

Jon Wainwright: Welcome to another episode of "California Lawmaking In Depth." Today we're going to be talking about an issue that came up briefly last session, and then is going to be coming back in the next session. To talk about that, we've brought back in Erinn Ryberg. Thank you for joining us again.

Erinn Ryberg: Thanks for having me.

JW: Today we're going to talk about stealthing, which is a newer issue it seems like. You want to explain for us what that is?

ER: Actually, as I always describe it, it's a new name for something that's been going on for decades. It's certainly not a new issue. It's just somebody finally coined a term and what to call it.

What it is, is when the guy removes the condom during sex without the knowledge of the partner. I think that this is unique, because it can happen in same-sex relationships as well as heterosexual relationships. It's just the person wearing the condom making a unilateral decision to remove the condom without the consent of the other person.

JW: You've said that this has been going on for decades, but it's just getting a name now. Why address this now? Have we reached a tipping point on stealthing where there needs to be something to address it?

ER: Yeah. I think also the STD rates are continuing to go up. That's really I think which has brought this discussion back out. Now they're putting the other person at risk to contract one of these diseases on top of pregnancy. Really, it comes down to the violation of trust and consent.

I think one of the issues is we don't have any numbers or statistics on it, because it's not something that's talked about. We say that it's been happening for decades, because when you have these conversations with people, it's nothing new.

Whether you just don't like how the condom feels, whether you want to try to have a baby and the other person doesn't, it's something that is not a new concept. It's just a new name.

JW: I think that's going to get to something we want to talk about later, which is some of the issues that were in the bill. Just get started on the process of it, the vehicle for stealthing this year was AB 1033 which initially wasn't a stealthing bill.

ER: Correct, it was Indian gaming.

JW: I think the interesting thing here is why go the gut-and-amend route? And then two, how did you get around the germaneness rule? It seems to be a pretty big switch.

ER: Definitely. I'll start with the second question first, there is an issue with the germaneness rule. Frankly, when legislative council flags it for us that, "You're going to have this issue," we take note. But it certainly doesn't stop a bill from going through the process.

When that will come into effect is if the bill were to ever be brought up in a court. Then one of the issues somebody would bring up is that there'd be an issue of the germaneness. For our purposes, it doesn't stop us from moving forward. That was flagged.

Then in terms of the gut-and-amend process, this is one of those bills that my boss just didn't want to wait until the next year to address. Because it was in the middle of the process...Like if you're at the very end, then it's impossible to move a bill through the entire process. But because we were in the Senate, it was still possible to change it.

She felt the bill that we had gutted and amended was stalled in the Senate and wasn't really moving anywhere. That's why we chose that as a vehicle. That happens all the time. People don't like it. The building says they don't like it, committees, but everyone does it.

It comes down to timing and just wanting to address it. She felt like this was an issue that needed to be addressed right now. That's why we picked that, and didn't choose to wait until the next year to introduce something.

JW: Then you get it through. It's on the Senate side. You get it to the Public Safety Committee. Were there any major changes there?

ER: That was our biggest roadblock and what ultimately led to us not moving forward with the bill. When it went into Public Safety, what we included in the definition of stealthing was taking the condom off during sex but also tampering with. The instances of someone pokes holes in a condom before having sex, that would be included as well.

When we went into Public Safety, we faced a lot of pushback. One of the big issues was this applying to women as well and making sure that, especially with the tampering part, a woman can tamper with a condom before and then give it to the partner. If he doesn't know, then...

We wanted to make sure to include that scenario, as well, so we were OK with that situation. The situation that we weren't OK with in that the committee forced us to take an amendment, in order to move out of committee, was applying this to birth control, the broader concept being just about contraceptives in general.

If somebody agreed to have sex on the understanding that she was on birth control, then if she had lied about birth control, then that would be a case of stealthing. My boss

agreed. Ultimately, she felt like it came down to consent and what you consent to in order to have sex and how, if you lied or if those situations changed, you took the condom off, then the consent would go away with that.

We agreed. We got out of committee. We also had to take an amendment about removing it from the sex offender registry, which is also a big fight. There was another bill this year to redo the sex offender registry.

Actually, I guess the biggest amendment of all was dropping it from rape to a sexual battery, which we expected that we were going have to do. The committee definitely wasn't OK with us moving forward in the rape category.

JW: I wanted to touch on that, too. The need for the bill and your explanation for why you need this piece of legislation, your boss put out, "It's clear stealthing is rape." That was a committee amendment to tack it down from rape to...

ER: We still believe that it's rape. If you keep in mind the idea that sex was contingent on the use of the condom, if someone removed the condom, therefore the consent is gone. We still believe that.

The problem is and the issue we had with the committee is putting these victims of rape up against these victims of stealthing. We are not a position of comparing experiences, but they felt like it would be a slap in the face to rape victims to put it on that same level. So we did drop it down.

Again, one of the big issues that the opponents raised is just how to prove it. If it's a matter of somebody going to jail for this, then do we want to put them on the same level as a rape conviction, than just a sexual battery which I think is three to eight years in jail time, maybe, or a fine.

JW: I want to get to that issue of proof because it's difficult to get beyond hearsay when we're talking about one partner saying, "He took the condom off without my knowing," or he's saying, "He tampered with the condom without my knowing." How do you address that issue of being able to have some standard of proof that would hold up in court?

ER: It's a issue. Definitely with rape cases, in general, it often is a he said versus she said situation. Stealthing is no different than that. I guess the main reason that we decided to come forward with this bill is because we had a stealthing victim reach out to our office. She was turned away by two DAs offices telling her that it's not illegal to not wear a condom, which is true.

What she had, and she's now pursuing a civil case, was that she contracted a very specific strain of herpes. That's what they're using to prove that he gave it to her. They

have text messages that she was like, "I thought you wore a condom." He was like, "Actually I never put the condom on."

Anything short of that situation of text messaging or somebody else overhearing it, it does become a he said versus she said.

Ultimately, and the reason why we moved forward with this bill is it shines a light on that this is wrong and this is illegal. I think a lot of people don't think that that's the case. I think their reasoning is, "Well, she consented to sex," or, "As a female, I consented to sex. Everything that happens during this, I've consented to" which is not true at all.

You can say no at any point. You can change your mind at any point. That's why, if you've consented to sex, but they've taken the condom off, it does change the agreement that you made. No, the burden of proof is huge and not something that we made easier in this bill. We're just hoping that this bill...

The DAs were neutral on the bill. That's because they know that this probably occurs. We don't have statistics, because people don't come forward. Maybe this will be enough to raise awareness about it and to tell people that, "No, actually this is illegal what they're doing," and to address it. This bill is an uphill battle, starting with the burden of proof and ending with the governor.

JW: I think that's one of the other things that always interesting. How do you see yourselves getting this over the veto line? Obviously, the current governor's MO is anything that expands the penal code tends to get the veto pen pretty quick and that veto statement. How do you think you get past that hurdle?

ER: What our hopes are is the victim herself, because she is living proof that she went to the DA's office, too, and they turned her away. The governor does not like adding new crimes. The only time he will add a new crime is if it shows that there is a deficiency in the law.

He's signed one this year that dealt with sextortion and extortion in the digital age and sending naked pictures. Even though that was adding a new crime, he felt like there was a deficiency in the law. It wasn't addressed, so he signed it. That is what our hurdle with him is. As long as we can show there was a deficiency in the law.

The problem is a lot of people say this is already illegal. I think the argument can be made that it is illegal. It could be illegal, but the DA has to know that. The DA has to be willing to bring charges. There's just not enough public awareness about this that this in fact against the law.

Worse, the committee consultant actually said to me that this was a health issue and that this is a bill that should be going through the health committee. I'm like, "No, it's not

a health issue. Certainly, we're addressing issues of STDs and pregnancy, but really what it comes down to is a violation of consent. That's a public safety bill and that's why we wanted it in the rape statute."

But, in order to move through the process, we downgraded it to a sexual battery. I think there's a lot of things people don't know and understand about this. Again, one of the purposes of the bill is to really bring it into the discussion again.

JW: Maybe this is something you can address, too, is that obviously the context around this discussion is going to be very different next year. There is a huge culture of sexual harassment that has recently come to light in the Legislature. Do you feel like that changes the dynamics a little bit going forward? Does that put the political winds at your back, so to speak?

ER: I think it could but only because we're finally talking about victims again. I think so often we try to legislate and we don't think about the victims themselves. One of the goals of the bill is just making sure that victims understand what happened to them and that they feel comfortable coming forward.

We're having this huge issue of sexual harassment. Well, it's finally coming to light. We've had this issue forever.

JW: For decades.

ER: It's now finally coming to light. What my boss is trying to do with that issue is just circling back and focusing on the victims. That's why one of the big things is not forcing victims to name perpetrators or to actually name somebody, because then it puts again more responsibility on them.

The victims shouldn't have any responsibilities. They should just be getting through how they need to get through, if that's coming forward, if that's not coming forward, if that's seeking help and being able to get help. I think that's the dialogue that we'll have around it.

I don't think it will make it any easier in getting it passed next year, but at least maybe we'll be included in the newspaper headlines when they say, "All the bills that came out as a result of sexual harassment." Maybe this will be included in that which would be nice.

I think at least it changes the dialogue, and one of the problems we're having with this bill is people not understanding why it's necessary.

JW: Think it's potentially a wave year for victim's rights bills next year?

ER: Yeah. I hope so. I think everyone now wants to talk...We're talking about changing the culture and what needs to be done. We need to do that, but I think what my boss' goal has always been, what the goal of the Women's Caucus has always been, is centering this around victims.

We've passed a lot of legislation that's not helping victims. Some of the pushback we received on this bill is that it's not helping victims. We disagree, because it's alerting victims, knowing that, "Hey, this happened to me. Oh, and actually it is illegal and I can come forward and it is something that could be charged."

If they don't want to go forward with that, at least they know that what happened to them is wrong, and at least they can start there. It's going to be a busy year next year.

JW: Undoubtedly. This'll be another very interesting topic to keep an eye on. Erinn, thank you so much for coming in and talking with us again.

ER: Thank you.