NOTES

WHAT'S LAW GOT TO DO WITH IT?:
WHY WE SHOULD MEDIATE, RATHER THAN
LITIGATE, CASES OF WRONGFUL LIFE

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I. INTRODUCTION

The term “wrongful life” is culturally oxymoronic. With “life” religiously connoting a “gift from God,” politically connoting a “state interest,” and socially representing an unwitting assumption, it is not surprising that most Americans find abhorrent the idea that any human life is not worth living.

Despite the paradox, there are some forms of human life over whose value Americans are divided. What emerges from such debates is a rather nebulous spectrum of desirable life that each of us fine-tunes to suit our individual notions of what constitutes a “good life.”1 This spectrum considers both existing and potential life. We must all decide for ourselves whether we would want invasive medical intervention to keep our bodies alive if we become incapacitated; all of us, individually and collectively, must identify what types of life “should” be brought into the world, and at what cost.

One clear example of controversial potential life heatedly debated in American politics and society today is that of potential life conceived through rape. During the heightened political discord of the 2012 Presidential Election, at least fifteen Republican Senate candidates publicly opposed abortion for rape victims,2 with Richard Mourdock and Todd Akin leading the pack by asserting that

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Rape-caused pregnancies are part of God’s plan, concomitantly asserting that a woman’s body naturally rejects rape-conceived pregnancy. On the other side of the spectrum, many Americans balk at such political candidates, reacting to their statements viscerally, emotionally, and intellectually as they openly discuss the sharply sensitive topic of rape-induced pregnancy.

Rape-induced pregnancy embodies one end of the spectrum of desirable offspring, with discussions about it focusing on the violent nature of its origin and on what the potential baby would forever represent. Discussions rarely, if ever, delve into the actual physical and mental condition and development of the potential baby. Instead, because of the initially overpowering emotional and financial burden borne by the potential baby’s mother, most of our society condones the fetus’ abortion. The unparalleled agony of the baby’s conception leads to a nearly universal agreement that the fetus’ abortion should be legally permissible, with the aforementioned political candidates’ remarks starkly representing a narrowly defined minority view.

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Meanwhile, and perhaps needless to say, the other end of the spectrum is embodied by the loving and consensual conception of a healthy, wanted baby that will be nurtured by its parents as it grows into a capable adult. There is no controversy here: this is what both biology and intellect desire in procreation. Indeed, it is this peaceful vision of procreation that underscores the frightful nature of rape-induced pregnancy and renders it all the more undesired—an “easy” case for abortion, flippant as that may sound.

However, babies conceived through rape are not what the term “wrongful life” denotes. Rather, “wrongful life” cases often emerge from an initially ideal conception: two potential parents in love seek medical guidance to prepare them for a consensual pregnancy, ultimately giving birth to a baby they hoped would be healthy and thriving. Despite this idyllic trajectory, some parents are met not with the healthy and thriving baby for whom they had planned, but with a severely disabled and/or deformed one who will require extensive medical care for the rest of its life.8 In an attempt to recover mounting medical costs, a wrongful life suit alleging medical negligence in failing to diagnose a genetic disorder can be brought by the child against the physician or geneticist consulted by the parents prior to the birth.9

The ongoing wrongful life debate, both legal and social, centers on the direct assertion that the genetically disabled life in question is itself a tort—a wrong—that should never have been permitted to exist.10 The wrongful life claim is excruciatingly limited within the broader category of tort law: the child, in bringing a wrongful life suit, does not allege that the physician’s negligence caused the deformity, but that the negligence was in failing to ade-

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10 Id.
quately inform the parents of the genetic risk. The child does not allege that but for the inadequate advice, he would have led a healthy, unimpaired life—rather, he asserts that but for the negligence, he would never have been born to experience the pain and suffering attributable to the deformity. Thus, a wrongful life cause of action seeks to calculate damages dependent on the comparison of an unimpaired life to no life at all, “[a] comparison the law is not equipped to make.” Unlike the debate about conception through rape, in which American law and the majority of American society stand in favor of such lives’ prevention—thereby implying that rape-conceived lives are worse than no life at all—both the law and society recoil from the prospect of comparing genetically disabled lives to nonexistence.

In light of the legal and societal disfavor toward wrongful life suits, this Note examines the cultural, (bio)ethical, legal, and philosophical background of the wrongful life tort. While the disability rights movement and the pro-life strains of the abortion debate hope to silence proponents of wrongful life suits, the evolution of a legal right to die underscores the importance of autonomy and privacy for the individual. Philosophical exploration of prospective children—including the nonidentity problem, claim-rights and corresponding duties, and the subjunctive-threshold notion of harm—helps explain the confusion and moral conundrum that pervade the very notion of “wrongful life” and that render any clear-cut legal solution nearly impossible. This Note proposes mediation as a mode of dispute resolution preferable to litigation, or the lack thereof, for responding to genetically disabled children’s allegations of “wrongful life” against their parents’ physicians. By providing procedural justice, therapeutic jurisprudence, and a participatory approach to problem-solving, mediation can grant genetically disabled children a voice and, by extension, catharsis, regardless of monetary outcome.

11 Milani, supra note 8, at 193.
12 Id. at 193.
13 Id. at 222.
II. CONFLICTING BIOETHICS PRINCIPLES UNDERLIE THE CONTROVERSY OF WRONGFUL LIFE

Wrongful life cases raise issues of beneficence, non-maleficence, and autonomy—three of the four so-called Georgetown Principles of bioethics (with the fourth being distributive justice), also known as principlism. First described by the pivotal Belmont Report, the concept of basic principles’ importance in bioethics decision-making “refer[red] to those general judgments that serve as a basic justification for the many particular ethical prescriptions and evaluations of human actions” and focused primarily on beneficence and autonomy. Respect for persons entails the ethical treatment of people by respecting their decisions and protecting them from harm. While non-maleficence refers to a more negative duty not to do harm (akin to the Hippocratic Oath’s *primum non nocere*, “first do no harm”), beneficence incorporates a more positive duty to do good.

Principles are not simply applied but are shaped within context-specific interpretations, typically by developing policies: as noted philosopher and bioethicist Tom Beauchamp explains, “What is morally demanded, enforced, and condemned is less a matter of what we discover in already available basic principles and more a matter of what we decide by reference to and in development of those principles.” Such an interpretive approach to principlism allows for a balancing of principles when they come into conflict, and for the generation of contextually relevant norms. Beauchamp elaborates on his analytic model within healthcare ethics:

[It] involves a dialectical balancing of principles against other moral considerations in an attempt to achieve general coherence and a mutual support among the accepted norms. . . .


17 Id.


20 Id. at 956.

21 Id. at 959.

22 Id. at 959–60.

23 Id. at 960.
with paradigms of what is morally proper or morally improper, we then search for specifications of principles that are consistent with these paradigms and consistent with each other.\textsuperscript{24}

The controversy of wrongful life can perhaps be more easily understood as a conflict between the principles of beneficence and autonomy: between the widespread belief that any life is better than no life, and the genetically disabled child’s assertion that his life is, in and of itself, a tort. The disability rights movement advocates against cultural ambivalence and discrimination that hierarchizes disabled people below nondisabled ones.\textsuperscript{25} Conversely, right-to-die proponents assert that autonomous people have a constitutionally protected liberty interest in refusing unwanted medical treatment,\textsuperscript{26} and that when such a right is violated, the autonomous individuals have suffered a compensable injury in being allowed to continue living.\textsuperscript{27}

\section*{A. Disability Rights Activism}

The disability rights movement responds to a palpable cultural ambivalence toward disability primarily by fighting discrimination, both perceived and real. As discussed below, such activists occupy one side of the larger conversation surrounding autonomy and beneficence, opposing the right-do-die contingency. The debate generally centers on the interpretation of “beneficence”: what does it mean to do good for an individual? Disability rights activists seem to blur the line between the two bioethics principles by implying that respect for autonomy is the beneficence denied people with disabilities by means of their marginalization.\textsuperscript{28}

Disability rights activists condemn the wrongful life claim as unconstitutional due to its implication that a disabled person’s life is less valuable than a nondisabled person’s.\textsuperscript{29} Indeed, law professor Wendy Hensel contends:

\begin{itemize}
\item \textsuperscript{24} Id. at 961.
\item \textsuperscript{25} See generally John F. Muller, \textit{Disability, Ambivalence, and the Law}, 37 AM. J. L. AND MED. 469 (2011).
\item \textsuperscript{26} Cruzan v. Director, Mo. Dep’t of Health, 497 U.S. 261, 278 (1990).
\item \textsuperscript{27} Milani, \textit{supra} note 8, at 153.
\item \textsuperscript{28} Jerry Alan Winter, \textit{The Development of the Disability Rights Movement as a Social Problem Solver}, DISABILITY STUDIES QUARTERLY (Winter 2003), at 37.
\item \textsuperscript{29} Wendy F. Hensel, \textit{The Disabling Impact of Wrongful Birth and Wrongful Life Actions}, HARV. C.R.-C.L. L. REV. (2005), at 174–75.
\end{itemize}
Judicial recognition of such actions, particularly in the wrongful life context, is akin to a state-sanctioned acknowledgement that the community of one’s peers may legitimately evaluate whether an individual with impairments has a rightful place in the community and whether his functional limitations are sufficiently disruptive to warrant the preference of nonexistence.\textsuperscript{30}

While it is readily understandable that such judicial recognition sends an “anti-therapeutic message,”\textsuperscript{31} perhaps the assertion that an individual’s societal place can be determined by his peers is too sweeping a statement. Hensel herself acknowledges the wide variation in disability among the “disabled.” Indeed, there is quite a significant difference between a disability that does not prevent an individual from writing a letter to the ACLU opposing wrongful life actions,\textsuperscript{32} and that which leaves an individual in a vegetative state or in intolerable pain.\textsuperscript{33} Hensel goes on to lament lawsuits brought by children whose disabilities range from severe (such as Tay-Sachs disease) to ostensibly much more mild (such as congenital blindness).\textsuperscript{34} Hensel thus disconnects herself from her earlier claim that one’s peers can legitimately evaluate one’s societal place; it seems clear that to the extent wrongful life suits are allowed, the individual brings his own context-specific case, asking the court to recognize the physical, emotional, and financial costs of his disability.

Where Hensel’s assertion gains strength is in the context of society’s perceptions of people with disabilities. A social ambivalence has settled on the American culture and law.\textsuperscript{35} There are two general causes of this ambivalence: the disparity between the medical and social models of illness, and the social construction of disability.\textsuperscript{36} The medical model views disability as biological impairment synonymous with illness—and, therefore, undesirable.\textsuperscript{37} Conversely, the social model considers illness a social construction—and, therefore, malleable according to what differences American culture deems problematic.\textsuperscript{38} Thus, the social model of

\textsuperscript{30} Id. at 174.
\textsuperscript{31} Id. at 175.
\textsuperscript{33} Hensel, supra note 29, at 181.
\textsuperscript{34} Id. at 181–82.
\textsuperscript{35} Muller, supra note 25, at 470.
\textsuperscript{36} Id. at 470–71.
\textsuperscript{37} Id. at 470.
\textsuperscript{38} Id.
illness can be seen as directly informing the social construction of disability.

The changing nature of the social construction of disability has propagated a cultural ambivalence toward people with disabilities. “Disability attracts because it is a force that makes us human and disability repels because it is a force that threatens our humanity. . . . Often, one or both sentiments are denied, yielding an unequivocal vision of disability as valued, devalued, or neutral.”

Society’s ambivalence toward disability is apparent in both everyday life and the media. People with disabilities have recounted strangers’ uninvited attempts to discuss suicide motivated by such disabilities. Perhaps these strangers felt emboldened by the disabled individuals’ ostensible weakness; perhaps they could not resist expressing their own confusion as to how anyone could live with a disability. Arguably, Americans have not been taught how to speak to those with disabilities—hence the ostensible ambivalence when wrestling with whether to ascribe value to disability or refrain from doing so.

While society’s varying value-laden or -lacking view of disability might not be itself inherently detrimental—because, arguably, every aspect of humanity invites such analysis—difficulty certainly arises with respect to the law’s approach. Harvard Law Fellow John F. Muller argues that “the law should express the social ambivalence rather than strive for abstract conceptual clarity.”

The Americans with Disabilities Act of 1990 (“ADA”) sought to override ambivalence by communicating that “disability is a natural part of the human experience and in no way diminishes the rights of individuals to live independently, pursue meaningful careers, and enjoy full inclusion in the economic, political, cultural, and educational mainstream of American society.”

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39 Id. at 471.
40 Milani, supra note 8, at 198–202.
41 Id. at 198.
42 See, e.g., Woody Allen in Annie Hall (United Artists 1977); also quoted in Milani, supra note 8, at 200 (“I feel that life is divided up into the horrible and the miserable. Those are the two categories. . . . The horrible would be like, I don’t know, terminal cases, you know, and blind people, cripples. I don’t know how they get through life. It’s amazing to me. You know. The miserable is everyone else. So when you go through life, you should be thankful that you’re miserable.”).
44 Muller, supra note 25, at 470.
46 Id.
While Muller’s is perhaps a worthy ideal for which to strive, mediation can accommodate social ambivalence toward disability and allow for the individualized, context-specific approach that such ambivalence requires. Logistically, mediation emerges as a practical solution for avoiding the time-consuming, costly, and frustrating experience of litigation over employment discrimination involving the ADA. Furthermore, the ADA’s drafters could not have anticipated all of the litigable issues condoned by the Act: possible conflicts can be sparked by clashes between “fundamental values implicit in the act,” including not just equality of opportunity and efficiency, but also beneficence itself.

Because the ADA intrinsically limits the definition of what is litigable in the disability context—namely, discrimination against people with disabilities—it does not specifically consider the wrongful life claim. Instead, it defines its purpose in this way:

(1) [T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; . . . (4) to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address discrimination faced day-to-day by people with disabilities.

Indeed, the ADA includes a provision that recommends and encourages use of alternative means of dispute resolution: “Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.” Rather than serve as second-class justice, mediation can actually provide a form of justice superior to that sought in litigation.

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48 Winter, supra note 28, at 50.
50 Id. at § 12101(b).
51 Id. at § 12212.
52 Miller, supra note 47, at 12.
B. Personhood and Valuing Life in the Law

The abortion debate has called attention to the notion of legal personhood—when can or should an organism be considered a legal person and enjoy the protection of person-oriented laws? A related debate between proponents of selective abortion on the basis of prenatal disability, and advocates of selective non-treatment on the basis of neonatal disability, has highlighted the general question, when may prospective parents terminate a nascent life because of disability? The disability rights movement distinguishes between selective abortion and selective non-treatment by essentially asserting that, once born, any baby has “the right to live, no matter how deformed,” while generally and tacitly allowing for selective abortion.

Bioethicist Adrienne Asch, who is herself blind, analyzes prenatal testing as a process found inherently good by most people, acknowledging that “the inability to move without mechanical aid, to see, to hear, or to learn is not inherently neutral.” However, the concern remains that prenatal testing effectively promotes the societal conclusion that living with disability destroys the lives of both the disabled and their families. Thus, Asch asserts that the law should safeguard a thoughtful and informed decision-making process, rather than a hasty, biased one.

Ultimately, the disability and medical communities have jointly espoused a set of common “Principles of Treatment of Disabled Infants,” which stipulates that discrimination on the basis of disability “is morally and legally indefensible” from birth. The ensuing Child Abuse Amendments focus on post-natal infants, requiring that medically indicated treatment be subjected to three exceptions:

53 Muller, supra note 25, at 471.
54 Id. at 474 (quoting Mary Johnson, a prominent spokesperson for the disability rights movement).
55 Id. at 476.
57 Adrienne Asch, Reproductive Technology and Disability, in Reproductive Laws for the 1990s 69, 73 (Sherrill Cohen & Nadine Taub eds., 1989).
58 Muller, supra note 25, at 476.
59 Id.
60 Id. at 475.
(1) [If the infant is] chronically and irreversibly comatose; (2) the provision of such treatment would (i) merely prolong dying; (ii) not be effective in ameliorating or correcting all of the infant’s life-threatening conditions; or (iii) otherwise be futile in terms of the survival of the infant; or (3) [if] provisions of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.62

C. The Right to Die

Case law and statutory law first recognized the right to die in 1976. The pivotal case of In re Quinlan resulted in the Supreme Court of New Jersey’s permitting Karen Ann Quinlan’s parents to disconnect her life support:

[U]pon the concurrence of the guardian and family of Karen, should the responsible attending physicians conclude that there is no reasonable possibility of Karen’s ever emerging from her present comatose condition to a cognitive, sapient state and that the life-support apparatus now being administered to Karen should be discontinued, they shall consult with the hospital ‘Ethics Committee’ or like body of the institution in which Karen is then hospitalized. If that consultative body agrees that there is no reasonable possibility of Karen’s ever emerging from her present comatose condition to a cognitive, sapient state, the present life-support system may be withdrawn and said action shall be without any civil or criminal liability therefor on the part of any participant, whether guardian, physician, hospital or others.63

The court justified this holding by asserting that it was affirming the choice Karen herself likely would have made had she had the capacity to make an informed decision:

We have no hesitancy in deciding, in the instant diametrically opposite case, that no external compelling interest of the State could compel Karen to endure the unendurable, only to vegetate a few measurable months with no realistic possibility of returning to any semblance of cognitive or sapient life. We perceive no thread of logic distinguishing between such a choice on Karen’s part and a similar choice which, under the evidence in this case, could be made by a competent patient terminally ill,

riddled by cancer and suffering great pain; such a patient would not be resuscitated or put on a respirator in the example described by Dr. Korein, and a fortiori would not be kept against his will on a respirator.64

Because Karen was incapacitated and could not, therefore, articulate her decision clearly, the court supports the shift of Karen’s guardianship to her father, based on the United States Supreme Court’s recognition of the right of privacy surrounding medical decision-making.65 Focusing on Griswold v. Connecticut, the court recalls the penumbra of specific guarantees of the Bill of Rights “formed by emanations from those guarantees that help give them life and substance.”66 Encompassed by this privacy right, the court reasoned, is “a parent’s decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under certain conditions.”67

More recently, the recognition of the right to die has come to include a right to physician-assisted suicide.68 Moreover, the pervasive recognition of the right to die has engendered a suit allowing patients to sue based on their receiving unwanted life-sustaining treatment.69 This claim identifies the violation of the patient’s right to die as a compensable injury.70 In turn, this type of lawsuit spawned the wrongful living suit, in which patients allege that their “diminished quality of life after or while receiving treatment makes their lives not worth living, and, thus, that they would be better off dead.”71 Naturally, the wrongful living suit is directly analogous to the wrongful life suit, which alleges the same compensable harm as does the wrongful living suit, except that the latter identifies the time of injury as the point at which the subject’s life was first enabled—before birth itself.

64 Id. at 663.
65 Id. at 663–64.
66 Id. at 663 (quoting Griswold v. Connecticut, 381 U.S. 479, 514 (1965)).
67 Id. (citing Roe v. Wade, 410 U.S. 113, 153 (1973)).
68 Milani, supra note 8, at 151 (referring to Compassion in Dying v. Washington, 79 F.3d 790, 838 (9th Cir.) (en banc), cert. granted sub nom Washington v. Glucksberg, 65 U.S.L.W. 3218 (U.S. Oct. 1, 1996) (No. 96-110)).
69 Id. at 152–53.
70 Id. at 153.
71 Id.
The argument has been asserted that courts should reject a wrongful living tort because “life is not a compensable harm.”72 This claim rests on the disability rights movement’s concern that societal prejudice against disability would only be augmented should wrongful life suits be permitted.73 Ultimately, so this argument goes, courts should not participate in condoning and even furthering such prejudice, which has resulted in the labeling of disabled people’s desire to die as “natural” or “reasonable,” while labeling such a desire in nondisabled people as “suicidal.”

However, as the critical case of Bouvia v. Superior Court demonstrates, courts do not simply acquiesce to disabled claimants’ determination that their lives are not worth living, but rather require sufficient persuasion in order to allow such claimants to refuse medical care.74 At the time of trial, Elizabeth Bouvia was a twenty-eight-year-old quadriplegic in a state of constant physical pain and dependency.75 Prior to the case, Bouvia had repeatedly expressed a desire to die and had tried to starve herself to death, preempted only by her hospital’s forcibly inserting a nasogastric feeding tube to provide nutrition.76 Her case arose from her filing of a petition to have the feeding tube removed, an action that would allow her to die.77 The hospital argued that since Bouvia was not terminally ill, the state’s interest in preserving life outweighed the patient’s desire to withdraw life-sustaining treatment.78

Ultimately, the court, in supporting the value of a “collaborative relationship between the patient and the physician,” recognized the importance of informed consent, patient autonomy, and the patient’s right to accept or refuse treatment.79 The court, respecting Bouvia’s autonomy and right of medical decision-making, was persuaded by her compelling depiction of her life as one not worth living and granted her the official ability to decide whether to refuse life-sustaining medical intervention. Implicit in the court’s acceptance of Bouvia’s argument is its recognition of her

73 Id. at 203.
75 Id. at 1135–36.
76 Id. at 1136.
77 Id. at 1134.
78 Id. at 1142.
79 Id. at 1140.
equality as a person. Just as a nondisabled person can do with his body what he wants and needs, so, too, should a person with disabilities. The desire to refuse medical intervention must be universally allowed, regardless of physical ability.

Courts should be “attuned to the worth of an individual irrespective of physical or mental handicap.” While this quotation heralded the assertion that—in valuing the worth of people with and without disabilities alike—courts should reject the wrongful life cause of action, it can be turned on its head to connote that in valuing equally people with and without disabilities, courts should maintain, as the Bouvia court did, the utmost respect for patient autonomy and decision-making. In fact, in the case from which the quotation came, McKay v. Bergstedt, the court reasoned that:

As medical science continues to develop methods of prolonging life, it is not inconceivable that a person could be faced with any number of alternatives that would delay death and consign him or her to a living hell in which there is hopelessness, total dependence, a complete lack of dignity, and an ongoing cost that would impoverish loved ones. The State’s interests in preserving life and preventing what some may erroneously refer to as suicide does not extend so far.

III. The Wrongful Life Claim

As discussed above, the child alleging that the wrongful life tort was committed by his parents’ physician does not claim that the physician’s negligence caused the child’s deformity; instead, the claim is that the negligence in question was the inadequacy of information, as communicated by the physician to the child’s parents, about the risk of deformity. Implied in this claim, then, is the assertion that, but for the inadequacy of information about the risk, the parents would have chosen not to bring the child to term—and, therefore, the child would never have been born and would never have experienced the “pain and suffering attributable to the deformity.” This Note delves into the pain-and-suffering concern in Section IV. First, however, it must be asked what theories underlie the wrongful life claim that might impel the child’s physician—and

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80 Milani, supra note 8, at 154 (quoting McKay v. Bergstedt, 801 P.2d 617, 628 (Nev. 1990)).
81 McKay, 801 P.2d at 627.
82 Milani, supra note 8, at 193.
83 Id.
even parents—to consider the potential for pain and suffering before conception can occur. Do prospective children have rights such that parents and physicians owe them a duty of care?

A. Interests of Future Persons

The philosophical and ethical complexity of the notion of “prospective children” is difficult for courts, let alone potential parents, to fully comprehend.\textsuperscript{84} Even more distant from the cultural conception of the parent-child relationship is the idea of prospective children’s interests that give rise to claim-rights.\textsuperscript{85} To help us better grasp what prospective children and their claim-rights entail, the theory of the nonidentity problem has emerged.\textsuperscript{86} The nonidentity problem “refers to the fact that each person’s biological identity is contingent on the actions of that person’s natural parents, the circumstances of conception, and countless events prior to the conception.”\textsuperscript{87} Thus, both the mere existence and the quality of life—indeed, the very identity—of a future generation depend, at least in part, on how the present generation chooses to act.\textsuperscript{88}

The response by opponents to the nonidentity problem is that espousing such a theory would prevent us from

[D]emonstrating harm to the person created (and, therefore, any grounds for limiting the right to procreate) because preventing harm would mean preventing the creation of the person whose interests are at issue. That is, unless faced with creating a life which itself constitutes harm, prospective parents are not under a duty to prospective children.\textsuperscript{89}

The overriding question, therefore, is what duties—if any—prospective parents owe to their prospective children. The question could be conversely phrased: what claim-rights—if any—do prospective children have?\textsuperscript{90}

\textsuperscript{85} Id.
\textsuperscript{87} Id. at 3–4.
\textsuperscript{88} Id. at 4.
\textsuperscript{89} Dillard, supra note 84, at 404.
\textsuperscript{90} Usami, supra note 86, at 4–13.
Multiple theories of claim-rights and correlative duties have been advanced in response to the nonidentity problem. The will theory states that a “legal right is the power to enforce or not to enforce the correlative duty as well as the power to waive the duty.” Proponents of the will theory, including political philosopher Hillel Steiner, assert that prospective children cannot hold rights because to do so requires the capability of exercising such rights. Conversely, the interest theory “equates a right with an interest intentionally protected by law.” Thus, the interest theory implicitly responds to the glaring gap in the will theory’s reasoning: there are large classes of extant people—such as infants, senile people, and the comatose or otherwise incapacitated—who would be denied rights under the will theory because they, like prospective children, cannot exercise those rights.

The subjunctive-threshold interpretation of harm incorporates the interest theory, placing the onus on the prospective parents by formulaically establishing that “having acted in a certain way (or having refrained from acting in that way) at time T1, we thereby harm someone only if we cause this person’s life to fall below some specified threshold.” Thus, “a future person can be harmed by us when our choice of actions and policies causes her life to fall below some reasonable threshold of harm, even if this choice is the necessary condition of her coming into existence.” The implication is that the prospective person has the right to live above that reasonable threshold, and that if her existence would place her below that threshold, she should instead be prevented from coming into existence.

Critics of the subjunctive-threshold interpretation of harm find this implication paradoxical. Such critics proclaim that any rights-oriented theory has no place in intergenerational concern—that the discussion should not center on the claim-rights and correlative duties of the prospective generation and present generation.
respectively. In side-stepping a rights-oriented approach, such critics avoid the problem of supererogatory duties: because “the non-correlativity of a duty . . . does not logically imply its supererogatory character, trivialness, vagueness, or nonlegality,” categorizing interests into claim-rights deserving of correlative duties and interests that would engender only gratuitous action by the present generation is not necessarily a justifiable approach to intergenerational care. “Obligation to take account of the interests of future generations falls within the category of non-correlative duty, and the obligation is arguably justified with no reference to posterity’s rights.”

While avoiding a rights-oriented foundation for consideration of prospective children’s interests provides likely the cleanest argument, some rights-based reasoning beyond that of the rather intellectually challenging subjunctive-threshold interpretation of harm seems more universally comprehensible, if not universally appealing. Kant’s deontological approach reminds us that children should be treated only as ends in themselves and “not as non-consenting means of achieving some other end that the parent might have.” If we subscribe to this maxim, then every parent and prospective parent must question his or her own motives for procreating:

[T]his maxim might discount the claim that procreation is protected as an autonomous act of privacy and self-determination. If the prospective parents are using the child as an integral part of their life plan—as part of a self-determinative act—how is that not treating it as a means? Doesn’t treating the prospective child as an end in itself necessitate a serious consideration of its welfare?

As discussed below, Kantian inquiry has proven irreconcilable with the wrongful life suit; indeed, the subjunctive-threshold notion of harm, in its comparison among different types of life that prospective children may embody, appears to be the mode of analysis most reconcilable with this type of action. Even if these theories cannot be applied to litigation because courts continue to reject the wrongful life suit, mediation of wrongful life cases would still bene-

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100 Id. at 11.
101 Id. at 12.
102 Usami, supra note 86, at 12.
103 Dillard, supra note 84, at 405.
104 Id.
105 Id. at 408.
fit from such an analytical mode in order to avoid the stark juxtaposition of nonexistence and painful, unwanted existence. By adopting this analytical mode in mediation, disputing parties would likely find one another more sympathetic and, ultimately, more strongly aligned in determining how best to plan for the disabled child’s future.

B. Courts’ Position

Kantian analysis of family planning necessarily compares existence to non-existence and thereby proves antithetical to courts’ approach. Because the state necessarily values and protects life, courts simply cannot find that plaintiffs in wrongful life cases are harmed because to do so would be to admit that such plaintiffs’ lives are worse than no life at all.106 “The wrongful life action . . . involves ‘a calculation of damages dependent upon the relative benefits of an impaired life as opposed to no life at all.’”107 Because of this apparent impossibility of calculating damages and of courts’ “conceptual unwillingness to say that ‘life, even with severe injuries, constitutes an actionable injury,’” courts have been persistently unwilling to actually recognize the wrongful life action.108

The philosophical argument in support of courts’ position on the wrongful life claim asserts that such claims should be left unrecognized because “legal recognition that a disabled life is an injury would harm the interests of those most directly concerned, the handicapped.”109 However, while the notion that “courts should be attuned to the worth of an individual irrespective of physical or mental handicap”110 is intrinsically valid, it fails to take into account the individual’s notion of his or her own worth. Furthermore, while the law in almost every state recognizes advance directives of capacitated adults indicating when medical intervention should be withheld or withdrawn,111 the legality of children’s advance directives can be challenged if a parent is not present, and, consequentially, medical intervention can be forced upon such chil-

106 Id.
107 Milani, supra note 8, at 197 (quoting Cowe v. Forum Group, Inc., 575 N.E.2d 630, 634 (1991)).
108 Id. at 154 (quoting Cowe v. Forum Group, Inc., 575 N.E.2d at 634 (1991)).
109 Id. at 154 (quoting Smith v. Cote, 513 A.2d 341, 352–53 (N.H. 1986)).
110 Id. at 154 (quoting McKay v. Bergstedt, 801 P.2d 617, 628 (Nev. 1990)).
111 Id. at 159.
dren at all costs (financial, emotional, physical). Therefore, not only do severely disabled children encounter a near-universal rejection of the notion that their lives are not worth living and, legally, a compensable harm, but they also lack the autonomy to determine what types of medical intervention should be prohibited. Thus, the current legal atmosphere regarding severely disabled children harbors more concern for physicians’ liability than for the patients’ wishes. As discussed below, resorting to litigation in cases of wrongful life, in which plaintiffs’ central claims are that their lives constitute compensable injuries, results in such plaintiffs’ rejection and unsolved problems.

IV. HOW MEDIATION CAN SOLVE THE PROBLEM OF LITIGATION IN WRONGFUL LIFE

A. The Problem with Litigation

Most jurisdictions refuse to recognize the wrongful life cause of action; furthermore, “because of the incalculable nature of both elements of the harm-benefit equation, a reasonable, nonarbitrary award of general damages is viewed as not obtainable.” Thus, there are several key problems with looking to the courtroom as a suitable venue for resolving claims of wrongful life. Because of the philosophical difficulties and cultural discomfort inherent in valuing life, and in comparing a severely disabled life to no life at all, courts cannot calculate damages for the wrongful life plaintiff. States whose case law reveals a refusal to recognize the wrongful life cause of action are responding to several factors, including the complexity of the damages calculation, the philosophical burdens of weighing a disabled life against a nondisabled one, and the difficulty of contemplating whether life can ever be considered an injury. Moreover, there is the consideration of whether

113 Milani, supra note 8, at 183.
117 Id.
recognition of this cause of action would “(1) be inconsistent with more fundamental principles that sanctify life, (2) denigrate the rights and dignity of disabled persons, and (3) create unacceptably disparate results if placed into the hands of judges and juries [because of the nearly theological nature of the underlying premise].”118 Indeed, without either judicial or cultural recognition of cognizable injury, such suits are forced to fail.119

Jurisdictions that do recognize the wrongful life cause of action approach it as they would any other tort action.120 However, wrongful life plaintiffs are barred from recovering for pain and suffering—they may recover only the extraordinary expenses resulting from the impairment caused by the physician’s negligence.121 Extraordinary expenses include the costs of medical care, special education services, and specialized equipment.122 Thus, emotional suffering and loss of earning capacity must remain the child’s unmitigated burden; the justification for this notable absence of recovery potential for the wrongful life plaintiff is that “one cannot lose what one never had.”123

Because the purpose of damages is to restore the injured person to an approximation of his original state, the wrongful life plaintiff, by definition, remains unentitled to the damages intended to put him in a position without pain and suffering.124 What the wrongful life plaintiff has lost is not a life without pain and suffering, but the state of having no life at all.125 The theoretical calculation of damages is rendered even more obscure by the defendant’s right to have any damages offset by benefits incidentally conferred on the plaintiff by the defendant’s conduct.126 Because wrongful life plaintiffs were, by definition, allowed to come into existence by physicians’ conduct, they were permitted both a disabled life and their families’ love and support; however, familial love and support are as incalculable as the disabled life itself when compared to no life at all.127

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118 Id. at § 11.
119 Id. at § 10.
120 Id. at § 12.
121 Id. at § 24.
122 Palo, supra note 116, at § 23.
123 Id. at § 24.
124 Id.
125 Id.
126 Id.
127 Id.
Even when cases involving bioethics issues make their way into the courtroom, plaintiffs learn that litigation rarely provides a satisfactory process.128 The now-infamous case of Terri Schiavo,129 who fell into a persistent vegetative state (“PVS”) after being re-suscitated from cardiac arrest,130 exemplifies the need for a sustained and heightened consideration of process, rather than merely the outcome-oriented approach found in litigation.131 The familial bitterness within the Schiavo case, in which the patient’s husband was pitted against her parents, ensued because of their irreconcilable—indeed, diametrically opposed—perspectives on what was “right” for the patient.132 In fact, once the Schiavo case entered the mainstream media, it seemed as if everyone in America had a strong opinion on the euthanasia debate: there was a two-week period during which “it was possible to hear the Schiavo case debated all day and all night and still not get it straight whether there was, as people were actually shouting at each other on the cable talk shows, ‘anybody home.’”133

Perhaps most crucially, both sides of the debate centered on political convictions, while

What might have seemed a central argument in this case—the ethical argument, the argument about whether, when it comes to life and death, any of us can justifiably claim the ability or the right to judge the value of any other being’s life—remained largely unexpressed, mentioned, when at all, only to be dismissed.134 Rather than indulge in a nuanced exploration of ethical strains in such a complicated, arguably unsolvable situation, litigation of bioethics issues and the cultural conversation surrounding the litigation assume a binary nature that may actually thwart some of the goals of the legal system.135 The adversarial system attaches weighty value to “facts,” which can be viewed very differently, and counterposes people who might not otherwise neatly line up on


131 Cohen, supra note 43, at 254.


133 Didion, supra note 130, §2, ¶1.

134 Id. at §3, ¶2.

135 Cohen, supra note 43, at 260.
directly opposite “sides.”  This system thereby engenders or exacerbates antagonism among people or ideas and necessitates a third party—the judge—to decide which is “right.” But, how are judges more qualified than anyone else to make such decisions, especially those decisions concerning the benefits to and burdens on the patient?

It is clear that the death-and-dying and PVS contexts prove to be uniformly difficult ones in which to render such decisions. Societal indecision about the “right” time to die, a lack of a critical mass of well-established law to serve as precedent, the biases held by judges, and a general sense that no individual should be an “authority” on this sensitive and unclear part of life militate against easy solutions. Alternative dispute resolution (“ADR”), as opposed to litigation, is a mode of problem solving that promotes a process-oriented, flexible approach better suited to cases of ethical complexity.

B. Broaching the Use of ADR in Bioethics Cases

Potential challenges to the use of ADR, especially in the realm of bioethics, include inconsistency of process, patient capacity, and the need to control parties’ emotions. While the adjudicatory model offers a near-universal consistency of process, and the ADR model inherently avoids such predictability, parties can benefit from the ADR model’s context-specific tailoring of process so as to suit best the individuals and concerns of each unique case. Furthermore, ADR recognizes courts’ deficiencies, including their inability to provide consistent, predictable results in certain bioethics contexts, notably that of death and dying.

Indeed, despite a general societal reliance on courts’ objectivity, courts’ application of the clear and convincing evidence standard has been quite subjective. For example, in *Cruzan v. Director, Missouri Department of Health*, the probate court reversed itself when given only slightly more evidence, injecting a precariousness not universally understood as intrinsic to many...
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court decisions in the death-and-dying context. After a car accident that resulted in Nancy Cruzan’s ejection from her car into a water-filled ditch, Cruzan was resuscitated but ultimately diagnosed as being in a PVS. The case arose when her family petitioned the Court to allow Cruzan’s feeding tube and artificial hydration to be removed. The Court found in favor of the Missouri Department of Health: while upholding the legal standard that competent people can exercise the right to refuse medical treatment, the Court reasoned that because there was no “clear and convincing evidence” of what Cruzan would have wanted in such a situation, the state could continue enforcing medical treatment in the interest of preserving life:

If Nancy Cruzan’s life were defined by reference to her own interests, so that her life expired when her biological existence ceased serving any of her own interests, then her constitutionally protected interest in freedom from unwanted treatment would not come into conflict with her constitutionally protected interest in life. Conversely, if there were any evidence that Nancy Cruzan herself defined life to encompass every form of biological persistence by a human being, so that the continuation of treatment would serve Nancy’s own liberty, then once again there would be no conflict between life and liberty. The opposition of life and liberty in this case are thus not the result of Nancy Cruzan’s tragic accident, but are instead the artificial consequence of Missouri’s effort, and this Court’s willingness, to abstract Nancy Cruzan’s life from Nancy Cruzan’s person.

Following this decision, Cruzan’s family uncovered more evidence of what Cruzan would have wanted done for her in case of PVS and used this evidence to win a court order to have the life support removed. Cruzan died less than two weeks later.

In addition to this general instability of court decisions, there is an arguably incongruous use of litigation in such ethically uncertain situations, as demonstrated by Brennan’s dissent in Cruzan. Quoting Rasmussen v. Fleming, Brennan begins by powerfully re-

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143 Cohen, supra note 43, at 282.
144 Cruzan, 497 U.S. at 266.
145 Id. at 265.
146 Id. at 261, 265, 280, 353.
147 Id. at 351–52.
148 Id. at 351.
150 Id.
minding us of modern medical advancements that can create a liminal state between life and death:

Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity.151

The option of palliative care, suggested in this quotation, seeks a compromise between perpetual, medically sustained corporeal existence—what many states would deem “life”—and a painful deterioration into death. More to the point—and more widely applicable within bioethics cases—is the concept of moral aporia, discussed most prominently by bioethics professor Autumn Fiester. Focusing on bioethics issues, Fiester emphasizes the “genuine ethical ambivalence” that surfaces when there exist “more than one applicable moral principle,” frequent conflict among moral principles, and “more than one ethically justified option as a legitimate outcome of the conflict.”152 Aporia, Greek for “a state of perplexity,” is used in the bioethics context to connote the inability to reach an “immediate or automatic consensus among all of the parties involved about the morally appropriate course of action.”153 Contentious, morally uncertain cases involving death and dying—and, in the wrongful life claim, quality of life—are not those that can be easily interpreted and given a legal holding; rather, they require a “process that doesn’t ‘take sides,’ but instead tries to navigate a solution that all parties can share.”154 Fiester advocates bioethics mediation as the appropriate solution,155 explaining that processes that “‘take sides’ in such aporetic disputes are of questionable moral legitimacy because all of the stakeholders are appealing to valid moral principles.”156

Conflict among valid stances pervades the realm of bioethics. Such variance inherently includes the specific conflict between the principles of autonomy and beneficence that makes the wrongful life claim so controversial. Such a situation, in which a universally

151 Cruzan, 197 U.S. at 301 (quoting Rasmussen v. Fleming, 154 Ariz. 207, 211, 741 P.2d 674, 678 (1987)).
153 Id.
154 Id.
155 Id.
156 Id. at 356.
acceptable “solution” is impossible to reach, calls for mediation, which Fiester asserts

[P]rovides a better method of conflict resolution . . . than verdict-based processes, because it works towards consensus about outcome, even where consensus about principles or values is not possible. . . . Because it is not verdict-based, [mediation] does not claim moral authority when there is none—its ‘ethical’ reach does not exceed its grasp.157

V. CONCLUSION: MEDIATION’S ROLE IN WRONGFUL LIFE CASES

Life simply cannot be valued monetarily in the courtroom, and thus the primary goal of severely disabled children who enter into mediation with their physicians would most likely be empowerment.158 While a secondary goal might be settlement, the focus on empowerment would aim to provide such children with the “restoration . . . of a sense of their value and strength and their own capacity to make decisions and handle life’s problems.”159 The notion of “conflict transformation” should drive such cases, in which moral aporia renders the prospect of a clean “solution” unattainable.160 Attainment of catharsis, fueled by “recognition . . . [and] acknowledgment, understanding, or empathy for the situation and the views of the other” allows for a process that fosters procedural justice and therapeutic jurisprudence, rather than the antagonism and adversarial nature of litigation.161

The debate over right to life versus quality of life routinely reveals an undercurrent of distrust between people—“distrust that runs deeper than the particular medical treatment decisions at issue.”162 When the positions remain in contraposition in such a morally aporetic situation, “ambiguity and controversy remain trapped within each position.”163 Thus, both the inability of courts

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157 Id.
159 Id.
161 Id.
162 Minow, supra note 1, at 999.
163 Id. at 964.
to monetarily value life and allow wrongful life awards, and the
tendency of each position to “approach difficult problems with ab-
stract standards, and to couch actual conflicts in terms of conflict-
ing rights,”164 indicate the absolute necessity for mediation, which
should focus not on the parties’ positions, but on their interests.165
Litigation engenders winners and losers.166 Rather than espousing
the self-versus-other mentality underlying adversarial problem
solving, parties should be encouraged to embrace a sense of the
“interdependent self” in order to work together toward overlap-
ning goals.167
Mediation can reframe into a unifying experience the very dis-
trust that set the parties in opposition:

Hovering between tragedy, where choice and human will play a
role, and pathos, where human pain constitutes the story, every-
one who deals with the infant treatment decision shares the in-
sability to remove the infant’s disability along with the power to
affect the meaning of disability in this society. And everyone
shares the lack of knowledge of the infant’s interests and the
risk of distrusting others’ assessments of those interests.168

If a mediator can facilitate the parties’ new recognition of their
mutual distrust as, in fact, common experience, the parties can
emerge freer to engage in a process that will be universally benefi-
cial. This perceived fairness of the process employed is called ‘pro-
cedural justice,’ a phenomenon that profoundly affects parties’
opinions of the outcome’s distributive justice, otherwise termed the
outcome’s substantive fairness.169 In turn, parties who feel that the
process of dispute resolution was fair will be more likely to comply
with the process’ outcome.170 Because “disputants need to believe
that they are valued members of society and that the final outcome
of a dispute resolution process will be based on full information,”
mediation, rather than litigation, is the clear process of choice.171

The opportunity for catharsis in mediation—for parties to
voice their views and concerns, and to be heard by one another—

164 Id. at 966.
165 See generally ROGER FISHER AND WILLIAM URY, GETTING TO YES: NEGOTIATING
AGREEMENT WITHOUT GIVING IN (3rd ed. 2011).
166 Minow, supra note 1, at 1011.
167 Id. at 995–96.
168 Id. at 1012.
169 Nancy A. Welsh, Making Deals in Court-Connected Mediation: What’s Justice Got to Do
170 Id. at 818.
171 Id. at 817.
enhances parties’ perceptions of procedural justice. Moreover, a mediator’s observed work toward evenhandedness underscores parties’ perception that the process was conducted fairly and respectfully. Indeed, although one might expect the exercising of one’s rights in litigation to substantiate one’s views and self, this form of dispute resolution in fact tends to perpetuate parties’ feelings of displacement. While litigation requires the disputants to depend on figures of authority—lawyers and a judge—rather than cultivate dependence on the self and the interdependent relationship, mediation allows for an unbiased third party to facilitate dialogue among the disputants.

In allowing patients—as well as other players in the medical scenario, such as physicians, nurses, and patients’ family members—to express their fears, concerns, and proposals, mediation provides an opportunity for therapeutic jurisprudence in the wrongful life claim. Therapeutic jurisprudence is an “interdisciplinary perspective that can provide a grounding” for “decision-making proceedings [that] are considered more fair and satisfactory by individuals permitted to voice their own views and to share in the decision-making process.” In embodying a consensus-based decision-making model, mediation is superior to litigation in part “because it better enables parties to privately order their lives through direct negotiations; to reach resolutions that reflect their own goals, needs, and values; to preserve existing relationships; to save time and expense; to generate creative solutions; and to avoid the psychological trauma of a judicial confrontation.” In the clinical setting, in which life-and-death issues mingle with intense emotional responses, and in which vast changes—such as the shifting structure of health care funding and delivery, as well as an ever-increasing number of medical choices available—shake the very foundation for medical decision making, mediation has emerged as a mode of helping disputants achieve the catharsis promised by

\[172\] Id. at 820.
\[173\] Id. at 821.
\[174\] Cohen, supra note 43, at 295.
\[175\] Id.
\[176\] Id.
\[179\] Id. at 334.
therapeutic jurisprudence.180 The opportunity for a “participatory
decision-making style” has underscored the value of mediation in
the bioethical context.181 Indeed, “[i]n bioethics mediation, the
process is a key part of the product” and allows for a “multidiscipli-
nary discussion” incorporating a greater number of trained profes-
sionals who might be present at a mediation.182

The importance of procedural justice and therapeutic jurispru-
dence in mediation cannot be underestimated; because cases of
wrongful life cannot result in the eradication of the child’s disabil-
ity or life altogether, the potential for catharsis and inspiration dur-
ing mediation is a source of renewed vitality and hope in the child’s
and family members’ lives. The sociocultural and legal hostility to-
ward the wrongful life cause of action has effectively forced would-
be plaintiffs into an environment more conducive to a positive re-
framing of their painful lives. By engaging in mediation, seriously
disabled and deformed children, their families, and their physicians
can work toward a new conception of a relative “good life,” and
regardless of whether such children gain a financial settlement,
they can emerge strengthened and empowered by the mediation
process itself.

180 NANCY NEVELOFF DUBLER & CAROL B. LIEBMAN, BIOETHICS MEDIATION: A GUIDE TO
181 Hafemeister, supra note 178, at 359.
182 DUBLER & LIEBMAN, supra note 180, at 14.