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Wrongful Pregnancy and the Offset/ Benefits Approach

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After careful deliberation, a heterosexual, married couple already raising a family of three children decide against further additions to their family. In order to prevent further pregnancies, the wife opts for a tubal ligation. A few months after the procedure, she finds herself pregnant again. Unwilling to secure an abortion, she proceeds with the pregnancy and eventually delivers a healthy baby girl. Nonetheless, the couple sue the surgeon who performed the tubal ligation. At trial, it is determined that the procedure failed due to the surgeon's negligent performance. The couple seek damages related to the pregnancy itself (including loss of income), but they also claim an estimate of the cost of raising their new daughter to the age of majority. Many, including the defendant, find the latter claim offensive. Among the considerations put forward to block this claim is the principle that the tortfeasor owes the victim compensation, not a windfall. The defendant claims that in order to prevent a windfall award, the benefits of a healthy child must be weighed against the losses that rearing such a child might impose. The defendant further maintains that, since there is no objective method of balancing such competing considerations (an offensive exercise in any case), the only acceptable approach is to treat the opposing costs and benefits as cancelling each other out. In short, says the defendant, there should be no damages for the costs of raising an unplanned, healthy child.

Consider another familiar example from tort theory: Ernest Weinrib's hypothetical Smith v. Jones. The negligent Jones crashes his vehicle into Smith's parked car. The resulting damage prevents Smith using her car until it is repaired. Ultimately, this turns out to be quite a blessing. As a result of the accident, Smith is prevented from catching her afternoon flight, a flight that subsequently crashes. Weinrib, however, maintains that Jones cannot limit his liability for the damaged car by arguing that he has saved Smith's life.[1] Any ulterior benefits that result from Jones's negligence are irrelevant to the assessment of his liability to Smith. At first glance, it may seem that Smith v. Jones provides no illumination on wrongful pregnancy cases such as the one above. However, I argue that Smith v. Jones is a close parallel of wrongful pregnancy cases.

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1. Ernest Weinrib, "Right and Advantage in Private Law" (1989) 10:5-6 Cardozo L Rev 1283 at 1283.

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Wrongful pregnancy cases involve unwanted pregnancies and births caused by a tortfeasor's negligence. While the negligence in question often concerns an unsuccessful sterilization procedure, it may also involve a negligent diagnosis of the post-surgical condition or failure to provide patients with adequate information. In another infamous case, a pharmacist was found liable in negligence because he mistakenly filled a prescription for contraceptives with sleeping pills.[2] In all such cases, the resulting child is unplanned and the relevant healthcare professional's services were retained in order to prevent pregnancy and childbirth.

This paper takes up one aspect of the wrongful pregnancy debate: what I call the Offset/Benefits Approach.[3] I argue that the alleged benefits of unplanned healthy children are irrelevant to the tortfeasor/victim relationship; these benefits should not block or reduce victims' claims to child-rearing damages.

My conception of child-rearing damages includes pecuniary awards for the financial costs as well as non-pecuniary awards for personal autonomy losses and emotional costs. However, in the final section of the paper, I express some misgivings about the general category of emotional (or hedonic) damages.[4]

Section 1 provides a general account of the wrongful pregnancy debate, including the somewhat problematic distinction between principle and policy. I provide a brief summary of my more general argument for child-rearing damages and conclude Section 1 with an explanation of the Offset/Benefits Approach as a counter to that argument. In its most radical form, the Offset/Benefits Approach insists that healthy children always constitute an overall benefit to their parents and that this overall benefit cancels out any claim to child-rearing damages.

Section 2 deals with the conviction that healthy children must always be regarded as an overall benefit to their parents, even if these children are the unplanned results of medical negligence. I argue that this generalization should be rejected, because it is based on a confused combination of moralistic judgment and legal fiction.

Section 3 deals with the argument that the benefits of children, whatever these may be, must still be considered in wrongful pregnancy cases. Again, the idea is that victims are entitled to fair compensation, not a windfall. So the critic of child-rearing damages complains that, even if they are not an overall benefit, the benefits of children must still be deducted from victims' compensation claims. I consider the so-called separate interests rule as a response to this line of argument, but I base my own response on an account of tort law that marginalizes the concept of hedonic damages. I then use Weinrib's Smith v. Jones to reinforce my case against the Offset/Benefits Approach, arguing that, even if hedonic

2. The prescription error case is *Troppi v Scarf*, 31 Mich App 240 (1971). I will not consider in this paper the idea that the different forms of negligence might make a difference to the appropriate awards. I treat negligent surgery (tubal ligation and vasectomy), negligence in provision of information, and negligence in the prescription of drugs, as comparable failures of respect for bodily integrity.

3. The terms "Offset/Benefits Approach", "Total Recovery", and "Limited Damages" are drawn from *Kealey v Berezowski* (1996), 30 OR (3d) 37 at 39-57 (Gen Div) [*Kealey*].

4. Christopher Essert, "Tort Law and Happiness" (2010) 36:1 Queen's LJ 1 at 5.

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considerations are relevant to tort law, the benefits of children are irrelevant to the tortfeasor/victim relationship. Finally, I consider whether hedonic damages should be worked back into the picture. I conclude that, while the general concept of hedonic damages is somewhat problematic, there is no special problem with affording hedonic damages in wrongful pregnancy cases.

1. An Overview of Wrongful Pregnancy

In 1999, the House of Lords' *McFarlane* decision overturned 15 years of appellant authority establishing the recoverability of damages for child-rearing costs. *McFarlane* left the door open for such damages in cases involving disabled children, but for all other cases it restricted damages to costs associated with pregnancy itself.[5] While it later accepted that pregnancy related damages should be supplemented by a "conventional" award for loss of reproductive autonomy, the House of Lords continued to reject damages for child-rearing costs in healthy-child cases.[6] This rejection is typical of common law jurisdictions, but in its 2003 *Cattanach* decision, the High Court of Australia broke from the pack by accepting damages for child-rearing costs in a healthy-child wrongful pregnancy suit.[7]

This paper will not attempt to provide a detailed score card of the various individual opinions from these cases. Instead, I will briefly summarize some of the main lines of argument in order to set the stage for a discussion of the Offset/Benefits Approach in Section 2.

Wrongful pregnancy cases move to the assessment of damages because the tortfeasor's negligence is found to be a legal cause of the resulting pregnancy. Very few authors or judges reject the legitimacy of pregnancy related damages (though some do question whether pregnancy, a so-called natural condition, can be considered a genuine injury). However, serious disagreements occur once discussion turns to the possibility of damages for child-rearing costs. Hereafter, I shall refer to the idea that plaintiffs should receive both pregnancy and child-rearing costs as Total Recovery. The term Limited Damages refers to models that restrict damages to costs associated with pregnancy itself. These broad definitions leave room for different conceptions of both Total Recovery and Limited Damages. For instance, one might endorse a version of Total Recovery that includes damages for the financial costs of both pregnancy and child-rearing, but still refuse to accept hedonic losses (or loss of happiness) as a head of damage. Likewise, while proponents of Limited Damages may agree that damages are restricted to losses associated with pregnancy itself, they may differ on whether pregnancy-related emotional costs are compensable. Furthermore, proponents of Total Recovery may disagree about the scope of liability for child-rearing costs

5. *McFarlane and Another v Tayside Health Board*, [1999] UKHL 50, [2000] 2 AC 59 [*McFarlane* cited to AC]. The previous authority was established in *Emeh v Kensington and Chelsea and Westminster Area Health Authority*, [1985] QB 1012.

6. *Rees v Darlington Memorial Hospital*, [2003] UKHL 52, [2004] 1 AC 309. No change has occurred under the Supreme Court of the United Kingdom.

7. *Cattanach v Melchior*, [2003] HCA 38, 215 CLR 1 [*Cattanach* cited to HCA].

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(Do claims to child-rearing costs end once children reach the age of majority? Can parents base their claims to financial costs on their own views about optimal education or best parenting practices?).[8]

Some have argued that child-rearing costs are a non-compensable form of pure economic loss, falling outside the scope of the tortfeasor's wrongdoing. Several authors have commented on the *ad hoc* and implausible character of this argument.[9] Since the physician's services are employed for the purpose of preventing both pregnancy and child-birth, it is hard to see how the resulting child does not come within the scope of his liability. Even if child-rearing costs are a form of pure economic loss, they seem to be compensable. However, some defenders of Total Recovery pursue an argument based on consequential economic loss, not compensable pure economic loss.[10]

Again, many authors regard the pregnancy itself as a foreseeable and compensable form of physical injury. Since the economic costs of caring for a child, healthy or not, are themselves foreseeable consequences of the initial physical injury, proponents of Total Recovery argue that the tortfeasor is also liable for these additional losses.[11] Here, so the argument goes, we merely apply the general rule that requires damages for lost income where a labourer's physical injuries prevent him from working.

Opponents of Total Recovery pursue a variety of arguments in order to block the extension of the consequential economic loss principle. Some suggest that, because pregnancy is an artificial or constructed form of injury, the doctrine of consequential economic loss does not apply. Others suggest that child-rearing costs do not flow from the injurious aspects of pregnancy (this will bring us back to the question of pure economic loss).[12] Still others maintain that the tortfeasor cannot be held responsible for child-rearing costs, because these costs are grounded in parents' fundamental duties to care for their children; the tortfeasor's negligence might be a cause in fact of such costs, but the legal cause of such costs must always be the parental duties themselves.[13]

Perhaps, where a jurisdiction's rules permit, plaintiffs should mitigate their losses through either abortion or adoption. Almost without exception, opponents of Total Recovery have rejected this line of argument. However, some

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8. On Lax J's definition, Total Recovery holds that "damages may be recovered for the pecuniary and non-pecuniary costs associated with the birth as well as for the economic costs of raising the child." On my definition, the general concept of Total Recovery is open to additional non-pecuniary awards for child-rearing. On my account, specific conceptions of Total Recovery may differ on both the applicability of non-pecuniary damages and the scope of claims to compensation for economic costs. See *Kealey*, *supra* note 3 at 54.

9. Dean Stretton, "The Birth Torts: Damages for Wrongful Birth and Wrongful Life" (2005) 10:1 Deakin L Rev 319; Laura C H Hoyano, "Misconceptions About Wrongful Conception" (2002) 65:6 Mod L Rev 883.

10. This is the approach of Kirby J. See *Cattanach*, *supra* note 7 at para 148.

11. *Ibid.*

12. Christian Witting, "Physical Damage in Negligence" (2002) 61:1 Cambridge LJ 189. Witting questions the status of pregnancy as an injury, but, in another work, he defends the majority decision in *Cattanach*. See Christian Witting, "Tort Law, Policy and the High Court of Australia" (2007) 31:2 Melbourne UL Rev 569 at 583-86.

13. *Kealey*, *supra* note 3 at 69.

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have argued that once children are born, it is impossible to draw a line between compensable expenses and non-compensable mitigative expenses (expenditures intended to enhance one's enjoyment of unplanned children).[14]

It should also be noted that opponents of Total Recovery often eschew what they call "policy" arguments. This qualification is not especially illuminating, since judges who invoke the distinction between policy and principle fail to provide any robust definitions of the concepts in question. The rejection of policy does appear to flag a disavowal of incentive-based arguments (damages for child-rearing costs would encourage wrongful pregnancy victims to take their parental duties less seriously), but even this is sometimes unclear. Moreover, judges who reject Total Recovery sometimes admit that narrow arguments of "principle" would validate damages for child-rearing costs. But, at the same time, they maintain that the intuitive repugnance or overall unfairness of such damage awards must be considered decisive. Here the notion of a hypothetical opinion poll is sometimes brought to bear on the issue—the public would never approve of such damage awards, and this firm sense of public opinion must override any and all arguments that would favour Total Recovery.[15]

My own case for Total Recovery is a principled one; it is based on an account of corrective justice similar to that endorsed by authors such as Weinrib and Arthur Ripstein. On this view, the defendant is responsible for the wrongful losses imposed by his negligence, not the claims that the plaintiffs hold against other individuals or society more generally. Here, according to Weinrib, we are to think in terms of the general conception of duty articulated by Lord Atkin in *Donoghue v. Stevenson*.[16]

> Because liability relates the defendant as doer of the injustice to the plaintiff as sufferer of the same injustice, the justifications that support liability are coherent when they simultaneously treat the parties as the correlatively situated. Coherence thus requires that the reasons for considering the defendant to have done an injustice be the same as the reasons for considering the plaintiff to have suffered that injustice…
>
> …In holding the defendant liable to the plaintiff, the court is making not two separate judgments (one that awards something to the plaintiff and the other that

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14. *Ibid* at 70-71. In *Kealey*, Lax J denies that child-rearing costs are a compensable loss. But she does suggest that the option of mitigation (through abortion or adoption) would have to be taken into account if such costs were compensable. For the second line of argument, see *Bevilacqua v Altenkirk*, 2004 BCSC 945 [*Bevilacqua*]. For an alternative approach to mitigation, see Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart, 2007) at 392-402.

15. See Lord Steyn's opinion, *McFarlane*, *supra* note 5 at 82-83. However, at least one judge does not shy away from policy arguments. In his *Cattanach* dissent, Heydon J claims that broader social concerns are relevant to the assessment of wrongful pregnancy. In particular, he expresses the concern that unplanned children could be harmed by the revelation that their parents sought damages for child-rearing costs. He also disparages the motivations of parents who seek such damage awards. See *Cattanach*, *supra* note 7 at paras 390-403. Peter Cane argues that decisions about wrongful pregnancy require appeals to broader moral concerns, but this position reflects his more general pessimism about corrective justice approaches to tort law. See Peter Cane, "The Doctor, the Stork and the Court: a modern morality play" (2004) 120 Law Q Rev 23; Peter Cane, "Another Failed Sterilisation" (2004) 120 Law Q Rev 89.

16. *Donoghue v Stevenson*, [1932] UKHL 100, [1932] AC 562; Ernest Weinrib, "The Disintegration of Duty" (2006) 31:2 Advocates' Q 212 at 212-13.

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> coincidentally takes the same thing from the defendant), but a single judgment that embraces both parties in their interrelationship. Each party's position is intelligible only in the light of the position of the other.[17]

Or, as Ripstein puts it,

> duties of conduct and duties of repair are inseparable. Duties of conduct protect each person's entitlement to such means as he or she happens to have against interference by others; duties of repair require that wrongdoers restore equivalent means to those that have been wronged. The state only has standing to empower plaintiffs to demand that it "correct" a certain set of wrongs, and the only thing it can do about those wrongs is correct them. Anything else is an arbitrary use of force, inconsistent with the freedom of the citizens.[18]

The relationship between tortfeasor and victim begins and ends with the question of whether the tortfeasor has wrongfully deprived the plaintiff of what is hers. The tortfeasor owes compensation for the loss of the victim's means and for the foreseeable losses that flow from the relevant deprivation. Tort seeks only to remedy the losses that can be tied to the infringement of the victim's rights. No other feature of the interaction between the two parties is relevant to corrective justice. (Again, the question of whether or not hedonic damages fit within this model of tort law is considered in Section 3).

Policy, by contrast, involves appeals to effects on third parties, broader social goals, or claims of the victim and/or tortfeasor from outside corrective justice. While it may seem odd to describe children as third parties to the circumstances of their birth, children are third parties to the dispute between tortfeasor and victim in wrongful pregnancy cases. We may also wish to distribute losses to those who are best able to afford them. If we think that the imposition of a duty of care will tend to shift the costs of accidents from the poor to the rich, distributive justice inclines us to impose such a duty. Likewise, if we think that the imposition of a duty of care would frustrate this goal, distributive justice will incline us to reject it. Here, policy judgments may still involve the claims of potential defendants and potential plaintiffs, but the claims in question are not based on their specific relationship (the claims are external to corrective justice).

In my view, child-rearing costs in wrongful pregnancy cases cannot be understood as a form of pure economic loss. In these cases, tortfeasors are responsible for changes to victims' bodies, changes that result in unchosen obligations. These obligations constrain victims' choices regarding both their bodies and their financial resources. Likewise, these obligations may impose serious emotional costs. I maintain that wrongful pregnancy victims cannot be expected to use either abortion or adoption as paths of mitigation. The tortfeasor is properly liable for the losses associated with both pregnancy and child-rearing. Wrongful pregnancy victims have a claim to the financial costs of meeting their legal responsibilities for raising children up to the age of majority. They should

17. *Ibid* at 215.
18. Arthur Ripstein, "As If It Had Never Happened" (2007) 48:5 Wm & Mary L Rev 1957 at 1964.

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also receive non-pecuniary awards for loss of personal autonomy, though these awards should not exceed those found in cases of serious personal injury. This is my basic model of Total Recovery.

I am also open to non-pecuniary awards for the emotional costs associated with unplanned children. However, my support for this head of damages is tentative, because I am somewhat skeptical of the general category of emotional (or hedonic) damages. I discuss my skepticism concerning emotional (or hedonic) damages in Section 3.

I cannot provide a full defence of my model of Total Recovery here. Issues such as pure economic loss, mitigation, and the circumscription of victims' claims must be taken up in other papers. In this paper, I am concerned with an opponent who, for the sake of argument, concedes the model outlined above and counters with the Offset/Benefits Approach. I consider the merits of this counterargument through the lens of corrective justice. In light of the relationship between the parties, should the tortfeasor be permitted to limit his liability by appealing to the benefits provided by unplanned children? The other questions and arguments, policy-based or not, will be addressed only for the sake of contrast with the Offset/Benefits Approach.

The Offset/Benefits Approach is endorsed in some jurisdictions, but it is often used as part of an argument for collapsing the case for child-rearing costs into Limited Recovery. Opponents of Total Recovery claim that it would be difficult—as well as morally objectionable—to engage in this kind of balancing in individual cases. Somewhat perversely, such balancing would appear to call for parents who do not fully embrace their unplanned parenthood to receive greater damages than those who do embrace their new circumstances. Such morally dubious examples aside, in most cases, judgments of how the different costs and benefits should be weighed are likely to be *ad hoc* or arbitrary. The only acceptable approach, so the argument goes, is to treat the relevant costs and benefits as cancelling each other out in all cases involving healthy children.[19]

The next move in the collapse argument is to supplement the Offset/Benefits Approach with an additional principle, which I call Overall Benefits to Parents (OBP). The critic of Total Recovery insists that we must, as a matter of fairness to wrongful pregnancy tortfeasors, consider the offsetting benefits of unplanned children (the Offset/Benefits Approach). The critic then asserts that the law must always treat children (healthy ones at least) as overall benefits to their parents (Overall Benefits to Parents or OBP). The critic concludes that, because children must be treated as overall benefits, additional compensation for child-rearing costs, perhaps even compensation for pregnancy costs, provides plaintiffs with a windfall that exceeds fair compensation. However, as I argue in Section 2, the firm conviction surrounding OBP is driven by considerations external to corrective justice.

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19. This approach is adopted by Lord Millett, though he also treats this approach as cancelling out claims to damages for pregnancy-related losses. Lord Millett, however, recommends a modest conventional award that recognizes victims' loss of autonomy. See *McFarlane*, *supra* note 5 at 113-15.

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2. OBP as a Legal Truism

OBP may be taken as an empirical generalization, one that has no realistic counter-examples. This simple generalization, however, is recognized as false or misleading by virtually all commentators and judges, including opponents of Total Recovery. OBP may also be construed as a legal fiction intended to shore up wavering parents' commitment to their children. But the *McFarlane* court is at pains to avoid such incentive based arguments.[20]

So what is left for principled opponents of Total Recovery to say? Consider the argument from repugnance provided by Lord Millett. Lord Millett accepts that the strong generalization is something of a fiction. The law's stance on children is complicated; before actual children are born (or perhaps conceived) the law recognizes our legitimate interest in avoiding the duties of parenthood. Likewise, Lord Millett accepts that decisions to avoid abortion and adoption may stem from a sense of moral obligation—not a cost benefit analysis that determines the retention of an unplanned child to be utility maximizing for its parents.[21] Yet he concludes that,

> Nevertheless I am persuaded that the costs of bringing Catherine up are not recoverable. I accept the thrust of both the main arguments in favour of dismissing such a claim. In my opinion the law must take the birth of a normal, healthy baby to be a blessing, not a detriment. In truth it is a mixed blessing. It brings joy and sorrow, blessing and responsibility. The advantages and the disadvantages are inseparable. Individuals may choose to regard the balance as unfavourable and take steps to forgo the pleasures as well as the responsibilities of parenthood. They are entitled to decide for themselves where their own interests lie. But society itself must regard the balance as beneficial. It would be repugnant to its own sense of values to do otherwise. It is morally offensive to regard a normal, healthy baby as more trouble and expense than it is worth.[22]

We have here the combination of two ideas that are often invoked in law, though usually separately from one another. First, as I mentioned above, there is an appeal to a legal fiction; we pretend that one thing counts as another or we accept a generalization that we know to be false, suppressing consideration of what would otherwise be considered salient facts. The generalization that children are always an overall benefit to their parents is just this sort of fiction. The other idea is that the law can and should, independent of harm and welfare concerns, give effect to deep feelings of repugnance or distaste. For Lord Millett, the idea that children could be treated as something other than a benefit to their parents invokes repugnance, regardless of whether children are actually harmed by Total Recovery.

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20. It is difficult to give any other meaning to each Law Lord's explicit rejection of arguments based on "social policy" or "public policy". See *McFarlane*, *supra* note 5 at 76 (Lord Slynn), 83 (Lord Steyn), 95 (Lord Hope), 100 (Lord Clyde) and 108 (Lord Millett). For a detailed breakdown of the individual opinions, see Hoyano, *supra* note 9. Hoyano cites the same pages in her discussion of the *McFarlane* rejection of policy arguments. See Hoyano, *supra* note 9 at 889, n 53.

21. *McFarlane*, *supra* note 5 at 113.

22. *Ibid* at 113-14.

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Of course, many think that the law should give no effect to such feelings of repugnance where they are not supported by more concrete concerns about harm prevention. But rejecting Lord Millett's argument from repugnance does not require us to adopt such a thoroughgoing liberal position. Perhaps the law should allow great scope for the expression of collective feelings of repugnance. It should not, however, allow these expressions to be bound up with legal fictions, the suppression of otherwise salient facts.

Consider a classic example of the legal expression of repugnance or distaste: the criminalization of bestiality. Whatever the demerits of this law from a purely harm-based liberal perspective, it has a virtue of honesty that Lord Millett's view regarding the benefits of children lacks. In criminalizing bestiality we do not hide from any facts or pretend that certain common sense truths are false. Proponents of criminalization may reject the relevance of certain facts that others regard as important, such as the pleasure that some persons derive from sexual encounters with animals or an alleged lack of evidence that animals suffer recognizable harm in these encounters. But this requires no fiction or pretence. Here, proponents of criminalization are happy to assert that these factual claims, even if they are true, fail to provide moral reasons that override the majority's sense of repugnance or distaste. The sense of disgust is maintained in open and honest confrontation with the sentiments and facts that support a more liberal policy.

The claim that healthy children are always a benefit to their parents is different. Supposedly, it is repugnant to deny this generalization, but we know that the generalization is either false or at best misleading. Here, the sense of repugnance is coupled with a need to suppress or deny the troubling fact that the prized generalization really does admit of exceptions. It lacks the openness and honesty of the previous example, and this is a sound reason for refusing to give it effect through the law.

Of course, we do make legitimate use of legal fictions where children are concerned, but consider the justification for two key examples: the age of majority for voting and the age requirement for alcohol consumption. Such laws work on the generalization that those persons below the stipulated age lack the judgment required for full democratic participation or the responsible consumption of alcohol. We know that these generalizations admit of counter-examples; some persons below the voting age are more than ready for voting, and some persons below the drinking age can be trusted to make responsible decisions regarding alcohol. And, sadly, some persons at or above the relevant ages are ready for neither democratic participation nor alcohol. In both cases, however, the false generalization serves to provide material benefits or protection to some if not all persons. In the former case, a voting age aids in the general administration of the right to vote. In the latter case, the age for drinking aims to prevent significant numbers of persons from harming themselves, or others, through the irresponsible consumption of alcohol.

We allow for false generalizations in the law in order to protect and facilitate the exercise of important rights and to protect vulnerable persons, often children, from harm. These are the goals that legitimate such false generalizations. But in disavowing arguments from external policy (public or social policy), judges

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such as Lord Millett must be taken as eschewing appeals to incentive-based arguments or concerns about the ways in which damage awards may harm the interests of children.

Repugnance regarding the way in which tort might assess the benefits or burdens provided by unplanned children is not the same thing as concern for the actual welfare of children. In fact, the repugnance approach, in disengaging itself from concerns about external policy, suppresses the question of whether children may tend to benefit from a rule that favours Total Recovery. On the assumption that plaintiffs' decisions to pursue sterilization are carefully considered, it is far from obvious that damage awards which defray the anticipated stresses and costs of parenthood ill-serve their unplanned children. The blunt assertion that children are valuable and that parents must regard them as such does nothing to change the circumstances that inclined victims to decide against parenthood (or further parenthood). These circumstances, which may involve serious personal and financial difficulties, likely remain once a case is completed—the claim to child-rearing costs is rejected because we are outraged at the thought of parents who undervalue children. We do not consider what happens to the families once they disappear from view, and this makes it easier to maintain the convenient and comforting fiction that healthy children are always an overall benefit to their parents. The legal fiction that healthy children are always an overall benefit to their parents should be rejected. It is misleading, and it is unlikely to serve the interests of children. There is, however, another way in which the idea of children as overall benefits might be established.

Children have a claim against their parents to a secure upbringing, and the satisfaction of this claim requires not just the dutiful performance of certain actions, but also the adoption of certain affective dispositions. Parents owe it to their children to treat them as beneficial and desired, and to really treat them this way parents need to adopt the appropriate attitudes. In the absence of actual children, there is no one with a claim to such attitudes, so regarding potential children as unwanted burdens is unproblematic. This view is plausible, but we should recognize its limitations. Parents may have a duty to try to see their situation this way, but it is not realistic to think that the adoption of this attitude is easy to achieve in all circumstances.[23]

More importantly, we should recognize that, if anyone has a claim to this attitude on the part of the parents, it is the unplanned child in question. It is not obvious why the tortfeasor should be entitled to appeal to emotional or personal duties of parent to child to limit his liability to the parents. He stands in a different normative relation to the parents, so why should he in any way benefit from the claims that the child can make against the parents? Moreover, the tortfeasor had a duty to the plaintiffs to help them avoid the obligations of parenthood, so it seems strange that he can now appeal to those duties to limit his own liability.

23. As Shannon Dea reminds me, parents may love their children unconditionally without regarding them as a benefit. Here I am oversimplifying the appropriate attitudes towards children in order to show that, even with the generous account of parental affection noted above, the case against Total Recovery still fails.

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3. The Benefits of Children and Corrective Justice

In my view, OBP is a dubious principle. It has no real connection to the concern with victim overcompensation. It is true that the tortfeasor does not owe the plaintiff more than remedy for the costs of the relevant rights violations. However, OBP calls on us to suppress otherwise relevant costs in order to preserve the symbolic dignity or emotional well-being of third parties—children (the fact that some proponents of OBP have no similar concerns about the dignity or emotional well-being of disabled children is one of the more disturbing features of the debate).[24] The tortfeasor has no claim, from within corrective justice, that OBP be invoked to limit his liability. Likewise, judgments concerning the "offensive" character of the relevant balancing exercise do not come from within corrective justice. If the exercise is "offensive" at all, it is because it somehow threatens the symbolic value or emotional well-being of children.

Nonetheless, one may still claim that corrective justice requires us to weigh the burdens of unplanned children against their corresponding benefits, a task that may prove impossible owing to problems of incommensurability. There are at least three distinct problems here.

First, we are faced with the prospect of comparing pecuniary and non-pecuniary considerations. The most obvious burdens are physical and financial, while, early on at least, the most obvious benefits are emotional. Second, children may, in the long term, provide financial benefits to their parents by entering successful careers in adulthood. Third, at least some parental expenditures are best understood as a means of enhancing the enjoyment of being a parent.[25] If we are required to weigh all of these considerations, an objective calculation of plaintiffs' overall losses may well prove impossible. I hope the arguments below go some distance in addressing the first two concerns. The third issue will have to be taken up in another paper.

3.1 The Separate Interests Rule

In *Cattanach*, McHugh and Gummow JJ appeal to the example of the coal miner who is injured and unable to work because of his tortfeasor's negligence. Should the coal miner's damages for lost income be reduced because, although seriously injured, he can now enjoy his days sitting in the sun? According to McHugh and Gummow JJ, such a reduction would violate the separate interests rule—a tortfeasor who negligently damages one of a victim's interests cannot reduce his liability for that interest by arguing that his negligence has benefitted some of the victim's other interests. For McHugh and Gummow JJ, the same rule covers wrongful pregnancy cases. The victims in *Cattanach* made no claim for emotional losses, just a modest claim for child-rearing costs. According to McHugh and Gummow JJ, the plaintiffs' claim to compensation for financial expenditures

24. Nicolette Priaulx, *The Harm Paradox: Tort Law and the Unwanted Child in an Era of Choice* (New York: Routledge-Cavendish, 2007) at 57-58.
25. *Bevilacqua*, *supra* note 14 at paras 132-136.

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is immune to claims about the emotional benefits of children just as the miner's claim to compensation for lost income is immune to claims about the benefits of life above ground on sunny days.[26]

3.2 Challenges to the Separate Interests Rule

In *McFarlane*, Lord Clyde recognizes both the coal miner example and the general authority of the separate interests rule. But, with no explanation of why wrongful pregnancy should be an exception to the general rule, Lord Clyde concludes that child-rearing costs would exceed reasonable restitution.[27] Indeed, most opponents of Total Recovery make little effort to engage with the miner example and separate interests rule argument. The decision in the British Columbia case, *Bevilacqua v. Altenkirk*, provides a noteworthy exception.

In *Bevilacqua*, Groberman J rejects the separate interests rule, providing a different account of the coal miner example.

> These examples [the mineworker examples] are not particularly persuasive. When an injury forces a person to give up his or her livelihood, it rarely improves the plaintiff's quality of life: the injured coal miner may be able to sit in the sun and read his newspaper, but he does so while bearing the pain of his injury, the burden of being physically disabled, and the psychological scars resulting from his inability to earn his own living.
>
> Whatever benefits an injured person derives from his or her injury can normally be accounted for with a slight adjustment of his or her non-pecuniary damages; there is, therefore, no need to decrease pecuniary damages to compensate for any postulated intangible benefit of being injured. A wrongful birth claim stands on quite a different footing.[28]

According to Groberman J, full pecuniary compensation could not provide the coal miner with a windfall. Indeed, for Groberman J, suggesting that the miner's pecuniary compensation might be reduced in light of his enhanced well-being grossly underestimates the physical and emotional costs of the miner's injuries. On Groberman J's view, there is no general rule against weighing different interests against each other. For him, a sufficiently strong benefit to non-pecuniary interests could justify a reduction of pecuniary damages. Groberman J simply thinks that the benefits of sitting in the sun could not provide such a benefit for an injured coal miner.

However, the idea that the miner could receive a welfare windfall under full pecuniary compensation is not as implausible as Groberman J believes. Historically, mining is one of the most difficult and demanding jobs available in common law jurisdictions. The kind of injury that would prevent a person from returning to the mines might not seriously compromise his ability to enjoy other

26. *Cattanach*, *supra* note 7 at para 90.
27. *McFarlane*, *supra* note 5 at 103-06.
28. *Bevilacqua*, *supra* note 14 at paras 110-111. Groberman J uses the term "wrongful birth" instead of "wrongful pregnancy" for the class of cases in question. He explains his choice of terminology in an endnote. See *Bevilacqua*, *supra* note 14 at n 1.

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aspects of life. Of course, the former miner might still find himself unable to obtain any alternative work in an area that relies on mining for most employment opportunities. Yet it seems quite dogmatic to insist that the "psychological scars" resulting from the inability to earn one's own living would always outweigh the resulting benefits. Anyone who is inclined to trivialize the benefits of spending their days in the sun has probably never come close to working in a mine.

The possibility of a windfall is reinforced by recent empirical studies of post-injury happiness. It appears that, even in cases of serious disabling injuries, victims typically report recovery of their previous level of happiness after a few years of recovery and adjustment.[29] Evidently, the human ability to adjust to new and difficult circumstances, including physical disability, is more impressive than many of us, Groberman J included, realize. Thus, it is quite plausible to think that, given the right circumstances, full pecuniary compensation for a disabling injury could increase a victim's overall welfare, making him better off than he was before his injuries. Granted the apparent human capacity for adjustment to injury, we simply need an example where the injury removes the victim from work that he finds unfulfilling, tedious, or otherwise objectionable.

If the coal miner example is still not convincing here, consider another example. A violin prodigy with "million dollar" hands is injured by a tortfeasor's negligence.[30] One of the prodigy's hands is badly mangled; he will never play the violin again. His million dollar career is over. He truly enjoyed playing the violin, but after a period of adjustment, he finds that he is much happier than before. He does not miss the pressure of performance, the travel, or the general culture of the classical music scene within which his performing career flourished. He pursued his career to honor his parents' expectations and because he felt obliged to develop his God-given talent. In many ways, he experiences the accident as a release from the weight of his obligations. He later runs a small music shop and writes music (his true passion). He is, according to contemporary taste, a mediocre composer. He works hard, but none of his remaining skills can earn him the living he made before.

Should the prodigy's compensation be reduced because his overall happiness has been increased? I would say "No." I do not claim that it would be virtuous for the prodigy to pursue compensation from his tortfeasor. However, justice and virtue are distinct considerations. To my mind, the tortfeasor has wronged the prodigy by depriving the latter of his capacities and related income. The benefits to the prodigy's overall well-being are irrelevant to the concerns of corrective justice.[31] Now if this example still fails to convince, then let us return to Weinrib's plane crash tale. It is hard to deny that Weinrib's Smith is better off for

29. For a survey of the relevant literature, see Essert, *supra* note 4.

30. The example is based on one used by Guido Calabresi. Calabresi uses the example of a famous violinist in his illustration of the thin skull rule. I am unsure whether anyone else has used a similar example to parallel the coal miner example. See Guido Calabresi, *Ideals, Beliefs, Attitudes, and the Law* (New York: Syracuse University Press, 1985) at 24-25.

31. By contrast, I see no lack of virtue in wrongful pregnancy victims' claims. As I argue in Section 2, children are not always a straightforward benefit. Likewise, unplanned children's material interests may be well-served by Total Recovery.

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the negligent destruction of her car. But for this, she would have died when her scheduled flight crashed. If we accept that Smith is entitled to compensation for the destruction of her car, we appear to be committed to a very strong version of the separate interests rule.[32]

However, while the separate interests rule may track correct conclusions in the coal miner, prodigy, and Smith v. Jones examples, it does not provide a sufficient explanation of these cases. Why should we keep victim interests separate from each other in the assessment of tort liability? Failing to answer this question poses at least two problems. First, absent such an explanation it is fair to ask whether our intuitions concerning coal miner, prodigy, and Smith v. Jones are correct (perhaps compensation should be reduced or eliminated in these cases). Second, even if our intuitions about these cases are sound, a critic of Total Recovery may ask whether these cases can be accounted for without the separate interests rule (or without a version of that rule which validates Total Recovery). Thus, a blunt appeal to the separate interests rule is too superficial to provide a philosophically adequate defence of Total Recovery.

Moreover, defending Total Recovery through the separate interests rule may concede too much ground to Total Recovery's critics. In their appeal to the separate interests rule, McHugh and Gummow JJ note that the Melchiors claimed only a modest pecuniary award for the financial costs of raising their daughter. Such a claim, according to the two justices, is immune to emotional benefits discounting because of the separate interests rule. However, they also maintain that

> [a] different case would be presented if the mother claimed damages for "loss of enjoyment of life" as the result of raising the child. If such a head of damage were allowable, it would be correct to set off against the claim all the benefits derived from having the child. But the head of damages that is relevant in the present case is the financial damage that the parents will suffer as the result of their legal responsibility to raise the child. The benefits to be enjoyed as a result of having the child are not related to that head of damage.[33]

For McHugh and Gummow JJ, while the emotional benefits of children cannot carry over into the assessment of victims' pecuniary claims for child-rearing expenditures, they can be weighed against claims concerning the non-pecuniary emotional costs to enjoyment of life. This concession runs counter to Kirby J's

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32. A critic of this assertion might seek to draw a firm distinction between damage to person and damage to property here. On this view, a tortfeasor would owe his victim compensation for damaged property even if the victim's overall well-being was improved as a result of the property damage. However, the critic might also argue that damage to the victim's person (say, broken legs or damaged lungs) cannot be neatly sorted out from her overall situation. If true, this claim would undermine the application of the separate interests rule in damage to person cases. The critic may also suggest a response to this line of argument. Both property and physical capacities are the means through which persons act and pursue goals; persons are owed compensation for wrongful damage to their means, regardless of whether their overall well-being is improved. My previous cases (the coal miner and the prodigy) illustrate how a loss of means might, along with appropriate compensation, improve a victim's overall well-being. Smith v. Jones, is simply another dramatic illustration of this possibility. As I argue in the following sections of the paper, focusing on victims' claims to their means explains both the plausibility and scope of the separate interests rule.

33. *Cattanach*, *supra* note 7 at para 90.

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view, in *Cattanach*, that the speculative emotional benefits of children should not be weighed against victims' "proven" emotional costs in wrongful pregnancy cases.[34] Likewise, it ignores the question of whether wrongful pregnancy victims should enjoy an additional non-pecuniary award for their loss of personal autonomy.

To provide a better account of the relevant examples and their relation to wrongful pregnancy cases, I first turn to Ripstein's particular account of tort law, which rejects the general category of hedonic damages. Ripstein's account validates both non-pecuniary damages for loss of personal autonomy and pecuniary damages for consequential economic loss. In the final section of the paper, I explain how we might accept the basic features of Ripstein's view and still afford room for hedonic damages. On this account of hedonic damages, Kirby J's intuition about hedonic damages in wrongful pregnancy cases is validated.

3.3 Rights to Means and the Case for Total Recovery

Should we abandon the category of hedonic damages? Ripstein argues that corrective justice protects persons as purposive agents by protecting the means at their disposal. In his view,

> [t]he law of torts protects persons and property because your bodily powers as a person, and the property you hold, exhaust the set of means that you have available to you with which to set and pursue your own purposes. The only way to secure your capacity to choose is by securing the means that are at your disposal, and those means are exhausted by your person and property.[35]

Private law rights secure one's means against the actions of others. Where a victim's means are lost or damaged by a tortfeasor's negligence, tort law requires compensation that restores the victim's means. A victim who loses a body part due to a tortfeasor's negligence is owed compensation for the loss of that body part (though in the absence of a market that trades in this body part, calculation of appropriate compensation requires judgement). So both the coal miner and the prodigy are owed a form of non-pecuniary compensation for their loss of means. Likewise, where a victim uses (or intends to use) the relevant means to generate additional resources such as income, the tortfeasor must compensate the victim with pecuniary damages under the doctrine of consequential economic loss.

However, Ripstein also maintains that non-pecuniary damages for pain and suffering (or loss of happiness) fall outside the scope of rights-based protections.[36] Your happiness may be affected by any number of things that I might do, including actions that do not interfere with your control over your means (person and property). Thus, you have no freestanding claim to the protection of your happiness. To be answerable to you (in a way that is coercively enforceable), I must wrongfully deprive you of some of your means. Absent such a relation,

34. *Ibid* at paras 174-175.
35. Ripstein, *supra* note 18 at 1967.
36. *Ibid* at 1984.

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there is no "you and me" for tort to recognize. If the ways in which we affect each other do not implicate each other's private rights, then these effects do not sound in corrective justice.

Once I have compensated you for wrongful deprivation of your means, which includes any consequential economic loss, corrective justice takes no further interest in our relationship. You may remain profoundly saddened or angry concerning our interaction, but tort law, understood as corrective justice, does not afford you a right to protection of your happiness. Again, suppose that my actions, though they do not interfere with your means, make you profoundly unhappy. Perhaps I cease to offer the free violin concerts that you have come to enjoy, or perhaps I write a particularly scathing review of an opera that you produced. The emotional impact of either action might be great, but neither violates your rights. Thus, corrective justice takes no interest here. Likewise, once your loss of means has been redressed, corrective justice takes no further interest in whether your pre-accident level of happiness has been restored. Corrective justice leaves off where rights issues are exhausted, and you have no right to protection of your happiness.

Of course, this view does not reflect the reality of tort practice, as pain and suffering damages are a routine element of tort compensation in common law jurisdictions. However, Ripstein's account of tort does sit well with the sense of discomfort surrounding hedonic damages. Many authors doubt whether hedonic damages are a legitimate form of compensation. Many readers will be familiar with the claim that the real purpose of hedonic damages is to provide an additional payment source for lawyers, thus preventing legal fees from cutting too deeply into the compensation that victims receive for their pecuniary losses.[37]

For the moment, let us set aside concerns about consistency with tort practice and work with Ripstein's view. The sword cuts both ways. You have no right to happiness that restricts my right to decide the use of my own means. My right to control my means is constrained only by reciprocal respect for your control of your means. Likewise, however, I cannot complain of unjust enrichment simply because my actions contribute to your happiness. If you derive deep satisfaction from my choices, there is no wrong done to me because your satisfaction does not interfere with my right to decide the use of my means. The right to decide the use of my means is not a right to control all the possible effects of my chosen uses.

When a victim's means are restored, corrective justice takes no further interest in whether she is as happy as she was before. She has a right to her means, nothing else. An unhappy victim restored to her means is no different from you in the case where you are rendered unhappy by my rightful choices. But a victim does have a right to her means, and Ripstein's account of corrective justice does not make her claim to redress contingent on concerns about a happiness windfall. A happy victim restored to her means is no different from you in the case where my rightful choices happen to cause you additional happiness. You owe me nothing.

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37. Calabresi, *supra* note 30 at 81; Ripstein, *supra* note 18 at 1984, n 58. Ripstein notes this claim about the "real" purpose of hedonic damages. Calabresi describes it as a well-known truth.

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Likewise, the happy victim's tortfeasor has no complaint about the positive hedonic effects of compensation.

Where rights are respected, the effects on people's happiness, good or bad, are irrelevant to Ripstein's version of corrective justice. Tort compensation is meant to return parties to a condition where their rights are respected, and, for this reason, the happiness effects of such compensation, good or bad, are also irrelevant. Here, the mine worker's claim to pecuniary compensation is sacrosanct, but not because of the separate interests rule. The separate interests rule accepts the place of hedonic concerns within tort law—it simply precludes hedonic benefits from influencing the assessment of pecuniary damages. On Ripstein's view, hedonic concerns have no place within tort law, so there is no need for a rule that constrains the scope of their application. The coal miner and the prodigy are entitled to compensation for their loss of means and related consequential economic loss—damages afforded them for pain and suffering may be justified by hidden pragmatic considerations that have no basis in corrective justice.

In wrongful pregnancy cases, Ripstein's approach also validates both pecuniary damages for financial child-rearing costs and a non-pecuniary award for loss of physical means. As a result of their tortfeasor's negligence, victims are placed under a state of obligation that constrains the use of their means, both bodily powers and financial resources. Wrongful pregnancy victims do not lose body parts to injury, but their discretion over their bodily powers is limited by the state of obligation caused by the tortfeasor's negligence. The victims may derive substantial happiness from the state of obligation—but this is irrelevant to Ripstein's rights-based corrective justice. Here, victims' rights to restoration of their means are not contingent on hedonic considerations.

I anticipate three lines of response to this use of Ripstein's model of corrective justice. First, children are themselves a kind of means or resource; therefore, a comparison with unjust enrichment must be considered. Second, the exclusion of hedonic considerations appears plausible only if we restrict ourselves to relatively trivial matters of happiness; the profound emotional benefits of children, on the other hand, must be given some weight in the assessment of fair damages. Third, the benefits of children have a special non-contingent connection to the costs of child-rearing, and this connection is absent in examples such as Weinrib's plane crash case.

I take up each of these lines of argument in turn. I argue that each one fails and that each fails to undermine the case for Total Recovery even if, unlike Ripstein, we accept the general category of hedonic damages. The significance of the latter point is taken up in section 3.4. I argue that if we do accept the general category of hedonic damages, Total Recovery should include hedonic damages.

3.3.1 Unjust enrichment

The theme of unjust enrichment comes up frequently in judicial rejections of Total Recovery. Lord Millet in particular invokes the idea that the plaintiffs in wrongful pregnancy cases, having accepted a form of goods, cannot expect

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others to pay the costs of maintaining those goods.[38] Children, however, are not resources or chattels that persons can count amongst their means. While parents do enjoy substantial discretion concerning their children's upbringing, this discretion is generally regarded as a privilege that serves the interests of the children themselves. The discretion is to be exercised in light of parents' duty to raise their children well (a responsibility that would be impeded or frustrated by constant state supervision). Moreover, even if there are respects in which children constitute resources or means at their parents' disposal, pecuniary compensation still does not constitute a form of unjust enrichment.

To see why, let us return again to Weinrib's Smith v. Jones. Here Smith loses her car to Jones's negligence, and this loss causes Smith to miss an important flight. Of course, had Smith made the flight, she would have died in a terrible plane crash. As a consequence of Jones's actions, Smith's most crucial means, her bodily powers, are preserved. Likewise, unless Smith is a deeply unhappy person who desires death, Jones's actions cause a profound benefit to (or savings for) Smith's happiness. Yet both Weinrib and Ripstein maintain that Smith's claim to replacement costs for her car is sound.[39]

The reason is that the fortunate consequence (preservation of body and presumed happiness) still falls outside the rights relationship between the parties. Of course, Jones saving Smith's life in the plane crash example is tied, in a way, to a violation of Smith's rights. But we must avoid confusion here. Jones does not save Smith from the plane crash by violating Smith's rights. Jones saves Smith from the plane crash through an action that also happens to violate Smith's rights.

What makes Jones crashing into Smith's car a wrongful violation of the latter's rights has nothing to do with any speculations about what might or might not save victims such as Smith from a plane crash. Such speculations have nothing to do with the judgment that the damaged car belongs to Smith, and they have nothing to do with the assessment of whether Jones's driving fails to meet an appropriate standard of care. Jones owes Smith compensation for the ruined car because Jones failed to show an appropriate level of care in guarding against damage to Smith's property, and the resulting damage is precisely what Jones was supposed to be guarding against. Other effects of Jones's actions, good or bad, are just things that happen. Because Jones causing Smith to miss the plane has nothing to do with the rights relationship that activates corrective justice, it is irrelevant to corrective justice. This may seem harsh, but note that the same considerations serve to limit a tortfeasor's potential liability. If my crashing into your car leads you to take a later flight, and it is this later flight that crashes, your family cannot pursue a wrongful death claim against me. Again, speculations about crashing flights play no role in determining the wrongfulness of my crashing into your car. For the purposes of corrective justice, it is no different if I cause you to board a doomed flight through crashing into your car than if I cause

38. *McFarlane*, *supra* note 5 at 114.
39. Weinrib, *supra* note 1; Arthur Ripstein, *Equality Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999) at 57.

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this through my boring conversation. Because the outcome does not feature in an explanation of why my conduct was wrongful, I am not responsible for the outcome. It is simply something that happened as a result of my actions.

Note that this is true even if the relevant effects concern losses to a person's means. Ripstein maintains that corrective justice is concerned only with the protection of persons' means, not their happiness. But I cannot be responsible for losses to your means just because my actions provide a "but for" condition of your losses. This, Ripstein explains, would impose a regime of strict liability—the notion of reasonable foreseeability determines whether I owe you a duty of care, and it also determines the scope of my liability for the losses that result from violations of my duty of care (should I be under one).[40] I am responsible for your losses only if I cause them in the right way—your losses must fall within the scope of my wrongdoing. Likewise, the mere fact that my actions happen to cause an enhancement or protection of your means has, by itself, no significance within corrective justice. Perhaps you should be grateful to me if my boring conversation saves you from a fatal plane crash, but I have no enforceable claim to reward—your boon is just something that happened as a result of my actions. In Weinrib's plane crash case, corrective justice calls on us to ask whether Smith's losses fall within the scope of Jones's wrongdoing—if so, then Smith receives compensation for the ruined car. The fact that Smith's life was saved is irrelevant, because it has no connection to the rights/duties relation that links the tortfeasor to the victim. It is merely something that happened as a result of Jones's actions.

Of course, it is sometimes possible to make a claim against a person who has benefited from your actions. Following this line of thought, Lord Millett concludes that Total Recovery must be rejected, because

> [the law] insists that he who takes the benefit must take the burden. In the mundane transactions of commercial life, the common law does not allow a man to keep goods delivered to him and refuse to pay for them on the ground that he did not order them.[41]

While unjust enrichment may call for restitution even where the parties have no contractual arrangement, it strains credulity to compare Lord Millet's example with wrongful pregnancy cases. Broadly speaking, unjust enrichment requires three elements: 1) the defendant must be enriched; 2) the defendant must be enriched at the plaintiff's expense; and 3) there must be no valid juristic reason for the enrichment. I have already argued that children do not constitute a straightforward expansion of parents' means or resources. But suppose that children are an enrichment in this sense, or even that the benefits relevant to unjust enrichment include purely hedonic considerations. It is still ridiculous to claim that, in wrongful pregnancy cases, children are provided to the plaintiffs at the negligent physician's expense. Unlike a contractor who accidentally enhances my property (rather than that of my neighbor, his actual customer), a negligent surgeon does not labour to provide his victims with children. Nor does the negligent physician

40. Arthur Ripstein, "Equality, Luck, and Responsibility" (1994) 23:1 Phil & Pub Aff 3 at 20-21.
41. *McFarlane*, *supra* note 5 at 114.

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deliver a good, something that he owns, for which he might demand payment. Instead, the physician simply fails to take due care in the task of preventing the plaintiffs' unplanned pregnancy. Children are produced because of the physician's actions, but not because he laboured (without compensation) to provide the plaintiffs with children.

No doubt, opponents of Total Recovery wish to say that the unjust enrichment occurs right at the point where a negligent physician is required to pay for the plaintiff parents' child-rearing costs. The physician is then forced to subsidize the plaintiffs' acquisition of new means, means that the plaintiffs would not have enjoyed but for his negligence. But the tortfeasor in Weinrib's plane crash case can make precisely the same case. If he is forced to provide the victim with the value of the ruined car, then he is forced to pay the cost of maintaining the victim's bodily powers (as it turns out, the car being destroyed was a "but for" condition of the victim's continued life), a maintenance or preservation that would not have occurred but for his negligence. The response to the tortfeasor in the plane crash case is simple. "This is not a case of unjust enrichment. The fact that the victim's life was saved is merely something that happened as a result of your actions, and it is not relevant to the victim's claim." The same response applies to the rhetoric of unjust enrichment offered by opponents of Total Recovery in wrongful pregnancy cases.

The preceding discussion sets to one side the question of whether parents in wrongful pregnancy cases are in a position to choose the relevant benefits. As Pollock CB notes in *Taylor v. Laird*, "One cleans another's shoes; what can the other do but put them on?"[42] Strangely, Lord Millett himself denies that wrongful pregnancy victims can choose whether to mitigate their losses through adoption or abortion. Yet he insists that their tortfeasor can hold them responsible for the decision to accept the benefits provided by healthy children.[43] My own view is that the decision to accept and raise unplanned children has no relevance to the tortfeasor/victim relationship in wrongful pregnancy cases. But this claim cannot be further developed or defended within this paper.

3.3.2 Profound benefits

One might follow up with a line of criticism similar to the one that Groberman J invokes against the separate interests rule. Exclusion of hedonic considerations appears plausible only if we restrict our discussion to cases where hedonic considerations are either trivial or evenly balanced. However, where it is clear that hedonic considerations are both profound and one-sided, fairness requires that we take them into account in the assessment of tort damages. However, to be relevant to wrongful pregnancy cases, this line of argument must rely on OBP, a principle refuted in section 2. Moreover, whatever one makes of the coal miner and prodigy cases, it is hard to see how the hedonic considerations in the plane

42. *Taylor v Laird*, (1856), 25 LJ Ex 329 at para 332. I thank the CJLJ reviewer for reminding me of this comment from *Taylor*.
43. *McFarlane*, *supra* note 5 at 113-14.

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crash example are anything other than profound and one-sided. Unless we take the ancient Greek restriction, "Call no man happy until he is dead" very seriously, the victim in the plane crash case is much happier for his tortfeasor's negligence. Yet the victim's claim to compensation for her car is untouched.

3.3.3 Closeness of connection

Here, opponents of Total Recovery may still insist the benefits in wrongful pregnancy cases have a special or non-contingent character that distinguishes them from the benefits in the coal miner, prodigy and plane crash cases. In other words, even if the rhetoric of unjust enrichment is inappropriate, the tortfeasor's negligence is still more than a mere "but for" condition of the benefits provided by children in wrongful pregnancy cases. Somehow, critics of Total Recovery might opine, the benefits of children do fall within the scope of the relationship between tortfeasor and victim.

This conviction is driven by two underlying beliefs. First, having a child typically provides parents with at least some benefits (emotional or resource-based). In other words, having a child has at least some foreseeable benefits. Second, causing a victim to have a child is a foreseeable effect of the tortfeasor's negligence in wrongful pregnancy cases. Therefore, the benefits of children fall within the scope of the tortfeasor/victim relationship in wrongful pregnancy cases.

Consider the first belief. No one thinks that life-saving is a routine consequence of negligently destroying someone's car. This could happen, of course. But *could happen* in the "anything can happen" sense is not sufficient for reasonable foreseeability. So the possibility of life-saving plays no role in our account of the tortfeasor/victim relationship in the plane crash case. By contrast, we think it quite routine that parents enjoy at least some benefits from caring for children, so one might conclude that the benefits of children are reasonably foreseeable.

Presumably, however, we would not allow a tortfeasor to invoke the benefits of children just because he happened to provide a "but for" condition of his victim's having children. Here I have in mind an example that runs parallel to the plane crash case, one in which the tortfeasor's negligence damages some of the victim's means, yet also provides a fluke "but for" condition of the plaintiff's having children.[44] Consider a somewhat fanciful case. Suppose that a negligently performed surgery results in long-term loss of mobility for a patient. As a fluke side-effect, the surgery also enables the previously sterile patient to have children. The patient sues the negligent surgeon for the damages related to her loss of mobility, and she

44. In one way, such parallel cases are utterly pervasive. As Derek Parfit points out, any change in the timing of our procreative decisions affects the identity of the children that are subsequently born. Thus, anyone who has had any effects on timing (not just partners) in A's sex life might stake a claim to having caused the birth of A's particular child. It would be far more difficult, if not impossible, to prove that, had B not intervened in A's life in a particular way, A would never have procreated at all. However, even if such complex causal chains could be traced, it seems obvious that A owes no enforceable debt to B, just because some of B's actions are a "but for" condition of A's becoming a parent. Perhaps A should be grateful to B, just as the victim should be grateful in plane crash cases, but that is all. See Derek Parfit, *Reasons and Persons* (New York: Oxford University Press, 1986) at ch 16.

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does not think that her damage award should be limited by the counter-balancing beneficial effects of her children. She is, perhaps, deficient with respect to the virtue of gratitude. But I think that her claim to damages for loss of mobility—unmodified by the benefits provided by her children—is sound.

Here, critics of Total Recovery might invoke the second belief. The benefits of children are not reasonably foreseeable in the fanciful case, because children are not reasonably foreseeable in the fanciful case. By contrast, one should not be terribly surprised if children result from a negligently performed sterilization procedure. However, I maintain that the empirical likelihood of children cannot be sufficient to bring the benefits within the scope of the tortfeasor/victim relationship.

Consider an intentional tort version of a wrongful pregnancy case. The surgeon botches the procedure on purpose, because he believes that the woman in question would benefit from another child (or, if she has none, she would benefit from having at least one). Few, I think, would accept that this tortfeasor could limit his liability by appealing to the benefits of unplanned children. However, the distinction between intentional torts and negligence cannot provide any satisfactory account of why negligence victims should receive more limited damages. The victim's means, what is hers to use, are not determined by questions about the tortfeasor's intentions. Intentional torts allow us to forgo questions of duty and standard of care, because the relevant tortfeasors choose to transgress their victim's boundaries. In negligence cases, we do not find such simple choices, so we must ask whether the tortfeasor showed sufficient care in attempting to avoid such transgressions. If the answer is no, then the victim is wrongfully deprived of her legitimate means, just as she is wrongfully deprived of her means by the meddling surgeon's intentional actions. The meddling physician's intentions are particularly offensive because they reveal a lack of respect for choices (concerning use of means) that belong to the victim. However, a similar lack of respect emerges in negligence cases, *ex post*, if we demand that victims forgo compensation for wrongful loss of the very same means.

Perversely, it follows that the only person in a position to invoke the benefits of unplanned healthy children is a physician who fails in his duty to help prevent such births. Here, the decision in *Marciniak v. Lundborg* (from Wisconsin, one of the few US jurisdictions with judicial approval of Total Recovery) is instructive:

> The parents made a decision not to have a child. It was precisely to avoid that "benefit" that the parents went to the physician in the first place. Any "benefits" that were conferred upon them as a result of having a new child in their lives were not asked for and were sought to be avoided. With respect to emotional benefits, potential parents in this situation are presumably well aware of the emotional benefits that might accrue to them as the result of a new child in their lives. When parents make the decision to forego this opportunity for emotional enrichment, it hardly seems equitable to not only force this benefit upon them but to tell them they must pay for it as well by offsetting it against their proven emotional damages. With respect to economic benefits, the same argument prevails.[45]

45. *Marciniak v Lundborg*, 153 Wis 2d 59 (Sup Ct 1990) at 73-74 [*Marciniak*]. Partially quoted by Kirby J, *Cattanach*, *supra* note 7 at para 174.

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The negligent physician in wrongful pregnancy cases is responsible for the plaintiffs' loss of means; this includes time, use of one's own body, and monies. The fact that certain advantages attend closely upon the relevant loss of means is irrelevant. No other tortfeasors could claim compensation or diminish liability by appealing to their causal role in bringing about the birth of a healthy child. Indeed, even if we retained the category of hedonic damages, no other tortfeasors would be permitted to invoke either the resource-related or emotional benefits of children. Failure in one's duty to help plaintiffs avoid an outcome cannot make the benefits that tend to accompany that outcome relevant to corrective justice.

3.4 Means, Separate Interests, and Hedonic Damages

The idea of the separate interests rule tracks appropriate outcomes in cases such as the mine worker, prodigy, and plane crash examples: victims' claims to pecuniary damages are not subject to reduction in light of hedonic benefits. And simple application of the separate interests rule appears to validate a form of Total Recovery that compensates wrongful pregnancy victims for the financial costs of child-rearing. However, we lack an explanation of why the interests in question should be kept separate.

Ripstein's basic account of tort law explains the sacrosanct character of pecuniary damages in the former examples, and his account also validates the same version of Total Recovery as the separate interests rule. Ripstein's account of tort law does this by challenging the basic category of hedonic damages. For this reason, some might argue that the conceptual cost of grounding Total Recovery in Ripstein's account of tort is too high. But the legitimacy of hedonic damages is a serious source of concern within tort theory, and reflection on wrongful pregnancy claims provides additional reasons for facing up to this concern. If the underlying purpose of hedonic damages is to provide a means for paying lawyers, then tort law does not have a genuine interest in hedonic evaluations. And if tort law does not have a genuine concern with hedonic evaluations, then much of the criticism of Total Recovery is grounded in a confused (or perhaps hypocritical) presentation of tort law's aims. Tort theory must confront this issue.

However, in Sections 3.3.1 through 3.3.3, I also argued that responses to my use of Ripstein's approach would fail even if we opened the door to hedonic damages. At first glance, this seems to bring us back to the separate interests rule—hedonic benefits cannot be weighed against losses to means in the calculation of damages. Instead, I think that we can modify Ripstein's account of tort in a way that provides for hedonic damages. This modification explains the *Marciniak* decision, which treats the "proven" emotional and financial costs of child-rearing as immune to benefits-based discounting.

I doubt that there can be an independent right to the protection of happiness. Rather, I think that claims for lost happiness would have to be tied to more basic claims concerning loss of means. There is an independent right to protection of means. You cannot be expected to guard against all possible damage to my means, but you must show appropriate care where your conduct might damage or destroy

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what is mine. Your use of your means must show appropriate respect for my right to control what is mine. Where damage to my means is caused by your lack of appropriate care, perhaps you should also be liable for my consequential loss of happiness. But if you must also show some level of direct care and concern for my happiness, then my preferences and desires have a basic role in setting the use of your means. To some degree, your means come under the authority of my preferences and desires, and this seems to undermine the distinction between mine and thine. For similar reasons, liability for pure economic loss is confined to very specific relationships.[46] There can be no general duty to guard against pure economic loss to other persons as this would unduly constrain each person's right to determine the use of his own means. I have no claim against you in corrective justice, if I lose my fortune because you out-compete me in the manufacture and sale of widgets. But if my economic loss is consequent on your negligent damage or destruction of my means, you must compensate me for my economic loss. Similarly, it seems plausible that you owe me compensation for the lost happiness that was predicated on means that you have negligently damaged or destroyed.

However, as Christopher Essert argues, hedonic damages cannot be concerned with the maintenance or restoration of victims' all-things-considered happiness. In his view, hedonic damages deal with the specific emotional costs engendered by negligently inflicted injuries, not victims' all-things-considered emotional well-being over time.

Consider Essert's hypothetical case:

> Imagine that Alice was blinded as a result of Julia's negligence. At trial, Alice was awarded damages to cover her medical costs and to make up for her lost income. In addition, she was awarded damages for the loss of enjoyment of life caused by the accident. Losing her sight has caused her significant emotional hardship, deprived her of her zest for life, and ruined her ability to pursue her hobby of visiting art museums to see the works of Édouard Manet. Some years later, however, Alice's emotional state has returned to pre-injury levels. She is as happy as she was before, and John Coltrane's music has replaced Manet's paintings as a source of pleasure. On the basis of this new development, Julia might object that she had to pay damages to Alice for a loss that Alice may not actually have suffered.[47]

As I note in Section 3.2, there is nothing fanciful about this description of Alice's recovery. The human capacity to adapt to new circumstances, including serious bodily injury, seems to be quite impressive. It is actually quite common for victims such as Alice to find alternative pursuits and goals that, within a surprisingly short time, restore their previous level of happiness.

Here, the separate interests rule does not preserve Alice's claim to hedonic damages. As McHugh and Gummow JJ understand the rule, it does not preclude weighing gains against losses within the broad category of hedonic damages. This is why the two justices would have taken the emotional benefits of children into account in *Cattanach* had the victims made a claim for hedonic damages.

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46. But perhaps there are specific relationships in which one takes on direct responsibility for another's happiness.

47. Essert, *supra* note 4 at 2.

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Essert sees Alice's claim to hedonic damages as a close parallel of Smith's claim to compensation for the loss of her car in the plane crash example.[48] The tort law relationship between victim and tortfeasor is defined by our reasons for holding the tortfeasor under a duty of care to the victim. In *Marciniak*, Essert maintains that one of the reasons we protect people's means (including their bodily powers) in tort law is that people can use those means to produce happiness. Thus the immediate cost to a victim's happiness falls within the scope of a tortfeasor's wrongdoing even if the victim is eventually able to recover lost happiness through other pursuits. As Essert notes,

> The new happiness that Alice gains does nothing to change the fact that Julia breached a duty of care owed to her and thus deprived her of the happiness she could gain from her sight (just as Smith's fortuitous missing of her flight does nothing to change the fact that Jones breached a duty of care owed to Smith and injured her as a result).[49]

The reasons for holding Jones under a duty to guard against damage to Smith's vehicle dictate that Smith has a right to recover against Jones even though, as it turns out, Jones has provided Smith with an overall advantage. Smith would almost certainly have met her doom if Jones had not destroyed Smith's car. Likewise, while Alice always had the capacity to enjoy Coltrane's music, it seems unlikely that she would have accessed this capacity (to the same degree), but for Julia's negligence. But these advantages are irrelevant to the parties' relationship in corrective justice.

If this argument resolves the puzzle of hedonic damages in cases such as Alice v. Julia, it also validates the *Marciniak* position on hedonic damages in wrongful pregnancy cases. Wrongful pregnancy victims are deprived of their means in that an unchosen state of obligation constrains their control over both their bodily powers and their financial resources. While hedonic damages may not apply to lost financial resources, the emotional disruption caused by the physical aspects of obligation falls within the scope of the tortfeasor's wrongdoing. Moreover, even if one insists that the subjective well-being of wrongful pregnancy victims is not merely recovered but also enhanced, the case for hedonic damages remains intact. As I argued in Sections 3.3.1 through 3.3.3, none of the benefits provided by children falls within the scope of the victim/tortfeasor relationship.

To further illustrate this point, consider a variation on Smith v. Jones. Suppose that Jones negligently injures Smith, blinding her. Smith's injury renders her incapable of taking a foreign aid assignment that would have exposed her to a deadly toxin that would have caused a slow and painful death. Presumably, Smith's claim for loss of her sight, including related hedonic damages, remains intact. The case for hedonic damages in wrongful pregnancy cases is, if anything, stronger, as wrongful pregnancy victims chose to avoid the relevant emotional benefits by seeking sterilization.

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48. *Ibid* at 20.
49. *Ibid* at 29-30.

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However, I am still somewhat wary of the general category of hedonic damages. Consider Essert's case for hedonic damages in relation to the victim's duty to mitigate losses. A victim's claim to consequential economic loss is calculated as if she has made reasonable efforts to secure alternative employment. An assessment of such alternative income is then deducted from the victim's previously expected income (the income she would have earned without the injury). Why should hedonic assessment be any different in this regard? If victims are expected to make an effort to replace the lost income that results from bodily injury, why should they not be expected to replace similarly caused lost happiness? The relevant psychological literature appears to indicate that most persons are quite capable of performing this kind of mitigation.

Perhaps hedonic damages are best understood as compensating for the mental effort that victims must exert in order to recover their happiness through alternative paths. I cannot pursue the broader question of hedonic damages further in this paper. Nonetheless, I am confident that, if hedonic damages are justified, wrongful pregnancy victims have a claim to hedonic damages parallel to that of victims such as Alice.

Conclusion

I have argued that the so-called Offset/Benefits Approach cannot be used to block or reduce wrongful pregnancy victims' claims to child-rearing damages. The conviction that children must always be treated as overall beneficial to their parents is based on a confused combination of moralistic judgment and legal fiction. More importantly, the benefits of children, whatever these may be, fall outside the scope of the tortfeasor's liability; these benefits are irrelevant to the assessment of damages. However, whether Total Recovery should include an award for hedonic damages raises important questions about the legitimacy of the general category of hedonic damages. These questions, along with the other criticisms of Total Recovery, must be taken up in other works.

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