

True Reproductive Justice

Applying Ordinary Reckless-Battery Principles to Pregnancy Caused Without Express Consent

I. Purpose and Principle

The law has long treated pregnancy as though its consequences belong almost entirely to the woman.

When an unintended pregnancy occurs, it is the woman whose body is altered. It is the woman who experiences the physical risks of pregnancy, miscarriage, childbirth, or abortion. It is the woman who may be confronted with fear, physical pain, emotional distress, medical intervention, disruption of work and family life, and decisions that may remain with her for the rest of her life.

Yet the conduct of the man who caused the pregnancy can disappear almost entirely from the legal analysis.

This proposal begins from a different premise:

True reproductive justice holds the father accountable in law while protecting all innocent parties.

It does not propose a new category of crime.

Rather, it asks that ordinary principles of reckless battery be applied consistently to pregnancy once the cognitive habit of treating reproductive injury as categorically different from other bodily injury is removed.

Consent to sexual activity is not necessarily consent to pregnancy.

A woman may consent to intimacy without expressly consenting to being made pregnant. If a man nevertheless engages in conduct that knowingly exposes her to pregnancy, without her express consent to pregnancy, and pregnancy results, the law should examine that conduct under the same principles of bodily integrity, foreseeability, causation, and recklessness that apply elsewhere.

The theory does not depend upon proving that the man deliberately intended to cause pregnancy.

Recklessness is enough.

A person may be legally accountable for knowingly exposing another person to a foreseeable risk of bodily harm even when the harmful result was not intended and even when the probability of harm was less than certain.

Pregnancy is foreseeable.

Indeed, the possibility of pregnancy is precisely why contraception exists.

Contraceptive use therefore should not be treated as permission to impose the remaining risk. It is evidence pointing in the opposite direction: that pregnancy is being actively avoided.

Because contraceptive methods have known failure rates, their use does not erase the remaining risk.

Nor should contraception transfer responsibility for that risk entirely onto the woman.

A woman should not be expected to chemically, hormonally, mechanically, or surgically alter her body merely so that a man need not exercise responsibility and self-command over conduct capable of creating a child.

This proposal therefore places responsibility earlier, before the crisis exists.

A man who is not prepared to accept the consequences of procreative conduct must learn restraint.

A man who recklessly engages in conduct that causes pregnancy without the woman's express consent should be accountable for the bodily consequence that results.

II. The Legal Theory: Ordinary Reckless Battery

The proposal does not ask lawmakers to declare pregnancy a special new category of criminal harm.

It asks a more basic question:

If ordinary battery law protects bodily integrity against harmful or offensive physical consequences caused without consent, why should pregnancy automatically be excluded from that analysis?

The proposed approach applies familiar principles:

- bodily integrity;
- consent;
- voluntary conduct;
- foreseeability;
- recklessness;
- causation; and
- resulting physical consequences.

The relevant allegation would be that the defendant recklessly caused a profound physical condition in another person's body without her express consent to that condition.

Pregnancy is not the crime.

Fatherhood is not the crime.

Sexual intimacy is not the crime.

Consensual procreation is not the crime.

The issue is whether conduct resulting in pregnancy satisfies the ordinary elements of reckless battery when the pregnancy was not consented to.

The precise charge available in any individual case would depend upon the governing jurisdiction's existing battery statutes and definitions.

The larger principle, however, does not require invention of a new class of offense.

It requires consistent application of existing principles.

III. Recklessness Does Not Require Certainty of Harm

A central objection is likely to be:

“He did not know that pregnancy would occur.”

That misunderstands recklessness.

Reckless conduct is not limited to situations in which the actor knows that harm will certainly result.

The relevant question is whether a person knowingly exposes another person to a foreseeable risk and proceeds despite that risk.

This principle appears throughout criminal law.

A person who drives dangerously need not intend to strike another person.

A person who engages in other conduct creating a known risk of physical injury does not escape responsibility merely because injury ordinarily does not occur.

The comparison is important because reproductive conduct is often subjected to a different mental framework.

People acknowledge simultaneously that:

1. sexual intercourse can cause pregnancy;
2. contraceptive methods can fail;
3. pregnancy substantially alters a woman's body;

yet when pregnancy actually occurs, the foreseeable result is frequently treated as though no one could have anticipated it.

That is the cognitive dissonance this proposal challenges.

The fact that a harmful result was statistically uncertain does not make the risk unforeseeable.

Indeed, widespread attempts to prevent a particular result demonstrate knowledge that the result is possible.

IV. Express Consent to Pregnancy

The proposal distinguishes two permissions:

consent to sexual activity and **consent to pregnancy**.

They are not interchangeable.

For purposes of this analysis, express consent to pregnancy means an affirmative communication or unmistakable mutual understanding that the woman is willing to engage in conduct for the purpose of, or with affirmative acceptance of, becoming pregnant by that man.

No particular legal form should be required.

There need not be a written agreement.

There need not be formal words.

A married couple deliberately attempting to conceive plainly presents a different factual situation from a woman actively attempting to prevent conception.

The question is whether the evidence establishes that pregnancy itself was affirmatively accepted rather than merely biologically possible.

Past consent does not automatically establish present consent.

A previous desire to have children does not constitute perpetual permission to cause pregnancy.

Marriage does not constitute permanent reproductive consent.

An established sexual relationship does not constitute permanent reproductive consent.

And consent to a particular sexual act does not necessarily constitute express consent to every reproductive consequence that another person's conduct may impose.

V. Contraception Is Evidence Against Consent to Pregnancy

One of the most important features of this proposal is its treatment of contraception.

The conventional argument often runs as follows:

“They used contraception, so they acted responsibly and the pregnancy was simply an accident.”

But that formulation hides the critical question of consent.

Why was contraception being used?

To prevent pregnancy.

Its use therefore indicates that pregnancy was not being affirmatively sought.

Contraception should not logically function both as evidence that a woman was trying not to become pregnant and as evidence that she consented to becoming pregnant if the method failed.

Those propositions contradict one another.

Contraceptive use may reduce the probability of pregnancy.

It does not transform unwanted pregnancy into consented pregnancy.

Nor does accepting the known imperfection of a preventive measure amount to consenting to the outcome the measure is designed to prevent.

Knowing that a seat belt cannot prevent every injury does not constitute consent to being injured.

Knowing that a smoke detector cannot prevent every fire does not constitute consent to someone recklessly creating a fire risk.

Likewise, knowledge that contraception can fail does not itself constitute consent to pregnancy.

VI. Responsibility Cannot Be Shifted Entirely Onto the Woman

Modern reproductive assumptions frequently place the burden of pregnancy prevention predominantly upon women.

She may be expected to take medication.

She may be expected to tolerate hormonal effects.

She may be expected to use implanted or inserted devices.

She may be expected to undergo procedures.

And if all of that fails, she may then be expected to solve the resulting crisis herself.

This proposal rejects that asymmetry.

A man's reproductive responsibility cannot be outsourced to a woman's willingness to alter her own body.

The possibility that she can take contraceptives does not eliminate his obligation to exercise self-command.

Nor does contraceptive use grant him an entitlement to impose whatever remaining risk exists.

The responsibility begins with recognizing the procreative power of the act itself.

VII. The Proposal Does Not Condone Abortion

Nothing in this proposal should be interpreted as endorsing, normalizing, or morally approving abortion.

The proposal begins from the opposite concern:

By the time a woman believes she must resort to abortion drugs or surgery, society may already have failed her.

The debate often begins only after pregnancy occurs.

What will she do?

Will she carry the pregnancy?

Will she raise the child?

Will she place the child for adoption?

Will she seek an abortion?

This proposal asks the question that comes first:

How did she come to be pregnant, and did she consent to being placed in that condition?

If she expressly consented to pregnancy, this theory of battery is not implicated.

If she did not, the law should not direct all of its scrutiny toward her subsequent actions while treating the father's antecedent conduct as legally invisible.

The availability of abortion cannot erase whatever wrongful conduct caused the pregnancy.

Nor should a man be able effectively to say that his responsibility ends because the woman can undergo drugs or surgery to eliminate the consequences.

That simply transfers the physical, emotional, medical, and moral burden back onto her.

The objective is to prevent the crisis from being created in the first place.

VIII. When the Courts Become Involved

This proposal is not intended to place government inside every private relationship.

Pregnancy alone would not automatically initiate criminal proceedings.

If the woman does not complain and the matter otherwise does not enter the legal system, the courts ordinarily have no occasion to act.

Where the woman alleges that she was made pregnant without her express consent, however, authorities may investigate whether the facts satisfy the ordinary elements of reckless battery.

The usual protections of criminal law remain essential.

The accusation itself does not establish guilt.

Pregnancy itself does not establish guilt.

Paternity itself does not establish guilt.

The government bears the burden of proving every required element to the applicable criminal standard.

Evidence may include the woman's testimony, the man's testimony, contemporaneous communications, admissions, evidence concerning contraception, circumstances surrounding the encounter, paternity evidence, and other admissible facts.

IX. Pregnancy and Abortion as Evidence

Where pregnancy results, the pregnancy establishes the physical consequence that must be examined.

Where a woman subsequently seeks an abortion because she does not consent to continuing the pregnancy, that circumstance demonstrates the seriousness of the position in which she finds herself.

It does not, standing alone, prove the father's criminal culpability.

The underlying inquiry remains:

- Did she expressly consent to pregnancy?
- Did his conduct cause the pregnancy?
- Did he act with the recklessness required by ordinary battery law?

The woman seeking medical care should not thereby become the accused.

The legal inquiry concerns the conduct that placed her in that position.

X. First-Offense Diversion: Accountability Through Formation

For an appropriate first offender, the preferred response should not necessarily be conventional incarceration.

The objective should be responsibility.

A man whose conduct demonstrates that he has not developed sufficient discipline to exercise procreative power without harming women and children should be required to develop that discipline.

An intensive diversion program could operate through certified public-private partnerships, including qualified nonprofit and faith-based organizations.

The model could resemble a structured residential service corps.

Participants would live under disciplined conditions and engage in intensive vocational, practical, educational, and personal-development work.

The objective would be to teach self-command and turn destructive irresponsibility into productive capacity.

XI. Core Elements of the Diversion Program

A qualifying program could include:

- structured residential living;
- consistent schedules and expectations;
- physical fitness;
- construction skills;
- carpentry;
- plumbing and mechanical trades;
- electrical and maintenance skills;
- agriculture and food production;
- land and environmental restoration;
- disaster-response skills;
- community rebuilding projects;
- financial literacy;
- budgeting;
- employment preparation;
- conflict resolution;
- relationship responsibility;
- parenting education;
- infant and child care;
- understanding the financial cost of raising children;
- family-support responsibilities;
- service to vulnerable populations;
- mentoring by responsible adult men;
- education concerning consent and bodily integrity;
- emotional discipline;
- delayed gratification; and
- development of self-command.

Productive labor is not incidental to this vision.

It is central.

A man should learn that human energy can be directed toward building, repairing, producing, protecting, serving, and providing.

The program should teach the transformation of impulse into useful work.

XII. Practical Structure of Diversion

The diversion system could be organized around several stages.

Stage One: Assessment

Each participant would receive an individualized assessment of:

- employment history;
- vocational ability;
- educational needs;
- financial stability;
- parenting experience;
- housing;
- substance-use issues where relevant;
- behavioral needs;
- family obligations; and
- existing skills.

Stage Two: Intensive Formation

The participant would enter a structured period of residential or comparably intensive training.

This would combine work, vocational instruction, responsibility education, and supervised service.

Stage Three: Productive Employment

The participant would transition toward ordinary paid employment or apprenticeship.

The objective is not permanent dependence upon the program.

The objective is employability and independence.

Stage Four: Family Responsibility

Where a child has resulted and legal parental responsibilities exist, the participant would be expected to demonstrate the practical ability to contribute to that child's support.

Responsibility toward the child does not create entitlement to a relationship with the mother.

Her safety and freedom remain separate considerations.

Stage Five: Completion

Successful completion could be recognized by the court under whatever existing diversion, filing, deferred-disposition, dismissal, or sentencing mechanisms are legally available.

The precise procedure would depend upon existing state law.

XIII. Public-Private and Faith-Based Partnerships

Government need not operate every program itself.

Qualified private organizations could provide housing, training, mentoring, vocational instruction, work opportunities, and family education under public standards.

Faith-based organizations may be particularly well positioned to contribute experience in:

- character formation;
- service;
- mentoring;
- family support;
- vocational programs;
- residential communities;
- recovery programs; and
- volunteer mobilization.

Participation in a government-funded diversion opportunity should not require profession of a particular religion.

Faith-based organizations can nevertheless contribute their institutional strengths while complying with applicable constitutional requirements.

XIV. Objections and Responses

Objection 1: “Consent to sex means accepting the risk of pregnancy.”

Response

Accepting that a biological consequence is possible does not necessarily constitute consent to having another person impose that consequence.

The relevant question is not whether pregnancy was imaginable.

It is whether pregnancy was affirmatively consented to.

Consent to sexual activity and express reproductive consent are separate questions.

Objection 2: “You are inventing a new crime.”

Response

No.

The proposal asks whether ordinary reckless-battery principles already applicable to other invasions of bodily integrity should also apply when the resulting physical condition is pregnancy.

The argument is one of consistent application, not creation of a special reproductive offense.

Objection 3: “Pregnancy is not an injury.”

Response

A wanted pregnancy need not be characterized as an injury.

The relevant question is whether a substantial physical condition has been imposed upon another person's body without consent.

Pregnancy produces extensive physiological consequences.

Whether those consequences are welcomed or unwanted matters enormously to the person experiencing them.

The legal inquiry concerns bodily integrity and consent, not hostility toward pregnancy or children.

Objection 4: “He didn't intend pregnancy.”

Response

The theory is recklessness, not intent.

People are routinely held responsible for consequences they did not specifically desire when they knowingly created a sufficiently serious and foreseeable risk.

Objection 5: “But the chance of pregnancy was small.”

Response

A risk need not exceed fifty percent before conduct can be reckless.

Criminal law does not ordinarily measure culpability by asking whether injury was more likely than not.

The relevant considerations include foreseeability, seriousness of the consequence, knowledge of the risk, and disregard of that risk.

Objection 6: “They used contraception.”

Response

That does not establish consent to pregnancy.

It indicates an effort to prevent pregnancy.

Known failure rates mean the risk remains foreseeable.

Reducing a risk does not automatically authorize another person to impose the remaining risk.

Objection 7: “She accepted the failure rate.”

Response

Knowledge that a preventive measure can fail is not identical to consent to the outcome being prevented.

A woman may recognize that pregnancy remains biologically possible while expressly declining to consent to pregnancy.

Objection 8: “She should have used more effective contraception.”

Response

That argument transfers reproductive responsibility almost entirely onto the woman's body.

The proposal rejects the assumption that male responsibility consists merely of relying upon whatever chemical, hormonal, mechanical, or surgical intervention a woman is willing to undergo.

Men also have duties of restraint and self-command.

Objection 9: “Why doesn't she just abstain?”

Response

A woman's right to bodily integrity does not require abstention from all intimacy.

Agreement to sexual activity does not necessarily authorize another person to impose pregnancy.

Objection 10: “This criminalizes ordinary sex.”

Response

No.

Consensual intimacy remains consensual intimacy.

Consensual procreation remains consensual procreation.

The issue arises only where pregnancy actually results and the facts are alleged to satisfy the ordinary requirements of reckless battery.

Objection 11: “What about marriage?”

Response

Marriage does not logically create permanent consent to pregnancy.

A spouse may consent enthusiastically to one pregnancy and decline another.

Reproductive consent remains meaningful within marriage.

Objection 12: “What if they always said they wanted children?”

Response

A general desire for children at some point does not necessarily establish express consent to pregnancy on every occasion.

Timing, circumstances, and communication matter.

Objection 13: “What if she changes her mind afterward?”

Response

A later change of mind cannot retroactively eliminate consent that actually existed.

The inquiry concerns consent at the relevant time.

Objection 14: “What if she never told him she didn't want pregnancy?”

Response

This raises an evidentiary question.

The proposal's reliance upon express reproductive consent requires courts to examine what was actually communicated or unmistakably understood.

The government still bears the burden of proving the required mental state and lack of consent.

Objection 15: “What if she was using contraception but never discussed it?”

Response

Contraceptive use is relevant evidence precisely because it tends to demonstrate an effort to avoid pregnancy.

The weight of that evidence would depend upon the facts.

Objection 16: “What if she lies about contraception?”

Response

Her deception may present separate questions of wrongdoing and responsibility.

It does not automatically resolve whether the man's own conduct satisfied the elements of reckless battery.

Each person's conduct should be evaluated on its own terms.

Objection 17: “What if he was told she could not become pregnant?”

Response

That may bear directly upon recklessness.

A genuinely reasonable belief that pregnancy was impossible could negate the mental state required for reckless battery.

Where pregnancy was merely considered unlikely, however, the issue becomes whether the remaining risk was knowingly disregarded.

Objection 18: “What about infertility?”

Response

True impossibility and reduced fertility are different.

If pregnancy cannot occur, the resulting battery theory cannot apply because the alleged bodily consequence does not occur.

If conception remains possible, foreseeability must be evaluated according to the actual circumstances.

Objection 19: “What if withdrawal was used?”

Response

Attempting to reduce the probability of pregnancy does not itself establish consent to pregnancy.

The relevant questions remain consent, knowledge of the remaining risk, recklessness, causation, and result.

Objection 20: “What if the critical act was accidental?”

Response

A genuine unavoidable accident is not automatically reckless.

The prosecution must prove the mental state required under ordinary battery principles.

Objection 21: “What if he says he could not control himself?”

Response

Sexual impulse does not create a legal entitlement to impose bodily consequences upon another person.

Adult responsibility requires self-command.

That principle is also central to the proposed diversion program.

XV. Proof and Due Process

Objection 22: “This will be his word against hers.”

Response

Sometimes it will.

Many offenses occur in private.

The difficulty of proving an offense does not determine whether the underlying conduct can constitute an offense.

Ordinary evidentiary standards and the presumption of innocence remain intact.

Objection 23: “Does her accusation prove guilt?”

Response

No.

An allegation initiates investigation.

It does not establish guilt.

The government must prove every required element.

Objection 24: “Does pregnancy prove guilt?”

Response

No.

Pregnancy establishes the physical result.

Consent, causation, and recklessness remain separate questions.

Objection 25: “Does paternity prove guilt?”

Response

No.

Paternity establishes biological causation.

It does not establish the defendant's state of mind or whether pregnancy was consented to.

Objection 26: “What if paternity is disputed?”

Response

The government must establish causation using lawful evidence.

No person should be convicted merely because he might be the father.

Objection 27: “What if more than one man could be the father?”

Response

The same principle applies.

Causation must be proved as to the particular defendant.

XVI. Pregnancy Outcomes

Objection 28: “What if she miscarries?”

Response

A later miscarriage does not erase the fact that pregnancy occurred or the physical consequences already experienced.

Objection 29: “What if the pregnancy is ectopic?”

Response

The underlying analysis remains the same.

The seriousness of an ectopic pregnancy illustrates particularly clearly why reproductive consequences cannot be dismissed as trivial simply because they arise biologically.

Objection 30: “What if there is a stillbirth?”

Response

The subsequent loss of the child does not retroactively change the circumstances under which pregnancy occurred.

Objection 31: “What if she carries the child and loves the baby?”

Response

Love for the child and lack of consent to the circumstances of conception can coexist.

The child is innocent.

The mother's later love cannot retroactively create consent that did not exist.

XVII. Abortion-Related Objections

Objection 32: “If she can obtain an abortion, why should he be liable?”

Response

Because her ability to undergo a medical intervention does not erase his prior conduct.

It cannot be just to impose a pregnancy and then treat drugs or surgery undertaken by the woman as the man's escape from responsibility.

Objection 33: “Does the proposal endorse abortion?”

Response

No.

Its stated objective is to prevent the circumstances that make women believe abortion is their only remaining option.

The proposal directs accountability toward the conduct preceding pregnancy instead of placing the entire burden upon the woman afterward.

Objection 34: “Would the woman be prosecuted?”

Response

No.

The woman whose body has been subjected to the alleged battery is not the criminal target of this proposal.

Objection 35: “Is the child somehow treated as an injury?”

Response

No.

The child is innocent.

The legal issue is the nonconsensual physical condition imposed upon the woman's body and the conduct that caused it.

Recognition of that wrong does not diminish the worth of the child who results.

XVIII. Protecting All Innocent Parties

The central objective is not simply punishment.

It is justice that protects everyone who is innocent.

The woman should not bear alone the physical and emotional consequences of another person's irresponsibility.

The child should not be blamed, devalued, or treated as the problem.

And where rehabilitation is possible, the man should not simply be discarded into a system that may leave him even less able to become a responsible father.

The proper response is accountability joined to formation.

XIX. Objections to Diversion

Objection 36: “Why not just incarcerate him?”

Response

Because incarceration alone may neither compensate for the harm nor make him capable of assuming responsibility.

A program that produces employable, disciplined, self-supporting men may better protect women, children, and society.

Objection 37: “This sounds like a labor camp.”

Response

The objective is not punitive extraction of labor.

The objective is structured formation through productive work, vocational instruction, service, discipline, and responsibility.

Any program must operate under lawful diversion or sentencing authority and comply with constitutional requirements.

Objection 38: “Why emphasize hard work?”

Response

Because disciplined productive work develops capacities directly relevant to responsible adulthood:

self-command, persistence, competence, delayed gratification, usefulness, confidence, and the ability to provide.

The program deliberately redirects energy toward creation and service.

Objection 39: “Why teach men to become husbands and fathers?”

Response

Because procreative conduct cannot responsibly be separated from the possibility of parenthood.

A man capable of creating a child should understand what raising, protecting, and providing for a child actually requires.

The program would not compel marriage.

It would teach the capacities necessary for responsible family life.

Objection 40: “Why involve religious organizations?”

Response

Because many religious and charitable organizations already possess substantial experience in mentoring, family support, residential formation, vocational instruction, service, and community building.

They can participate as partners where lawful without requiring religious adherence from participants.

XX. Objections from Women

Objection 41: "This treats women as helpless."

Response

It does the opposite.

It recognizes a woman's authority to decide whether another person may subject her body to pregnancy.

It refuses to treat reproductive responsibility as something she alone must manage after conception.

Objection 42: "Women can manage their own contraception."

Response

They may choose to do so.

The issue is whether their ability to alter their own bodies relieves men of responsibility for their own reproductive conduct.

This proposal says it does not.

XXI. Objections from Men

Objection 43: "This is anti-man."

Response

The proposal rests upon the belief that men are capable of much more than being governed by sexual impulse.

Men can exercise discipline.

They can restrain themselves.

They can build.

They can work.

They can protect.

They can provide.

They can become good fathers.

Holding men responsible for capacities they possess is not hostility toward men.

It is an expectation of maturity.

Objection 44: "Why place responsibility on the man?"

Response

Because the physical consequences are not symmetrical.

Pregnancy occurs within the woman's body.

She cannot walk away from the biological event once it occurs.

Whatever happens next, she experiences the consequences in her flesh.

The legal system should recognize that reality.

Objection 45: “Men will become afraid of sex.”

Response

Men should think seriously about the possible consequences of procreative conduct.

The purpose is not fear of intimacy.

It is awareness that sexual conduct capable of creating human life carries responsibilities extending beyond momentary gratification.

XXII. The Broader Principle

Modern reproductive debates usually begin too late.

They begin after conception.

They ask what the woman is going to do.

This proposal asks what happened before she was forced to make that decision.

Did she expressly consent to pregnancy?

Did the man knowingly expose her to pregnancy anyway?

Did pregnancy result?

If so, why should the physical consequences imposed upon her be excluded from the ordinary legal principles governing reckless interference with another person's body?

That is the question at the heart of this proposal.

Reproductive power carries responsibility.

That responsibility begins before conception.

XXIII. A Different Vision of Reproductive Justice

True reproductive justice holds the father accountable while protecting every innocent party.

It protects the woman from having pregnancy imposed upon her without her express consent.

It protects the innocent child from being treated as the problem.

And it seeks, where possible, to transform an irresponsible man into a disciplined and capable father rather than simply throwing him away.

The aim is ultimately preventative.

Fewer women placed in desperate situations.

Fewer children conceived amid abandonment and irresponsibility.

Fewer men treating reproductive consequences as someone else's problem.

Fewer abortions contemplated because a woman has been left frightened and alone.

And more men who understand that genuine strength is expressed through discipline, productive work, protection, responsibility, and self-command.

Protect the woman.

Protect the child.

Hold the father accountable.

Teach the man to become capable of fatherhood.

That is the proposed meaning of true reproductive justice.