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## The Affordable Care Act, Experience Rating, and the Problem of Non-Vaccination

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## THE AFFORDABLE CARE ACT, EXPERIENCE RATING, AND THE PROBLEM OF NON-VACCINATION

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Eric Esshaki\*

Polio, the whooping cough, and the mumps, among many other communicable diseases, were once prevalent in communities within the developed world and killed millions of people.<sup>1</sup> The advent of vaccinations contained or eradicated several of these diseases.<sup>2</sup> However, these diseases still exist in the environment<sup>3</sup> and are making a comeback in the United States.<sup>4</sup> Their persistence is directly attributable to the rising trend among parents refusing to vaccinate their children.<sup>5</sup> One proposed solution to this problem is to hold parents liable in tort when others are harmed by their failure to vaccinate. Another proposed solution argues that parents should pay a tax when they fail to vaccinate their children. Although these proposals might have some limited benefits, there is a third and more efficacious solution: Congress should amend the Affordable Care Act (ACA) to permit insurance companies to discriminately charge higher premiums to those who choose to not vaccinate. Part I lays out the problem of non-vaccination in more detail. Part II explains the shortcomings of tort liability and taxation as viable solutions to the problem. Part III describes the benefits of permitting insurance companies to charge higher premiums for non-vaccination and explains why Congress must amend the ACA before higher premiums can be charged.

### PART I. THE DECLINE OF HERD IMMUNITY AND THE RISING COSTS OF NON-VACCINATION

There is a rising trend among parents in the United States to forgo vaccinating their children against preventable communicable diseases.<sup>6</sup>

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1. Brian Krans, *Anti-Vaccination Movement Causes a Deadly Year in the U.S.*, HEALTHLINE (Dec. 3, 2013), <http://www.healthline.com/health-news/children-anti-vaccination-movement-leads-to-disease-outbreaks-120312>.

2. *See generally Disease Eradication*, HISTORY OF VACCINES.ORG (Jan. 13, 2015), <http://www.historyofvaccines.org/content/articles/disease-eradication> (discussing the eradication of small pox and the potential to eradicate other communicable diseases with widespread vaccination).

3. *See id.*

4. CENTER FOR DISEASE CONTROL, REPORTED CASES AND DEATHS FROM VACCINE PREVENTABLE DISEASES, UNITED STATES, 1950-2013 (2015), <http://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/E/reported-cases.pdf>.

5. *See Krans, supra* note 1.

6. Christine Parkins, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDISC. L.J. 437, 440 (2012).

This trend is dangerous and has the potential to create a public health emergency.<sup>7</sup> Parents who refuse to vaccinate their children do not just threaten their children's health and their community's health; they also contribute to substantial economic costs.<sup>8</sup> The United States spends ten billion dollars each year to treat vaccine-preventable diseases.<sup>9</sup> If the trend against vaccination continues to increase and more people are infected with vaccine-preventable diseases, increased healthcare expenditures will inevitably follow. Although the economic impact is substantial, the impact on human life is even more alarming. Current figures suggest that approximately 30,000 people lose their lives each year as a result of vaccine-preventable diseases.<sup>10</sup> Again, if the trend towards non-vaccination continues, the number of lives affected and potentially lost by these diseases will also likely increase.<sup>11</sup>

Although the current figures (i.e., ten billion dollars and 30,000 lives per year) reflecting the negative impact of forgoing childhood vaccinations are not necessarily alarming relative to overall healthcare costs and overall deaths, bare statistics fail to tell the whole story. The thrust of the problem lies not in the current figures, but in the real possibility of these figures increasing substantially, or even exponentially, if the non-vaccination trend continues. One might argue that an individual's choice to forgo vaccinating her children does not affect the general public because the general public can vaccinate. This solution would offer protection from those who choose not to be vaccinated.<sup>12</sup> This argument suggests that unvaccinated, infected individuals cannot infect a vaccinated individual. If that were the case, then the problem would be limited to individuals who choose to forgo vaccinating. This sort of analysis, however, ignores the complexity of the problem and fails to recognize that even when a small portion of the population chooses to forgo vaccinating, there is substantial cause for concern; vaccine-preventable diseases will proliferate in the community and affect those who do not medically qualify to receive the vaccines. To better appreciate the gravity of the problem, and the harm it poses to the general public, it is necessary to understand how vaccinating protects those who are ineligible to become vaccinated.

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7. *See id.*

8. *Id.* at 440.

9. *Id.* at 440–41.

10. *Id.* at 441.

11. The figures cited do not take into account the large number of people who will likely suffer debilitating effects from vaccine-preventable diseases such as polio. These diseases will also create economic costs if the current trend towards non-vaccination continues.

12. This assumption is incorrect because it takes for granted that vaccination is a matter of choice; sometimes, for medical reasons or age, vaccination is not possible. *See infra* note 16 (providing examples of individuals that are not able to become vaccinated due to medical conditions).

This understanding starts with the concept of “herd immunity.”<sup>13</sup> The scientific literature defines herd immunity as “the principle that if a significant portion of the community—for most diseases, more than 80 percent—is vaccinated, those who cannot be vaccinated will be protected from illness by the community members who are vaccinated because the vaccine has eliminated ‘chains of contagion.’”<sup>14</sup> That is, when “the proportion of nonsusceptible [sic] individuals increases to an extent that the infectious agent is significantly limited in its ability to spread among the remaining susceptible individuals, outbreaks are aborted, and pandemics abate.”<sup>15</sup> Herd immunity is important because there is a substantial portion of the population that cannot be vaccinated and depends entirely on herd immunity for protection.<sup>16</sup> When too many individuals fail to vaccinate and instead rely on herd immunity for their own protection against disease, it becomes difficult to manage outbreaks and epidemics. Hence, when herd immunity diminishes, some of the more vulnerable in our society (e.g., those who cannot safely be vaccinated) are needlessly subjected to preventable communicable diseases.<sup>17</sup>

The correlation between the number of vaccinated individuals and the effectiveness of herd immunity varies among diseases.<sup>18</sup> For example, to achieve herd immunity against polio, about eighty percent of the community needs to be vaccinated.<sup>19</sup> The number is closer to ninety percent to achieve the same for measles.<sup>20</sup> If the number of unvaccinated individuals were spread evenly across all geographical demographics, the trend towards non-vaccination would not necessarily pose an immediate concern; the real concern arises when herd immunity is diminished. For example, if five percent of the entire population is not vaccinated against measles, and the threshold to preserve herd immunity requires only ninety percent of the population to be vaccinated, then

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13. See generally Matan J. Cohen et al., *Vaccination, Herd Behavior, and Herd Immunity*, 33 *MED. DECIS. MAKING* 1026 (2013).

14. Parkins, *supra* note 6, at 440 (citing Donald S. Kenkel, *Prevention*, in 1B *Handbook of Health Economics* 1677, 1694 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000)).

15. Cohen, *supra* note 13, at 1032.

16. See *Who Should NOT Get Vaccinated with These Vaccines?*, CDC.GOV, (Nov. 5, 2015), <http://www.cdc.gov/vaccines/vpd-vac/should-not-vacc.htm> (indicating that some vaccines are not available to nursing mothers, people with pre-existing health conditions, and newborns, among others).

17. There are several normative arguments one might make regarding why a healthy individual ought to be vaccinated to protect others who cannot become vaccinated. Although interesting, such arguments are outside the scope of this Comment. I will not address those arguments here.

18. See, e.g., Alan R. Hinman et al., *Childhood Immunization: Laws That Work*, 30 *J.L. MED. & ETHICS* 122, 125 (2002) (discussing the percentage of the population required to be vaccinated against measles in order to achieve effective herd immunity).

19. *Id.*

20. *Id.*

perhaps the five percent of unvaccinated individuals would have no impact on the maintenance of herd immunity.

This calculus changes, however, when we see trends in certain locations where far more than ten percent of the population is unvaccinated, thus threatening herd immunity within that geographical location. So even though the total population of unvaccinated individuals remains at five percent, we see herd immunity diminish within those geographical areas trending against vaccinating. In the United States, many regions of the country already fall well below the thresholds necessary to maintain herd immunity.<sup>21</sup> These unvaccinated “pockets” across the country are caused by the religious and philosophical beliefs embedded in the particular communities where a substantial number of parents (more than the threshold requirement to maintain herd immunity within the community) choose to not vaccinate.<sup>22</sup> Whatever the cause, the high non-vaccination rates in these communities pose serious challenges and cause serious harm.<sup>23</sup>

## PART II. THE FAILURE OF TORT LIABILITY AND TAXATION

### A. *The Failure of Tort Liability as a Solution to Non-Vaccination*

Although non-vaccination has diminished herd immunity—posing a serious threat to many individuals in the United States—attempts to mitigate the harmful effects of non-vaccination through tort liability have been ill received and largely unsuccessful, as evidenced by the continued failure to vaccinate.<sup>24</sup> Parents provide several justifications for not vaccinating their children, but whatever the reason, one thing is clear: many parents do not want the government intruding upon the medical choices that they make for their children.<sup>25</sup>

The current legal scholarship addressing the problem of non-vaccination among children has focused on remedies that avoid any direct assault on individual autonomy.<sup>26</sup> That is, recently proposed

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21. *See id.*

22. *Id.* at 125.

23. *See id.* (highlighting the prevalence of recent outbreaks of vaccine-preventable illnesses such as polio, pertussis, and rubella).

24. *See, e.g.,* Kyra R. Wagoner, *Mandating the Gardasil Vaccine: A Constitutional Analysis*, 5 IND. HEALTH L. REV. 403, 405 (2008) (discussing the various challenges raised to mandatory vaccination programs implemented by school districts as a requirement for children to attend school).

25. *See id.* (indicating that one of the challenges raised against mandatory vaccination programs was a “governmental interference with individual autonomy”).

26. *See* Parkins, *supra* note 6, at 471 (suggesting a personal tax on individuals who fail to vaccinate their children); *see also* Douglas S. Diekema, *Choices Should Have Consequences: Failure to Vaccinate, Harm to Others, and Civil Liability*, 107 MICH. L. REV. FIRST IMPRESSIONS

solutions have shifted away from government-mandated and compulsory vaccinations. Two prominent proposals are currently being offered to rectify the problem while avoiding challenges based on the concept of individual autonomy: (1) taxing parents who refuse to vaccinate their children,<sup>27</sup> and (2) holding parents liable in tort when others are harmed because parents failed to vaccinate.<sup>28</sup> Both of these proposed solutions, however, fall short of successfully solving the problem and provoke controversy.

Proponents of expanding tort liability to cover parents who choose not to vaccinate their children argue that parents “act unfairly to others in the community by pursuing self-interest ahead of civic responsibility. Even if the community refuses to coerce or punish these free riders, they remain morally culpable in an important way.”<sup>29</sup> They further argue that parents’ failure to take reasonable steps constitutes a breach of duty.<sup>30</sup> So far, these claims follow the standard analytical framework of traditional negligence in tort liability and seem unproblematic.<sup>31</sup> There are, however, three primary shortcomings not addressed by this solution: (1) the causation element is difficult to prove in this context, which might make tort liability an unfeasible solution; (2) such a solution is limited in its effectual capabilities to prevent and reconcile harm; and (3) it incentivizes free-riding on herd immunity as a primary source of protection against communicable diseases. At no cost of their own, free-riders will gain the benefits of the costs and risks incurred by those who choose to be vaccinated.

Taking each of the above concerns in turn, I will first discuss the causation issue.<sup>32</sup> Any theory of negligence in tort law requires the victim to prove, *inter alia*, that his harm was both factually and legally caused by the negligent actions of another.<sup>33</sup> The primary difficulty plaintiffs will face in pursuing a theory of tort liability against parents when they fail to vaccinate their children is establishing factual causation or the “but-for cause.”<sup>34</sup> To do this, the plaintiff must prove that *but for* the defendant’s failure to vaccinate his child, he (the

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90, 93–94 (2009) (arguing that parents who refuse to vaccinate their children should be liable in tort for any harm caused to another individual as a result of this decision).

27. *E.g.*, Parkins, *supra* note 6, at 471.

28. *E.g.*, Diekema, *supra* note 26.

29. *Id.* at 92–93.

30. *Id.* at 93.

31. See David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1671–72 (2007) (listing the traditional five elements of negligence: duty, breach of duty, cause in fact, proximate cause, and harm).

32. I assume, *arguendo*, that the elements of duty and breach of duty are established as a matter of law, and I will discuss what I consider to be the more difficult question: proving causation.

33. RESTATEMENT (SECOND) OF TORTS § 430 (AM. LAW INST. 1965).

34. *Hale v. Ostrow*, 166 S.W.3d 713, 718 (Tenn. 2005) (stating that factual causation exists when “[t]he plaintiff’s injury would not have happened *but for* the defendant’s [act].” (emphasis added)).

plaintiff) would not have been harmed; this is no easy task given the nature of the communicable diseases and their spread among individuals.<sup>35</sup> “Although technological advances have made tracking the spread of disease more reliable than ever, it is still difficult to trace contagions through both place and time.”<sup>36</sup> A plaintiff might be able to demonstrate that he had exposure to person A, that person A had a communicable disease, and that he now has the same communicable disease, but this is insufficient to establish factual causation. Given the social nature of our communities and the multiple contacts that we have with others on a daily basis (many of whom we do not know), there seems to be no way to firmly establish that person A is the responsible party and the other contacts, often unknown to the plaintiff, were not the responsible parties. Moreover, the ability to track the party responsible for the transmission of the disease is further complicated in those communities with a substantial number of unvaccinated individuals.<sup>37</sup> In such a situation, it is entirely possible that more than one individual could be causally responsible. This raises the question as to how liability would be imposed when causation is potentially linked to more than one individual, but there is a lack of definitive proof.<sup>38</sup>

Supposing for a moment that proving causation is not at issue here, it is worth considering whether tort liability would provide a satisfactory remedy. The primary purpose of tort liability is to “provide compensation to injured persons.”<sup>39</sup> It functions remedially and *ex post*. Hence, one might wonder if tort liability is conducive to the goal of ensuring herd immunity in our communities, where herd immunity seeks to prevent (as opposed to remedy) communicable disease. This Comment argues that it does not. Although holding parents liable in tort might provide a deterrent against forgoing vaccinations, whatever ostensible deterrent there might be is sure to be an overstatement; where herd immunity exists, the likelihood of spreading communicable diseases is limited. And if there is a limited risk of spreading communicable diseases (or getting one in the first place), there is also a limited risk of being held liable in tort. Thus, tort liability is unlikely to prompt parents to vaccinate their children and will only create an effective incentive after herd immunity has already declined within the community. At this point, when herd immunity is diminished and no longer effective, so too will be the value of incentivizing vaccinations

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35. See generally *A Shot in the Dark: Why Parents Should Not be Held Civilly Liable for Injuries Caused by Unvaccinated Children*, NAT'L L. REV. (2014), <http://www.natlawreview.com/article/shot-dark-why-parents-should-not-be-held-civilly-liable-injuries-caused-unvaccinated>.

36. *Id.* (internal quotation marks omitted).

37. *Id.*

38. See *id.*

39. *E.g.*, 14 N.Y. PRAC., NEW YORK LAW OF TORTS § 8:2.

via tort liability, because the absence of herd immunity will be realized and the damage done.

Holding parents liable in tort when they fail to vaccinate their children creates an additional concern: free-riding.<sup>40</sup> If we assume that tort liability preserves herd immunity by creating the necessary incentives to encourage enough individuals to vaccinate, there will still be those who free-ride on the backs of those contributing to the maintenance of herd immunity.<sup>41</sup> These “free-riders” will essentially benefit from the costs and risks incurred by those who choose to vaccinate and will, themselves, contribute nothing. From a normative perspective, there is something intuitively unfair and irresponsible about this scenario. Tort liability inevitably creates this free-rider concern but remains entirely powerless to address it in a substantive way.

### *B. Why Taxation Fails to Address Non-Vaccination*

Legal scholars also suggest that a tax ought to be imposed on parents who do not vaccinate their children.<sup>42</sup> The idea is essentially borrowed from the ACA.<sup>43</sup> Like the ACA’s individual mandate to purchase health insurance, these proposals would impose a mandate to vaccinate or face an IRS penalty.<sup>44</sup> This solution, however, also has its shortcomings. The implementation of a vaccination mandate will almost certainly foster polarizing political controversy and prove to be politically impossible to implement.<sup>45</sup> In addition, such a mandate would likely invite constitutional questions related to the scope and extent of individual autonomy in child rearing.<sup>46</sup>

The ACA’s individual mandate provision was accompanied by no shortage of political controversy and acrimonious debate.<sup>47</sup> Those in opposition to the mandate contested the government’s legal authority to force them to participate in the health insurance market. Although there

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40. Parkins, *supra* note 6, at 441.

41. *See id.*

42. *See generally* Parkins, *supra* note 6.

43. *Id.* at 472–73.

44. *See id.* at 471–78.

45. *Cf. 51% Remain Opposed to Obamacare’s Individual Mandate*, RASMUSSEN REPORTS (July 7, 2014), [http://www.rasmussenreports.com/public\\_content/archive/health\\_care\\_update\\_archive/july\\_2014/51\\_remain\\_opposed\\_to\\_obamacare\\_s\\_individual\\_mandate](http://www.rasmussenreports.com/public_content/archive/health_care_update_archive/july_2014/51_remain_opposed_to_obamacare_s_individual_mandate) (discussing the extensive controversy surrounding the passage of the ACA and, in particular, the individual mandate to purchase insurance against the threat of the imposition of a tax). Although the individual mandate provision of the ACA ultimately became law, the issue here concerns a fundamental right valued greater than the ability to opt out of health insurance. *See infra* notes 48–50 and accompanying text.

46. *See generally* Workman v. Mingo Cnty. Bd. of Educ., 419 F. App’x 348 (4th Cir. 2011) (plaintiff argued that requiring her child to be vaccinated in order to be admitted to a school violated her constitutional rights).

47. *See* RASMUSSEN REPORTS, *supra* note 45.

is room to argue, the thrust of this argument focused primarily on individual economic rights.<sup>48</sup> Unlike the ACA's individual mandate to purchase insurance, a government mandate to vaccinate children has and will continue to foster concerns regarding the usurpation of fundamental rights—rights regarding a parent's ability to decide the best way to raise a child.<sup>49</sup> This sort of argument, though not necessarily constitutional in nature, could potentially halt the political process, thus making the possibility of implementing a vaccine mandate nearly impossible.

If there were political support for a vaccine mandate, it is not clear whether a vaccine mandate would be constitutional. After the implementation of the ACA's mandate, however, it is much more likely. The justification for the ACA's mandate lies in the ability of the government to compel economic decisions. But when a government mandate implicates a fundamental right such as rearing one's children,<sup>50</sup> it is a different proposition altogether. To coerce a desired behavior by threatening a tax is functionally identical to coercing the behavior via force. For example, no one would argue that taxing speech is constitutional under the Spending Clause. First, free speech is a core fundamental right.<sup>51</sup> Second, a tax on free speech would curtail or severely limit that right.<sup>52</sup> Similarly, taxing one's ability to rear his children in a manner consistent with his personal beliefs constitutes a violation of his core fundamental right.<sup>53</sup> To coerce a particular course of action through the threat of a tax appears to, at the very least, infringe on that right and raise constitutional questions.

### PART III. AMENDING THE AFFORDABLE CARE ACT

Tort liability and the imposition of a tax fall short of rectifying the problems that arise when parents refuse to vaccinate their children.<sup>54</sup> Where tort liability fails to address the problem adequately, imposing a tax invites political criticism and poses potential constitutional concerns. But where legal solutions or mandates fail to provide the right balance between creating the necessary incentives for healthy living and

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48. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012).

49. See e.g., *Workman*, 419 F. App'x at 355–56.

50. E.g., *P.O.P.S. v. Gardner*, 998 F.2d 764, 767 (9th Cir. 1993) (“[T]he rights to . . . have children, and maintain a relationship with one's children are fundamental rights protected by the Fourteenth Amendment's Due Process Clause. . . . Statutes that directly and substantially impair those rights require strict scrutiny.”).

51. E.g., *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936).

52. Cf. e.g., *id.* In *Grosjean*, the United States Supreme Court struck down a Louisiana statute, which imposed a tax on the circulation of newspapers. The Court stated, “[a] free press stands as one of the great interpreters between the government and the people. To allow it to be fettered [via taxation] is to fetter ourselves.” *Id.*

53. See *supra* note 50.

54. See *supra* Part II.

individual autonomy, the free market has the potential to offer an effective and satisfactory solution. This goal can be accomplished by allowing insurance providers to manipulate health insurance premiums in a manner that requires non-vaccinated individuals to pay higher premiums.

At present, the ACA substantially limits the discretion of insurance companies to discriminately charge higher premiums.<sup>55</sup> More specifically, the ACA only permits insurance companies to charge discriminatory premiums for the following reasons: tobacco use, age, family coverage, and geography.<sup>56</sup> Permitting discriminatory premiums based on these factors makes sense; that is, the presence of the factors is commensurate to the risk incurred by the insurance company. Glaringly missing from the list of exceptions provided by the ACA is an individual's vaccination status.<sup>57</sup> Hence, to permit the free market to adequately address the problems related to non-vaccination without treading on individual autonomy, the ACA should be amended to permit insurance companies to charge discriminatory rates based on an individual's vaccination status. Of course, an exception would be necessary where an individual is precluded from vaccination for medical reasons.

As previously noted, it makes sense to permit insurance companies to charge higher premiums where the risk they incur in insuring an individual is substantially higher. The difficulty is in determining which factors substantially increase that risk. It is obvious that the permissible factors enumerated in the ACA substantially increase the risk. What is not obvious is why other factors such as an individual's vaccination status are omitted. The United States is already spending ten billion dollars each year treating vaccine-preventable communicable diseases, and this number will rise if the trends against vaccination continue.<sup>58</sup> Admittedly, the costs of treating preventable communicable diseases are far less than the costs to treat, for example, tobacco-related diseases.<sup>59</sup> However, if the purpose of the ACA's tobacco exception is to obviate the increased risk associated with insuring tobacco users, there is no obvious reason why insurance companies should be prohibited from doing the same when it comes to insuring unvaccinated individuals.<sup>60</sup>

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55. See Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg(a)(1)(A)(i-iv) (2010).

56. *Id.*

57. *See id.*

58. *See supra* Part I.

59. *See Health Effects*, AM. LUNG ASS'N, <http://www.lung.org/stop-smoking/about-smoking/health-effects/smoking.html> (last visited Jan. 6, 2015) (indicating that 96 billion dollars were spent in 2004 treating health illness related to cigarette smoking).

60. Perhaps it is necessary to tailor the discriminatory premium charged with the risk level incurred, but there is seemingly no reason to ignore the risk entirely. The ACA currently permits flexibility in discriminatory premium charges by recognizing the varying levels of risk associated with each factor listed. For example, according to the ACA, tobacco users can be charged premiums

The factors enumerated in the ACA are factors that merely increase the risk associated with insuring the individual. These factors do not pose risks to third parties. Failing to vaccinate, however, creates a substantial risk of harm to third parties, thus increasing the level of risk associated with insuring not only the unvaccinated individuals, but also the vulnerable third parties. In other words, a person's age might very well contribute to the overall risk associated with providing that person with insurance. However, that risk is limited and unlikely to have an effect on the risk evaluation for insuring third parties. The same cannot be said of unvaccinated individuals. Unvaccinated individuals not only increase the risk incurred by the insurance company for their own insurance, but they also increase the risk level associated with insuring other customers who can no longer depend on herd immunity for protection and who are more frequently exposed to communicable diseases.<sup>61</sup>

When determining what factors ought to permit charging discriminatory premiums, we might look beyond the costs associated with treating individuals possessing a particular factor and also focus on whether the presence of those factors leads to an increase in third-party risk. Vaccination status would be one of a limited number of factors that would have this exception-qualifying effect and, therefore, vaccination status should be one of the exceptions in the ACA, ultimately permitting insurance companies to charge higher premiums.

Charging higher insurance premiums based on an individual's vaccination status would provide the same incentive that a tax would achieve.<sup>62</sup> Functionally, there is no difference. It would not, however, raise individual autonomy issues or constitutional issues, because the underlying reasoning would be based on economic considerations and would seek to match the risk level with the premium charge imposed. Where normative considerations are often the primary concern regarding the implementation of a tax, economic considerations (though functionally achieving the same results) supply the purpose for permitting higher premiums for unvaccinated individuals. Moreover, charging higher premiums avoids the intricate causal issues and free-rider concerns associated with the application of tort liability.<sup>63</sup>

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at a rate of 1.5 to 1 compared to non-tobacco users. And the elderly can be charged higher premium rates at a rate of 3 to 1 compared to other adults. 42 U.S.C. § 300gg(a)(1)(A)(ii-iii).

61. See generally Krans, *supra* note 1.

62. From the consumer's perspective, the incentive provided by implementing a tax is functionally no different from paying increased premiums. In both scenarios, consumers are charged more because they are not vaccinated, thus providing incentive for them to become vaccinated.

63. See *supra* Part II.

## CONCLUSION

The current trends against vaccinating children have contributed to the resurgence of vaccine-preventable communicable diseases in the United States. As this trend continues to increase, herd immunity will continue to decrease, and the costs associated with these diseases—both human and economic—will continue to grow. Although there are current proposals in the literature, such as the imposition of tort liability and implementation of a tax for failure to vaccinate, these proposals will likely fall short of solving the problem. Tort liability would only serve as an *ex post* remedy and would also contribute to the free-rider problem discussed above. Taxation raises serious political concerns and potential constitutional issues. Where these proposals fall short, amending Section 300gg(a)(1)(A) of the ACA to permit discriminatory premium charges for those who fail to vaccinate provides an effectual and politically viable solution while avoiding the concerns raised by using tort liability or taxation as the solution.