their fault, even if though they consented to sex in the first place. The prevalence of rape myths has been known to lead to greater victim blame as it does not fit in with common conceptualisations of violent stranger rape.⁷⁵ If victims of rape blame themselves for allowing the victims into their rooms, victims of stealthing may feel more blame for allowing consensual sex initially with a condom.⁷⁶ Finally, the same reluctance exists to report a perpetrator the victim knows. This is especially high due to rape myths in society where the victim may not wish to label or punish the perpetrator as a rapist, as they do not think the stealthing act warrants that punishment. This is also less likely for sex workers, as they will firstly know the severity of stealthing, and thus are more likely to report the act as the consequences affect their livelihood. This is as for example, a pregnant woman would likely not engage in sex work. Disclosing that you are a rape victim is most common in a stereotypical rape scenarios, as otherwise many victims do not identify as rape victims.⁷⁷ And with even more barriers existing for stealthing and sexual violence victims, there is often little incentives to outweigh the barriers they think they may face.

2 *Reporting to the police and other authorities*

There seems to be three main reasons why sexual violence and stealthing in particular have been known to be difficult to report to the police and other authorities. This essay is not suggesting that these authorities are unfairly prejudicing potential victims of stealthing, but that practically the nature of the act makes it difficult to respond to a complaint.

The first reason for this, is that sometimes, police have been known to be hesitant to take on sexual violence cases. While police are generally empathetic, they often still have reservations.⁷⁸ Certain accounts from police officers in a study stated that they had witnessed too many sexual assault cases where the victim was accusing due to their own guilt of consenting, or that they

⁷⁵ Claire R. Gravelin, Monica Biernat, Caroline E. Bucher “ Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors” (21 Jan 2019) *Frontiers in Psychology* <<https://www.frontiersin.org/articles/10.3389/fpsyg.2018.02422/full>>.

⁷⁶ Caron & Mitchell, above n 65, at 1997.

⁷⁷ Ahrens, above n 66, at 143.

⁷⁸ Tania Boyer, Sue Allison & Helen Creagh *Improving the Justice Response to Victims of Sexual Violence: Victims' Experiences* (Ministry of Justice, Wellington, 2018) at 30.

were vindictive towards the defendant.⁷⁹ And while these are very isolated cases, due to their existence, some are scared to go to the police. This is further heightened as many victims have no experiences with the police, other than seeing them on television which give a false sense of how the police operate.⁸⁰

Furthermore, modern day sexual assault cases often hinge on he said, she said arguments.⁸¹ Thus the second reason for the difficulties in reporting for victims, is that these authorities have a low amount of evidence to work with. Although testimonies from complainants are important, due to the presumption of innocence and the first factor already discussed, some police authorities have found it difficult to justify investigating a sexual violence case especially if the alleged perpetrator has pleaded innocence.⁸² Sexual violence is often behind closed doors with zero witnesses. For certain instances of sexual violence, cases hinge on a wholly unconsented act, and thus text messages and actions from earlier in the day can be helpful to show if there was an initial consent by the victim.⁸³ However with stealthing, or even other forms of sexual violence having an initial consensual act, these clues have been less important and potentially unhelpful. Thus, often all that can be relied upon to meet a high threshold, is the statements of the complainant and perpetrator, which may well be inconsistent. Furthermore, due to this high threshold, even when the police have taken a complaint seriously, victims have been shocked by the perceived 'lightness' of charges laid.⁸⁴ However this is actually due to a strategy where the police play down the seriousness of the crime in order to guarantee a conviction.⁸⁵ This will be even more apparent with stealthing, as it has to meet the requirements of rape, which are high due to its severe offence. Nevertheless despite its good intentions, it still deters citizens from reporting to the police. Finally what complicates this matter further is that often these sexual violence acts are while both parties are drunk or under the influence of drugs, leading to memory

⁷⁹ Deborah Tuerkheimer "Incredible Women: Sexual Violence and the Credibility Discount" 166 U. Pa. L. Rev. 1 at 32.

⁸⁰ Boyer, Allison & Creagh, above n 79, at 31.

⁸¹ Tuerkheimer, above n 80, at 9.

⁸² Tuerkheimer, above n 80, at 22.

⁸³ Tuerkheimer, above n 80, at 10.

⁸⁴ Boyer, Allison & Creagh, above n 79, at 47.

⁸⁵ Boyer, Allison & Creagh, above n 79, at 47.

loss about their acts.⁸⁶ Therefore due to these factors, testimonies also become difficult to analyse for authorities.

Finally the last barrier is that stealthing is a new concept to New Zealand and thus authorities have been known to not take it so seriously.⁸⁷ Katerine Cresswell Riol, a New Zealand woman after being stealthed in 2019, went to the police only to hear derogatory comments and little urgency in the investigation which ended up taking over a year.⁸⁸ Perhaps due to a lack of knowledge of what stealthing is as well as existing rape myths in society, it seemed as if it was a small priority. With stealthing being a new concept in New Zealand, few people know of it. Therefore perhaps the police are less urgent to investigate it as they do not understand its severity.

3 *Juries*

Most counsel advise clients to elect jury trials rather than with a judge, as juries are more likely to believe the defendant, even when the story is implausible.⁸⁹ Thus, even if the case gets to court, more barriers exist, in the form of juries. This stems from the idea that some jurors do not want young men labelled and stigmatised as rapists even when evidence is strong.⁹⁰ This is due to the harsh label it attaches to the perpetrator, affecting their employment and reputation.⁹¹ Therefore practically, despite an accurate label of stealthing, which is under the offence of rape, sometimes society wishes to overturn theories of labelling and legal principles for in their eyes, a more equitable solution. They instead undergo jury nullification, a process where despite guilt beyond reasonable doubt for the defendant, the jury decides for extraneous factors to acquit.⁹²

⁸⁶ Caron & Mitchell, above n 65, at 1993.

⁸⁷ Brianna Chesser “New Zealand’s First Successful ‘Stealthing’ Prosecution Leads the Way for Law Changes in Australia and Everywhere” (28 April 2021) *The Conversation* <<https://theconversation.com/new-zealands-first-successful-stealthing-prosecution-leads-the-way-for-law-changes-in-australia-and-elsewhere-159323>>.

⁸⁸ Otago Daily Times “I felt judged’ - woman's anger after taking stealthing case to police” (25 April 2021) <<https://www.odt.co.nz/news/dunedin/crime/i-felt-judged-womans-anger-after-taking-stealthing-case-police>>.

⁸⁹ Elisabeth McDonald *In the Absence of a Jury: Examining Judge-Along Rape Trials* (Cantebury University Press, Christchurch, 2022) at 16.

⁹⁰ Julie Bindel “Juries Have No Place in Rape Trials. They Simply Can’t be Trusted” *The Guardian* <<https://www.theguardian.com/commentisfree/2018/nov/21/juries-rape-trials-myths-justice>>.

⁹¹ Zedner & Roberts, above n 48, at 70.

⁹² Andrew D. Leipold “Rethinking Jury Nullification” (1996) *Va. L. Rev.* 253 at 254.

Occupation, age and charisma of the defendant have been shown to have an effect on juror's verdicts.⁹³ This may relate to the idea of the "promising young man who made a mistake". Juries sometimes may be reluctant to throw away a man's life by convicting him as a rapist for a mistake, especially if he is young and has potential of contributing to society. Due to the willingness to use jury nullification, some victims have sensed this presumption not to prosecute by the jury unless absolutely necessary, and have subsequently felt very scrutinised.⁹⁴ This leads them to be stressed in trying to seem overly genuine and truthful, rather than focusing on saying the truth when speaking in trial.⁹⁵ And subsequently, some complainants have even less incentives to report, due to juries.

The prevalence of rape myths makes convicting stealthing difficult for juries. For example that it is less traumatic to be raped by someone you know or consented to sex to in the past.⁹⁶ This however is not always accurate. This is as often in this instance, as there was an initial consenting act, the removal of the condom breaches the victims trust. However, due to these myths, jurors may be reluctant to convict someone for rape for an act they don't believe is as bad as rape. This is especially if they are a promising young man, as jurors may feel sympathy, and therefore be more lenient in their decision than a judge.

All the above factors, make convicting men in sexual assault cases, through juries highly difficult. Figures state that rape trials decided by a jury routinely end in acquittal, where some prior relationship or acquaintanceship exists.⁹⁷ This does not bode well for stealthing where due to the initial consenting act, there is often a prior relationship between the victim and perpetrator. Therefore the jury system, which is used often in criminal cases, is firmly a barrier for stealthing victims.

⁹³ Dominic Willmott "Is Jury Bias Preventing Justice for Rape Victims" (10 June 2016) *The Conversation* <<https://theconversation.com/is-jury-bias-preventing-justice-for-rape-victims-60090>>.

⁹⁴ Boyer, Allison & Creagh, above n 79, at 79.

⁹⁵ Boyer, Allison & Creagh, above n 79, at 78.

⁹⁶ Dominic Willmott, Daniel Boduszek, Agata Debowska & Lara Hudspith *Jury Decision Making in Rape Trials: An Attitude Problem?* (Wiley-Blackwell, 2021) at 14.

⁹⁷ Willmott, Boduszek, Debowska & Hudspith, above n 92, at 9.

C How Does a New Offence Help Mitigate these Practical Barriers

Our aim in this essay is to decide which course of action could help mitigate these practical barriers the most. This is as these barriers have been prominent for decades and thus would not be fixed instantly by one decision. Ultimately, this essay has chosen to argue that a new offence of stealthing will be a step in the right direction to help improve all three main barriers in our criminal system. This will mainly be due to the awareness of stealthing to society, which thus tramples rape myths. This is due to the subsequent media and societal discussion, a new offence provides. This would mean going away from the decision in *Campos*. *Campos* does not tackle these practical barriers in a way that is appropriate for our aims. This as as they still exist since the decision, so perhaps we need change, and also as many of the barriers relate more to non sexual workers, so *Campos* may not be appropriate.

Implementing a new offence of stealthing promotes the declaratory function of the law, by drawing it to the public's attention and clearly denouncing the act,⁹⁸ as well the deterrence function, as a new offence warns society not to stealth.⁹⁹ This is important as stealthing is not widely known about in New Zealand by the public, and has subsequently led to many of the practical barriers discussed above.¹⁰⁰ What better way to publicly denounce an act than making it a new flashy offence, which subsequently leads to media and public debate on the act.¹⁰¹ This will help at mitigating our barriers as many of them come from the idea that stealthing is not well known in New Zealand and therefore not treated in a serious manner by victims or others in the criminal justice system.

By prosecuting the act as rape, symbolically, stealthing is now publically an act comparable to the same level of harm and culpability to rape. With rape being one of the more highly condemned acts by society, this is a huge symbolic statement, and one higher than if it was prosecuted separately to stealthing.¹⁰² Society regards rape in an extremely high manner so

⁹⁸ Ashworth, above n 30, at 78.

⁹⁹ C. M. V. Clarkson "Theft and Fair Labelling" (1993) 554 Mod. Law Rev at 555.

¹⁰⁰ "What You Need to Know About 'Stealthing'" (23 May 2017) RNZ
<<https://www.rnz.co.nz/news/the-wireless/374627/what-you-need-to-know-about-stealthing>>.

¹⁰¹ Andrew Ashworth "Conceptions of Overcriminalization" (2007) 5 Ohio State Journal of Criminal Law 407 at 409.

¹⁰² H. E. Baber "How Bad is Rape" (1987) 2 Hypatia 125 at 125.

comparing as similar to it is highly symbolic. This aims to trample these rape myths which make acts such as stealthing, seem minor in comparison.

While a new offence would not directly aid in resolving the fear a victim has of their perpetrator or for reliving the traumatic experience, many of the other barriers a victim faces could be mitigated through a new offence. Firstly, the same internal blame would not exist. This is as victims are usually upset that they feel so violated for an act that did not seem like the aggressive stranger rape scenario that they know. However, after this new offence was implemented, victims could be validated that they experienced a highly traumatic incident. This is due to the public discussion which would arise from the new offence which would show the victim how harmful the act is. Secondly, the societal stigma from being stealthed, by being called a 'slut' or 'weak' by society or the perpetrator would be reduced. By bringing awareness, people will not throw around these harsh labels, as they only exist in the first place due to a lack of knowledge of stealthing. Finally the reluctance of punishing someone known by the victim with a grave sentence or label will not be the same. This is as the reluctance comes from rape myths where victims may think that it would be unfair to punish a the perpetrator, who they know, as a rapist. However, with a new offence, this is mitigated as the same label or sentence would not be there.

A new offence would also bring societal awareness in a necessary way to aid the reporting of stealthing to authorities. It is important to mention that the barrier relating to obtaining evidence will not be affected through a new offence, as it will still be just as difficult. The offence of stealthing however may require a lower bar of evidence than rape, which may help with this issue, but the analysis of this is outside the scope of this essay. This lower bar may incentivise the police not to go for lower charges, thus also keeping complainants happy. A new offence would also help with the barrier that the police do not take stealthing complaints seriously. With a lack of understanding of the grave consequences of stealthing, perhaps authorities have been more reluctant to investigate a complaint compared to other cases, such as stranger rape. Therefore with a new offence, which brings more societal awareness of the adverse harms of stealthing, authorities will hopefully be more willing to take complaints seriously.

Ultimately, jury nullification exists mainly as a mechanism to overturn an immoral law implemented by the Government.¹⁰³ However it should be used sparingly, as it can overturn any law due to its broad unregulated power. Instead, juries have perhaps used it too frequently, as they think that a promising young man who made a mistake may be punished for too long. This however, is not the purpose of jury nullification as here we are not overturning an immoral law. This is instead prosecuting based on fairness. Hence we intend to mitigate the overuse of this mechanism through this new offence as much as possible. Firstly, this is through a new offence of stealthing which has a lower maximum penalty than for rape. Due to this, jurors will hopefully be less incentivised to use jury nullification in order to protect the promising young man. This is as the punishment will be lower and therefore the same fear of throwing away a young man's life will not be as prevalent, in comparison to rape. Further, a new offence also seeks to tackle the issue of rape myths in society by educating people on how severe the act of stealthing is, through societal discussion on the offence and its grave harms. Therefore jurors who due to rape myths think that stealthing is not that serious, will hopefully think again before using jury nullification unnecessarily.

As evident from all of the above practical barriers to reporting and convictions of stealthing, there is no single answer. With so many different adverse consequences occurring from stealthing, a wide variety of barriers have emerged. However, a trend has been shown. While this will not solve all of the barriers, many barriers simply exist due to a lack of knowledge from society on stealthing. Therefore, perhaps it may be important to bring awareness to the stealthing as an act which is occurring often and within this their effects.

VI Conclusion - Do we Implement a New Offence?

There is a genuine dilemma and tension. While analysing the harms of stealthing, it is almost indistinguishable from the harms of rape. However, in contrast, there are large practical barriers with convicting a stealter, which make a new offence of stealthing also highly attractive. With this nuance, the decision seems impossible to satisfy all the harm issues, and barriers discussed.

¹⁰³ Leipold, above n 91, at 296.

Based on the analysis of the harms of stealthing, following Campos would be logical as due to its similarities in harm with rape, it should be penalised under the offence of rape. This would be regardless of if the stealthing was done in a commercial setting like *Campos*, or even if it was a more social scenario between university students, as the harm is identical either way. However, the practical barriers to report stealthing are too important to ignore. This is as we need victims to report when stealthing has occurred to them in order to facilitate all the usual functions of the criminal law, such as deterrence and retribution. We must therefore seek a new offence, to affect change and get more victims to report as *Campos* does not scale well to tackle these barriers, as they still remain in society since the decisions.

However, even with this new offence, we must recognise that different barriers require different acts to be effectively mitigated. For example jury nullification would maybe require a low maximum sentence so that jurors do not feel that convicting would throw away a promising man's life. In contrast, barriers which exist due to rape myths such as victims internally blaming themselves, need a severe punishment to prove to the victims that what occurred to them is serious enough to report. Therefore we will not tackle all the barriers by just implementing a new offence. We hence require some adjustments in the maximum sentence of this offence to help mitigate as many barriers as possible.

This essay advocates that this new offence of stealthing should have a maximum penalty of 14 years of imprisonment. Currently, sexual violation, which rape falls under has the maximum sentence of 20 years, sexual conduct with consent induced through threats has a maximum sentence of 14 years, and other types of sexual assaults range from a maximum sentence of 7-14 years imprisonment.¹⁰⁴ With a majority of barriers requiring awareness to society through a new offence, the tension is that a new offence would not be grave enough to show the severity of the harm, but also that this punishment could not be so high that it incentivises jury nullification. With that in mind, 14 years seemed logical as a middle ground. While 14 years is still a very long time, and necessary for the gravest of offences, it is not the 20 years a rapist may face. Instead it mirrors the years of sexual assault with consent induced through threats. The reasoning behind this is that while the same sexual assault has occurred here, the similar questions of consent

¹⁰⁴ Liberty Law "Sexual Offences" <<https://libertylaw.co.nz/areas-of-expertise/sexual-offences/>>.

remains. Both instances have some sort of consent at a certain point, which may blur the lines of consent for the perpetrator. Therefore it seems logical to mirror the maximum sentence for that offence. Furthermore, while the specifics are not within the scope of this essay, the lowering of the maximum sentence indicates that the threshold to attain a conviction may be slightly lower than for sexual assault which has a higher maximum penalty of 20 years. This seeks to tackle the barriers mentioned, which look at the difficulty of obtaining credible and useful evidence to prosecute stealthing. Yes, this may contrast with the fair labelling principle of unnecessary proliferation of the law as it adds more elements and burdens of proof within the conviction process. However this is a necessary sacrifice to tackle the practical barriers which we have decided are the priorities of this essay.

Ultimately the new offence seeks to tackle the practical issues which surround obtaining convictions for the harm of stealthing, more than other justifications. This means that we aim to attain more convictions for stealthing than we already achieve, due to the belief that it is not being convicted perfectly within the criminal justice process at the moment. However this does not mean we neglect the harm or fair labelling arguments, which advocate for stealthing to be within the offence of rape. Given our priorities to tackle practical barriers and the decision to lower the maximum sentence, we argue that some of the arguments in favour of keeping stealthing within rape, is not as important as they may have seemed. Firstly, we argue that this new offence may not be an unnecessary proliferation for the criminal law, like we thought before. Previously while just looking from a harm perspective, the new offence entailed an act so similar to rape, that it seemed unnecessary to punish the offender differently. However as it actually aims to tackle barriers in our system relating to attaining convictions and overhauling rape myths, it is no longer unnecessary. Secondly, this new offence will also be somewhat proportional to the act. Yes it is not the maximum sentence of 20 years like rape, however, 14 years still shows a high level offence. 14 years is the maximum sentence for kidnapping in New Zealand.¹⁰⁵ With kidnapping also being highly immoral due to its impact on children, comparing stealthing to it shows stealthing's severity, as the law seeks to punish gravely for harm towards childrens.¹⁰⁶

¹⁰⁵ Crimes Act 1961 s 209.

¹⁰⁶ Meenakshi N.Mehta, Shalini S.Bhatt & M.G.Gore "Kidnapping' a social evil" (1979) 3 Child Abuse and Neglect 615 at 620.

Our priority is to tackle the practical barriers of stealthing and sexual violence which remain ingrained in our criminal justice system. This is through the implementation of a new offence of stealthing, which in turn moves away from *Campos* as our law on stealthing. This is as many barriers exist, especially for non sex workers, and thus *Campos* does not scale well to all stealthing scenarios, as it relates to sex workers. At first glance this may seem as if it is neglecting the fair labelling and harm justifications of convicting stealthing within rape. However, with this maximum sentence of 14 years, we aim to find a middle ground and satisfy all justification theories of criminal justice as well as possible. Nonetheless, we still will try keeping in mind our priorities of practical barriers which have lead to low reporting rates of stealthing and sexual violence. Regardless, stealthing remains a growing problem in society. And while the surrounding harms, rape myths, and practical barriers will not be solved over night, a new offence seeks a step in the right direction to mitigating these issues.

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The text of this paper (excluding table of contents, footnotes, and bibliography) comprises exactly 7991 words.

VII Bibliography

A Cases

1 New Zealand

Campos v R [2022] NZCA 311.

R v Campos [2020] DCR 507.

2 Australia

R v Winchester [2011] QCA 374.

B Legislation

1 New Zealand

Crimes Act 1961.

2 United Kingdom

Sexual Offences Act 2003.

C Books and Chapters in Books

Courtney E. Ahrens “*Silent and silenced: The disclosure and non -disclosure of sexual assault*” (University of Illinois Chicago, 1992).

Andrew Ashworth *Principles of Criminal Law* (6th Edition, Oxford University Press, 2009).

Tania Boyer, Sue Allison & Helen Creagh *Improving the Justice Response to Victims of Sexual Violence: Victims’ Experiences* (Ministry of Justice, Wellington, 2018).

Stuart P. Green “*Criminalizing Sex: A Unified Liberal Theory*” (Oxford University Press)

Kevin McCaffree *What Morality Means* (Palgrave Macmillan, New York, 2015).

Elisabeth McDonald *In the Absence of a Jury: Examining Judge-Along Rape Trials* (Cantebury University Press, Christchurch, 2022).

Julia R. Schwendinger & Herman Schwendinger *Rape Myths: In Legal, Theoretical, and Everyday Practice* (1974).

Sharon M. Wasco *Conceptualising the Harm Done by Rape* (University of Illinois, Chicago, 2003).

Lucia Zedner & Julian V. Roberts *Fair Labelling and Social Solidarity* (Oxford University Press, 2012) at 78.

D Journal Articles

David Archard “The Wrong of Rape” (2007) 57 *The Philosophical Quarterly* 374.

Andrew Ashworth “Conceptions of Overcriminalization” (2007) 5 Ohio State Journal of Criminal Law 407.

H. E. Baber “How Bad is Rape” (1987) 2 Hypatia 125.

Gerard V. Bradley “Retribution and the Secondary Aims of Punishment” (105) 44 Am. J. Juris 105.

Alexandra Brodsky “Rape-Adjacent: Imagining Legal Responses to Non-Consensual Condom Removal” (2007) 32 Colum.J.Gender & L. 183.

Sandra L. Caron & Deborah Mitchell “*‘I’ve Never Told Anyone’ : A Qualitative Analysis of Interviews with College Women Who Experienced Sexual Assault and Remained Silent*” (2022) 28 Violence Against Women 1987.

C. M. V. Clarkson “Theft and Fair Labelling” (1993) 554 Mod. Law Rev at 555.

James Chalmers & Fiona Leverick “Fair Labelling in Criminal Law” (2008) 71 Mod.Law Rev 217.

Brianna Chesser & April Zahra “Stealth: A Criminal Offence?” (2019) 31 CICJ 217.

Andrew Cornford “Beyond Fair Labelling: Offence Differentiation in Criminal Law” (2022) 00 O.J.L.S. 1.

Thomas Croft “Labelling Homicides” (2009) 17 Jb R & Ethik 355.

Sumayya Ebrahim “I’m Not Sure This is Rape, But: An Exposition of the Stealth Trend” (2019).

Aya Gruber “Consent Confusion” (2017) 38 Cardozo L. Rev. 415 at 416.

Katerina Hadjimatheou “Criminal Labelling, Publicity and Punishment” (2016) L. & Phil.; Law & Phil. 567.

Rosie L. Latimer, Lenka A. Vodstrel, Christopher K. Fairley, Vincent J. Cornelisse, Eric P. F. Chow, Tim R. H. Read, Catriona S. Bradshaw “Non-Consensual Condom Removal, Reported by Patients At a Sexual Health Clinic in Melbourne, Australia” (2018) Plos One 1.

Andrew D. Leipold “Rethinking Jury Nullification” (1996) Va. L. Rev. 253.

Kimmy Khanh Nguyen, Cody Weeks & Douglas Stenstrom “*Investigating the Effects of Stealth Justifications on Rape Perceptions*” (2021) 27 Violence Against Women 790

Meenakshi N.Mehta, Shalini S.Bhatt & M.G.Gore “‘Kidnapping’ a social evil” (1979) 3 Child Abuse and Neglect 615 at 620.

Barry Mitchell “Multiple Offence and Wrongdoing Structure: A Plea for Consistency and Fair Labelling” (2001) 64 Mod.Law Rev 393.

Catherine M. Reich, Gwendolyn D. Anderson & Richard Maclin “ Why I Didn’t Report: Reasons for Not Reporting Sexual Violence as Stated on Twitter” (2021) 31 Journal of Aggression, Maltreatment & Trauma.

Marjorie R. Sable, Fran Danis, Denise L. Mauzy & Sarah K. Gallagher “Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students” (2010) 55 Journal of American College Health 157.

Laura Tarzia, Sonia Srinivasan, Jennifer Marino & Kelsey Hegarty “Exploring the Gray Area Between “Stealth” and Reproductive Coercion and Abuse (2020) Women and Health.

Deborah Tuerkheimer “Incredible Women: Sexual Violence and the Credibility Discount” 166 U. Pa. L. Rev. 1.

Andrew Von Hirsch “Proportionality in the Philosophy of Punishment” (1992) 16 Crime & Just. 55.

E Internet Materials

Julie Bindel “Juries Have No Place in Rape Trials. They Simply Can’t be Trusted” The Guardian <<https://www.theguardian.com/commentisfree/2018/nov/21/juries-rape-trials-myths-justice>>.

Brianna Chesser “ New Zealand’s First Successful ‘Stealth’ Prosecution Leads the Way for Law Changes in Australia and Everywhere” (28 April 2021) The Conversation <<https://theconversation.com/new-zealands-first-successful-stealth-prosecution-leads-the-way-for-law-changes-in-australia-and-elsewhere-159323>>.

Claire R. Gravelin, Monica Biernat, Caroline E. Bucher “ Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors” (21 Jan 2019) Frontiers in Psychology <<https://www.frontiersin.org/articles/10.3389/fpsyg.2018.02422/full>>.

Sydney Karlos “Opinion: A Lesson on Why Victims of Sexual Assault Stay Silent” (May 8 2019) The Daily Aztec <<https://thedailyaztec.com/94723/el-alma/opinion-a-lesson-on-why-victims-of-sexual-assault-stay-silent/>>.

KMD Law “ Why Sexual Assault Survivors are Afraid to Speak Up” (July 7 2021) <<https://www.kmdlaw.com/blog/2021/july/why-sexual-assault-survivors-are-afraid-to-speak/>>.

Liberty Law “Sexual Offences” <<https://libertylaw.co.nz/areas-of-expertise/sexual-offences/>>.

Ministry of Justice “*Latest Crime Survey Reveals Surprising High Levels of Unreported Sexual Violence*” (28 February 2022)

<<https://www.justice.govt.nz/about/news-and-media/news/latest-crime-survey-reveals-surprising-high-levels-of-unreported-sexual-violence/>>.

Ministry of Justice “Rape Myths” Sexual Violence Victims Information

<<https://sexualviolence.victimsinfo.govt.nz/en/all-myths/>>.

Ed Stannard “A Yale Law Students Paper of ‘Rape-Adjacent’ Stealthing’ Inspires a California Bill (14 September 2021)

<<https://www.nhregister.com/news/article/A-Yale-law-student-s-paper-on-stealthing-16455850.php>>.

Otago Daily Times “‘I felt judged’ - woman's anger after taking stealthing case to police” (25 April 2021)

<<https://www.odt.co.nz/news/dunedin/crime/i-felt-judged-womans-anger-after-taking-stealthing-case-police>>.

Respect Ed Aotearoa “*Statistics*” <<https://respected.org.nz/get-involved/statistics/>>.

University of Otago “The Cost of Law-Making in New Zealand” (14 May 2012) Scoop

<<https://www.scoop.co.nz/stories/PO1205/S00204/the-cost-of-law-making-in-new-zealand.htm>>

.

“What You Need to Know About ‘Stealthing’” (23 May 2017) RNZ

<<https://www.rnz.co.nz/news/the-wireless/374627/what-you-need-to-know-about-stealthing>>.

Dominic Willmott “Is Jury Bias Preventing Justice for Rape Bias” (10 June 2016) The Conversation

<<https://theconversation.com/is-jury-bias-preventing-justice-for-rape-victims-60090>>.