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VACCINATION, DISABLED CHILDREN, AND PARENTAL INCOME

KAREN SYMA CZAPANSKIY*

Vaccination benefits both individuals and communities.¹ Vaccinated people gain protection against a disease. The community benefits, because each vaccinated individual is one fewer person who is spreading the disease. When a parent agrees to vaccinate a child, therefore, two things happen: the child is protected from contracting the disease, and the child's community gains a measure of protection because the child does not spread the disease.² That community inevitably includes people who are too young or too fragile to be safely vaccinated and whose protection depends on a community of non-spreaders, a concept called "herd immunity."³ Vaccination has been so successful in eliminating communicable diseases that it has been described as "one of the greatest achievements" of public health in the 20th century.⁴

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1. *Vaccines Protect Your Community*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (February 2020), <https://www.vaccines.gov/basics/work/protection> (showing through community immunity or herd immunity, people protect themselves and the community by getting vaccinated); *Vaccine Basics*, U.S. DEPARTMENT OF HEALTH AND HUM. SERVS. (March 2020), <https://www.vaccines.gov/basics> (explaining vaccinations allow the body to fight disease more quickly and effectively).

2. See Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or A Window for the Future?*, 48 OHIO ST. L.J. 387, 393 (1987) ("[C]hildren's vaccines are unlike other products. Children are required by law in every state to be immunized in order to attend public school. The fact that state governments require children to undergo a risk in order to protect society as a whole, was seen by Congress as justification for development of a national fund to compensate children who are injured because of these risks.") (citing to H.R. REP. NO. 99-908, pt. 1, at 4-5, as reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 6344, 6344-46).

3. *Herd Immunity and COVID-19 (coronavirus): What You Need to Know*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/herd-immunity-and-coronavirus/art-20486808> (last visited June 8, 2020).

4. Bruesewitz et al. v. Wyeth LLC, fka Wyeth, Inc., et al., 562 U.S. 22, 226 (2011) (quoting *Achievements in Public Health 1900-1999: Impact of Vaccines Universally Recommended for Children*, 48 MORBIDITY MORTALITY WLY. REP. 243, 247 (Apr. 2, 1999)).

Although the parent's decision to vaccinate a child is not always fully voluntary,⁵ the decision nonetheless deserves to be recognized and even celebrated by the community. Recognition of a parent's decision to vaccinate their child should include compensation in the exceptionally rare cases when a child suffers harm to the extent that the parent cannot continue to earn a living while caring for the child. As I explain in this article, parents are not awarded compensation for their work or for their lost income, due to an unjustifiable interpretation of the National Childhood Vaccine Injury Act of 1986 (hereinafter "the Act").⁶

Resistance to and hesitancy about vaccinations present a risk to the public.⁷ Among the most hesitant are parents deciding whether to vaccinate their children.⁸ An unvaccinated child is at risk of suffering from the disease. Not vaccinating a child also threatens the health of vulnerable people in the community.⁹ This threat to the community, which was recognized by the Supreme Court as justification for a vaccination mandate against smallpox over a century ago,¹⁰ is of no less importance today in light of both the COVID-19

5. See *State Vaccination Requirements*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html> (last visited Sept. 4, 2020). Even with the requirement, many children are not vaccinated or are not vaccinated on time, and the result can be that more children experience preventable illnesses. See Joshua Natbony & Marquita Genies, *Vaccine Hesitancy and Refusal*, 40 PEDIATRICS REV. 22, 22 (2019) (discussing how reductions in MMR vaccination rates resulted in "confirmed outbreaks in multiple states and more than 200 cases of measles across the United States" and similar experiences with the vaccine-preventable diseases of mumps and flu); *Ten Threats to Global Health in 2019*, WORLD HEALTH ORG., <https://www.who.int/news-room/feature-stories/ten-threats-to-global-health-in-2019> (last visited June 16, 2020) ("Vaccination is one of the most cost-effective ways of avoiding disease – it currently prevents 2-3 million deaths a year, and a further 1.5 million could be avoided if global coverage of vaccinations improved."); Pam Belluck & Reed Abelson, *Vaccine Injury Claims are Few and Far Between*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/health/vaccine-injury-claims.html> ("The Centers for Disease Control and Prevention has estimated that vaccines prevented more than 21 million hospitalizations and 732,000 deaths among children over a 20-year period.").

6. National Vaccine Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to 34.

7. Natbony & Genies, *supra* note 5, at 23.

8. See Lois A. Weithorn & Dorit Rubinstein Reiss, *Legal Approaches to Promoting Parental Compliance with Childhood Immunization Recommendations*, 14 HUM. VACCINES & IMMUNOTHERAPEUTICS 1610 (2018); NAT'L CTR. FOR IMMUNIZATION & RESPIRATORY DISEASES, CTRS. FOR DISEASE CONTROL & PREVENTION, EPIDEMIOLOGY AND PREVENTION OF VACCINE-PREVENTABLE DISEASES 48 (Jennifer Hamborsky et al., eds., 13th ed. 2015) (describing the need for public confidence in vaccinations, incidents of parental resistance and hesitancy about childhood vaccination, and systems for maintaining and monitoring vaccination safety); see generally Efthimios Parasidis, *Recalibrating Vaccination Laws*, 97 B.U. L. REV. 2153, 2162–64 (2017) (summarizing sources of hesitancy in parents).

9. Weithorn & Reiss, *supra* note 8, at 1610 ("[I]ncreasing numbers of parents have sought exemptions from vaccination requirements, which has, in turn, contributed to unprecedented increases in exemption rates, lower vaccination rates, and a higher risk of contracting vaccine preventable diseases").

10. *Id.* at 1610; see *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905) (holding that a Massachusetts statute mandating vaccination for smallpox was constitutional since the regulation was for the protection of public health and safety).

pandemic and repeated outbreaks of preventable and sometimes deadly infectious diseases such as measles, mumps, and pertussis.

A parent's opposition, hesitation, or resistance to vaccinating a child may put the parent at risk. A parent may be subject to social shaming¹¹ or child neglect proceedings.¹² In rare cases, criminal prosecution may be threatened.¹³ More commonly, parents may be barred from enrolling their children in school.¹⁴

Vaccination-compliant parents face a different risk. In a vanishingly small number of cases, a child may suffer long-term illness or death after receiving a vaccination.¹⁵ Caring for an ill or disabled child can have profound emotional and physical consequences for affected parents.¹⁶ Caregiving responsibilities may also impose a financial loss if engaging in a parent's job or profession is incompatible with meeting the child's unusual needs.¹⁷

In this article, I argue that, as a community, we should mitigate the financial consequences that vaccination-compliant parents may experience, because these parents do the community a service by getting their child vaccinated.¹⁸ What stands in the way of doing that is a peculiar and unsupportable interpretation of the Act. While the Act is intended to compensate for harms suffered after vaccination, the compensation provisions have been interpreted to exclude losses experienced by parents whose market participation is affected by the vaccinated child's need for care.¹⁹ Two examples illustrate the problem.

11. See Jamie Wells, *Want People to Get Vaccinated? Stop Shaming Them*, AM. COUNCIL ON SCI. & HEALTH (Feb. 8, 2019), <https://www.acsh.org/news/2019/02/08/want-people-get-vaccinated-stop-shaming-them-13796>; see also Parasidis, *supra* note 8, at 2164–65.

12. Efthimios Parasidis & Douglas J. Opel, *Parental Refusal of Childhood Vaccines and Medical Neglect Laws*, 107 AM. J. PUB. HEALTH 68, 68 (2017).

13. See Weithorn & Reiss, *supra* note 8, at 1614.

14. *Required Vaccines for Child Care and School*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/parents/records/schools.html> (last reviewed May 17, 2019); Weithorn & Reiss, *supra* note 8, at 1611; Diana Lambert & Daniel J. Willis, *California Charter, Private Schools Report Lower Vaccination Rates than Traditional Public Schools*, EDSOURCE (Aug. 7, 2019), <https://edsource.org/2019/california-charter-private-schools-report-lower-vaccination-rates-than-public-schools/615871>.

15. Belluck & Abelson, *supra* note 5 (“Over the past three decades, when billions of doses of vaccines have been given to hundreds of millions of Americans, the [Vaccine Act compensation] program has compensated about 6,600 people for harm they claimed was caused by vaccines. About 70% of the awards have been settlements in cases in which program officials did not find sufficient evidence that vaccines were at fault.” Most claims involve adults, not children.); Elaine R. Miller et al., *Deaths Following Vaccination: What Does the Evidence Show?*, 33 VACCINE 3288, 3291 (2015) (although millions of vaccinations “are administered to children and adults in the United States every year[,] [s]erious adverse reactions are uncommon and deaths caused by vaccines are very rare”).

16. *Impact on Families*, PEDIATRIC EMOTIONAL HEALTH (last updated March 1, 2019), <https://www.nationaljewish.org/conditions/pediatric-emotional-health/impact-on-family>.

17. *Financial Management During Crisis*, KIDSHEALTH (last reviewed April 2015), <https://kidshealth.org/en/parents/financial-crisis.html>.

18. See Weithorn & Reiss, *supra* note 8, at 1610, 1613–15 (explaining that improving access to and incentive for vaccinations can ease the burden on vaccination-compliant parents).

19. See *infra* Sections I.A and I.B.

After a vaccination, Tiffany experienced seizures and central nervous system dysfunction.²⁰ Her “overwhelming needs” required the fulltime care of a medical professional, but her parents could not afford to hire one.²¹ Assuming Tiffany’s parents were aware that reimbursement was available under the Act, perhaps they could have borrowed money to hire someone and repaid the loan with the promised reimbursement. Claims filed after 1998, however, take an average of more than five years to resolve.²² Tiffany’s case, which was filed in 2004, was not resolved until 2012.²³ Tiffany’s mother left her job to provide care for her daughter while the case was pending.²⁴ As part of Tiffany’s claim under the Act, Tiffany’s mother sought reimbursement for her lost wages.²⁵ The Special Master denying the claim said that the argument in favor of reimbursement “has much logical and intuitive appeal,” a claim that is borne out, as I explain here.²⁶ Nonetheless, the Special Master denied the claim, in compliance with the accepted interpretation of the statute.²⁷

Keith Riley contracted polio from the Oral Poliovirus Vaccine (OPV).²⁸ He experienced significant permanent injuries to his legs and back, and was unable

20. *Ku v. Sec’y of Health & Human Servs.*, No. 04-1370V, 2012 WL 6858039 at *1 (Fed. Cl. Mar. 29, 2012). The public record does not reveal the type of vaccination that Tiffany received, only that thimerosal was involved. *Id.* Tiffany was vaccinated as an infant in either 2001 or 2002. *Id.* She is one of an extremely small group of infants who experienced a serious adverse event from which she did not recover. *About the Vaccine Adverse Event Reporting System (VAERS)*, CDC WONDER, <https://wonder.cdc.gov/vaers.html> (last visited June 16, 2020). In 2001, only 142 such events were reported to the Centers for Disease Control (CDC). *Id.* In 2002, there were only 132. *Id.* This data was retrieved from the Vaccine Adverse Event Reporting System (VAERS) using the CDC WONDER Online Databases on May 19, 2020. *See generally id.* VAERS “contains information on unverified reports [received from 1990 to the present] of adverse events . . . following immunization with US-licensed vaccines.” *Id.*; *see generally* Parasidis, *supra* note 8, at 2210, 2222–28 (describing origins and limitations of the VAERS system and proposals for reform).

21. *Ku*, 2012 WL 6858039, at *1. In 2011, seven years after the claim was filed, the family’s third request for an interim award was granted. *Id.* (due to Tiffany’s condition after the vaccination, Tiffany’s mother had to leave her job and take on the role of full-time caregiver); *Wang v. Sec’y of Health & Hum. Servs.*, No. 04-1370V, 2011 WL 3806410 at *1 (Fed. Cl. Aug. 2, 2011) (granting interim award).

22. Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1685–87 (2015).

23. *Wang*, 2011 WL 3806410 at *1 (case filed in 2004); *Ku v. Sec’y of Health & Hum. Servs.*, No. 04-1370V, 2012 WL 5914057 (Fed. Cl. Oct. 22, 2012) (case resolved in 2012).

24. *Ku*, 2012 WL 6858039, at *1.

25. *Id.*

26. *Id.* at *2.

27. *Id.* at *4.

28. *Riley v. Sec’y of the Dep’t of Health & Hum. Servs.*, No. 90-466V, 1991 WL 123583 at *1 (Fed. Cl. June 21, 1991). Keith was vaccinated in 1989. *Id.* A total of thirty-four reports were made of serious adverse reactions to the OPV during 1989 affecting children under the age of one. *About the Vaccine Adverse Event Reporting System (VAERS)*, *supra* note 20. Of the thirty-four reports, probably less than a third involved paralytic polio. *See Poliomyelitis Prevention in the United States: Introduction of A Sequential Vaccination Schedule of Inactivated Poliovirus Vaccine Followed by Oral Poliovirus Vaccine; Recommendations of the Advisory Committee on Immunization Practices*, 46 MORBIDITY & MORTALITY WKLY. REP. 1, 1–25 (1997) (“Since 1980, an average of eight to nine cases

to walk without a wheelchair or crutches.²⁹ Keith also needed braces for his back, legs, and ankles.³⁰ Keith's parents were told that "constant home physical therapy was the most important element in Keith's recovery."³¹ Keith's mother left her employment as a tax attorney to devote herself to Keith's recovery. Her financial loss totaled nearly \$200,000.³² Although Keith qualified for compensation under the Act, no compensation was approved for his mother.³³

This article argues that the cases interpreting the Act as denying compensation for the efforts of parents to care for their sick child, while consistent, should be overturned. The argument has two parts. First, the cases wrongly refuse to interpret the word "expenses" to permit compensation for a parent's lost wages.³⁴ Second, the narrow and unjustified interpretation of "expenses" should be rejected because the interpretation imposes and reinforces disadvantages experienced by three groups: (1) children who experience a disability after a vaccination, (2) mothers and fathers who are meeting a child's unusual caregiving needs, and (3) low-income families who cannot afford to hire substitute caregivers. Strong public policy arguments with respect to each group demonstrate how the flawed interpretation of the Act is, quite simply, unfair.³⁵

I am not arguing that providing compensation for parents will convince vaccination-hesitant or resistant parents to vaccinate their children. Hesitancy and resistance result from sources other than rational financial calculations.³⁶ My argument is that vaccination-compliant parents deserve gratitude, not financial punishment. If a fair reinterpretation of the Act helps to improve trust in government and otherwise diminishes vaccine hesitancy or resistance, the result will be a happy but unintended by-product.

of paralytic poliomyelitis associated with OPV has been reported annually in the United States. Vaccine-associated paralytic poliomyelitis (VAPP) has been the only indigenous form of the disease in the United States since 1979. Additional (unreported) cases of VAPP probably occur . . . the risk for VAPP is low (approximately one case to 2.4 million doses distributed, or one case to 750,000 children receiving their first dose of OPV)"); NAT'L CTR. FOR IMMUNIZATION & RESPIRATORY DISEASES, CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 8, at 307 ("Vaccine-associated paralytic polio is a rare adverse event following live oral poliovirus vaccine;" 154 cases were reported between 1980 and 1999).

29. See *Riley*, 1991 WL 123583, at *2 (explaining that as a part of Riley's medical expenses, Riley had to purchase long leg braces and a scoliosis brace).

30. *Id.*

31. *Id.* at *5.

32. *Id.*

33. *Id.*

34. See *infra* Section I.B.

35. See *infra* Section II.

36. See *supra* note 8 and accompanying text.

I. THE NATIONAL CHILDHOOD VACCINE INJURY ACT IS PROPERLY
INTERPRETED AS COVERING A PARENT'S LOST WAGES

The Act is a no-fault system designed to provide compensation to people whose illness or injuries may be related to a vaccination and, simultaneously, to protect vaccine producers from unlimited liability.³⁷ Compensation for the vaccinated person covers a wide range of elements, although some elements are capped.³⁸ Similar to the tort system, the goal is to make the injured person whole,³⁹ but compensation under the Act is secondary to other specified sources of assistance.⁴⁰

Compensation under the Act covers medical costs as well as “rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary.”⁴¹ Residential and custodial care expenses “shall be sufficient to enable the compensated person to remain living at home.”⁴²

A. Cases Addressing Parental Losses

In cases where the vaccinated person is a child in the care of parents, compensation awards frequently address losses that parents experience along with the child. What these awards recognize is that the child, whether a minor or an adult, does not live independently of parents. The vaccinated child's losses may affect parents, particularly in terms of their capacity to care for the vaccinated child. Compensable losses, therefore, have been found to include both injuries directly suffered by the injured person and harms experienced by parents while caring for the vaccinated person. Since the Act is understood to encompass compensation for harms to both child and parent, the Act should also

37. See Parasidis, *supra* note 8, at 2211–19 (describing procedures applicable to claims under the Act).

38. 42 U.S.C. § 300aa-15(a)(2)-(a)(4) (limiting the award for vaccine-related death and for pain and suffering and emotional distress for vaccine-related injury to \$250,000 and setting limits on the calculation of lost earnings award); § 300aa-15(d) (“Compensation awarded under the Program may not include the following: (1) Punitive or exemplary damages. (2) Except with respect to compensation payments under paragraphs (2) and (3) of subsection (a), compensation for other than the health, education, or welfare of the person who suffered the vaccine-related injury with respect to which the compensation is paid”).

39. *Tembenis v. Sec’y of Health & Hum. Servs.*, 733 F.3d 1190, 1193 (Fed. Cir. 2013), *cert. denied sub nom. Tembenis v. Burwell*, 573 U.S. 945 (2014).

40. See 42 U.S.C. § 300aa-15(g) (stating that compensation under the Act is secondary to compensation available “(1) under any State compensation program, under an insurance policy, or under any Federal or State health benefits program (other than under Title XIX of the Social Security Act), or (2) by an entity which provides health services on a prepaid basis”).

41. *Id.* § 300aa-15(a)(1)(A), (B).

42. *Id.* § 300aa-15(c).

be understood as authorizing compensation for a parent's lost wages or for a parent's caregiving time for a vaccinated child. Nothing in the Act distinguishes compensation for parental work and lost opportunities from the other categories of permissible compensation; they are conceptually indistinct.

For example, in an early case under the Act, the court awarded compensation for counseling for the vaccinated child's parents and siblings over the government's objection that family counseling is not directly for the benefit of the child.⁴³ According to the court, helping the child's family respond to the stress and disruption of having a disabled family member is integral to the Act's compensation scheme.⁴⁴ While the counseling may also benefit other family members:

[T]he purpose of this counseling would be to assist the parents and children to develop a more positive, supportive atmosphere for D.J. ... While it may appear that only incidental benefit will accrue to D.J., the reality is that it will be far more substantive. Inasmuch as the individual members of the family are adversely affected by the breakdown in normal familial relations, the ill effects will redound to D.J., further exacerbating his behavioral difficulties. Without intervention, the result can, and probably will be, a vicious downward spiral. The undersigned finds a sufficient nexus between the vaccine injury and the breakdown of healthy family relationships to justify an award for psychological counseling.⁴⁵

In other words, the wellbeing of a parent of a vaccinated child is within the purview of the Act so long as attending to the parent's needs benefits the vaccinated child. The family's living situation provides another good example. In *Riley*, a case where the vaccinated child uses a wheelchair, the award included over \$40,000 to allow the family to move to a handicap-accessible home.⁴⁶ Alternatives could have included moving the child into an accessible institutional setting or leaving the family to try to care for the child in an inaccessible setting. Both alternatives would violate the statutory mandate that an award for

43. *Brewer v. Sec'y of Health & Hum. Servs.*, No. 93-0092V, 1996 WL 147722, at *16-17 (Fed. Cl. Mar. 18, 1996).

44. *See id.* at *17 (finding that a breakdown of health family relationships constituted a "sufficient nexus" to the vaccine injury to justify an award for psychological counseling under the Act).

45. *Id.*; *see also* *Huber v. Sec'y of Health & Hum. Servs.*, 22 Cl. Ct. 255, 257 (1991) ("counseling that equips parents with the expertise necessary to properly manage their injured child would be an allowable expense"). The *Riley* court came to an inconsistent conclusion when it rejected coverage of expenses for family counseling, which the parents sought to help equip them with expertise they lacked around the child's response to his disability. *Riley v. Sec'y of the Dep't of Health & Hum. Servs.*, No. 90-466V, 1991 WL 123583, at *3 (Fed. Cl. June 21, 1991).

46. *Riley*, 1991 WL 123583, at *4.

residential care expenses must enable the child to live at home.⁴⁷ At the same time, these alternatives would negatively impact the family as well as the child because both alternative scenarios would place an intolerable burden on the parent's effort to care for the child.

Attending to a parent's preference about the child's living situation is also important. The *Lerwick* case involved Braden who became "profoundly"⁴⁸ disabled after being vaccinated as an infant and would need around-the-clock physical care throughout his life.⁴⁹ Braden's mother wanted the child to remain in her home under her care after he entered adulthood, even though the government's expert was concerned that the physical demands on the mother could prove too great as she and the child grew older.⁵⁰ The court rejected the government's position that institutional care should be preferred and ordered compensation sufficient to honor the mother's preference to maintain her family in her home.⁵¹

Going a bit further afield, a parent's preference about employment can give rise to a compensation award under the Act. In *Riley*, a parent had access to health insurance through his employment, and a large portion of the child's medical expenses could be covered by that insurance.⁵² Awards under the Act are secondary to other insurance, so the court could have ordered a reduction in the compensation award in recognition of the benefits that the employment-based insurance would provide.⁵³ The court refused to do so on the basis, in part, that the parent wanted to leave the employment but could not do so because health insurance obtained through any other employer would probably not cover the child.⁵⁴ By not reducing the award, the court's decision sets a limit on the degree to which a parent's choices will be constrained in order to meet the needs of the vaccinated child.

A parent's preference that the parent, and not a third party, act as the guardian of the vaccinated adult child has also been the subject of compensation

47. 42 U.S.C. § 300aa-15(c).

48. *Lerwick v. Sec'y of Health & Hum. Servs.*, No. 06-847V, 2014 WL 3720309, at *1 (Fed. Cl. June 30, 2014), *aff'd*, 119 Fed. Cl. 745, 746 (2015) (quoting the government's physician).

49. *Id.* Braden's injuries were caused by the diphtheria, tetanus, acellular pertussis (DTaP) vaccination administered in August 2004 when he was three months old. *Lerwick v. Sec'y of Health & Hum. Servs.*, No. 06-847V, 2015 WL 1868583, at *1 (Fed. Cl. Mar. 31, 2015). During 2004, Braden was one of about forty-three infants under the age of six months who experienced a serious adverse reaction to a DTaP vaccine from which the infant did not recover. This data was retrieved from the Vaccine Adverse Event Reporting System (VAERS) using the CDC WONDER Online Databases on May 19, 2020. *About the Vaccine Adverse Event Reporting System (VAERS)*, *supra* note 20.

50. *Lerwick*, 2014 WL 3720309, at *1-2, *17.

51. *Id.* at *13.

52. *Riley v. Sec'y of Dep't of Health & Hum. Servs.*, No. 90-466V, 1991 WL 123583, at *3 (Fed. Cl. June 21, 1991).

53. *See supra* note 40 and accompanying text.

54. *Riley*, 1991 WL 123583, at *3.

under the Act. In the *McCulloch* case, compensation awarded to the vaccinated adult could not be released until the person's mother was appointed guardian of the estate.⁵⁵ Under state law, after the guardianship was granted, the order would have to be reviewed and renewed annually throughout the child's life.⁵⁶ The mother sought nearly \$64,000 to establish and maintain the guardianship.⁵⁷ The funds were awarded on the basis that the mother could not continue her involvement in caring for the child unless she was awarded the guardianship and had the resources to maintain the guardianship.⁵⁸ The mother was not required to expend her own resources to obtain and exercise the guardianship, so long as the money was spent for a task the mother was performing for the vaccinated person.⁵⁹

These examples demonstrate that compensation under the Act includes elements that go beyond the immediate needs of the vaccinated person. Instead, compensable losses include both injuries directly suffered by the injured person and problems experienced by parents while caring for the vaccinated person. If the language of the Act is properly interpreted as including both kinds of compensation, then the statute should also be properly interpreted as allowing compensation for a parent's lost wages or for a parent's caregiving time for a vaccinated child. The categories are conceptually indistinct. Allowing compensation for only one category reflects biases that are absent from the text of the Act.

B. Courts' Interpretations of "Expenses"

Courts that have rejected claims of parents for lost wages or compensation distinguish parental claims from other compensable losses by interpreting "expenses," to mean a cost that is billed and paid.⁶⁰ In other words, where no money changes hand, there is no "expense."⁶¹ A parent's "lost opportunity

55. *McCulloch v. Sec'y of Health & Human Servs.*, 137 Fed. Cl. 598, 600 (2018).

56. *Id.* at 604.

57. *Id.* at 601.

58. *Id.* at 604.

59. *Id.*

60. 42 U.S.C. § 300aa-15(a)(1)(A) ("Actual unreimbursable expenses incurred from the date of the judgment awarding such expenses and reasonable projected unreimbursable expenses"); §300aa-15(a)(1)(B) ("actual unreimbursable expenses incurred before the date of the judgment awarding such expenses").

61. *See Ku v. Sec'y of Health & Hum. Servs.*, No. 04-1370V, 2012 WL 6858039, at *1, *4 (Fed. Cl. Mar. 29, 2012). The mother in *Ku* did no paid work for eight years because the family could not afford to hire "someone to care for a child with T.K.'s overwhelming needs." *Id.* at *1. The court concluded that, "[i]ntuitively, it would seem that full compensation for the family would include compensation for that economic loss to the family. However, such compensation simply is *not provided* by the specific provisions of Vaccine Act." *Id.* at *4 (emphasis in original). *See also Hocraffer v. Sec'y of Health & Hum. Servs.*, No. 99-533V, 2007 WL 914914, at *8 (Fed. Cl. Feb. 28, 2007) ("'lost wages' were not an expense."); *McCullum v. Sec'y of Health & Hum. Servs.*, 91 Fed. Cl. 86, 91 (2010), *aff'd*

costs” are distinguished from an out-of-pocket cost.⁶² The former are not compensable, while the latter are.

One of the first cases denying parental claims about losses related to caregiving is *Riley*, where a child named Keith contracted polio shortly after being vaccinated for the disease.⁶³ Keith’s pediatrician advised the parents that constant home physical therapy was “the most important element” in Keith’s recovery.⁶⁴ Keith’s mother, a tax attorney, stopped working to provide Keith with many hours of therapy over two years.⁶⁵ She sought compensation under the Act for her lost wages in the amount of \$178,000, and the claim was denied.⁶⁶

The Act provides that compensation is available for “expenses” incurred before and after the judgment is entered.⁶⁷ “Expenses” is not defined in the statute.⁶⁸ The *Riley* court relied on a dictionary definition of “expense” to deny Keith’s mother’s claim.⁶⁹ As is true of many dictionary definitions, the word expense as defined in *Black’s Law Dictionary* has multiple meanings.⁷⁰ The *Riley* court, without explanation, focused only on one: “[t]hat which is expended, laid out or consumed. An outlay; charge; cost; price.”⁷¹ Based on that quotation, the court concluded that the foregone wages were not an incurred expense because nothing was “paid out.”⁷²

While the court did not identify which edition of *Black’s* provided the definition, the latest possible edition in print at the time of the decision was the sixth edition, published in 1990, a year before the *Riley* decision. In that edition,

per curiam, 412 Fed. Appx. 307, 308 (2011) (denying the father’s claim to recover lost income from leaving his job to care for his child)); *Edgar v. Sec’y of Health & Hum. Servs.*, 26 Cl. Ct. 286, 292 (1992), *vacated on other grounds*, 989 F.2d 473, 477 (Fed. Cir. 1993); *Riley v. Sec’y of Dep’t of Health & Hum. Servs.*, No. 90-466V, 1991 WL 123583, at *5 (Fed. Cl. June 21, 1991).

62. *Ku*, 2012 WL 6859039, at *3–4; *see also Riley*, 1991 WL 123583, at *5 (finding that a parent’s lost wages is not an “incurred” expense).

63. *Riley*, 1991 WL 123583, at *1.

64. *Id.* at *5.

65. *Id.*

66. *Id.*

67. *See supra* note 60 and accompanying text.

68. 42 U.S.C. § 300aa-15.

69. *Riley*, 1991 WL 123583, at *5 n.7. The second and third sources relied upon by the *Riley* court were two cases decided under the Act. One is *Stotts v. Sec’y of Dep’t of Health & Hum. Servs.*, a 1990 decision about the meaning of the word expenses as used in the legislative history pertaining to a different section of the Act. No. 89-108V, 1990 WL 293856, at *1 (Cl. Ct. Oct. 11, 1990). All that the *Stotts* court decided was that an award for pain and suffering may be different from an expense but that the distinction is not determinative; the question of whether the word expense includes or excludes a lost opportunity to earn wages was not before the court. *Id.* at *16. The other case is *Wasson v. Sec’y of Dep’t of Health & Hum. Servs.*, in which the word expenses was discussed in terms of how much should be allowed for expert witness fees. 24 Cl. Ct. 482 (Cl. Ct. 1991). That decision too says nothing about whether a lost opportunity to earn wages is or is not an expense. *Id.*

70. *See infra* note 74 and accompanying text.

71. *Riley*, 1991 WL 123583, at *5 n.7.

72. *Id.*

the definition of expense includes the language quoted by the court.⁷³ The rest of the definition, omitted by the court, does not limit the word to something which is paid out. Other conduct is also included within the term: “[t]he expenditure of money, time, labor, resources, and thought. That which is expended in order to secure benefit or bring about a result.”⁷⁴

A lost opportunity to earn wages is an expenditure of time, and Mrs. Riley used her time to secure a benefit for her son through her hands-on care rather than through her paycheck.⁷⁵ Nothing in the full definition, in other words, excludes Mrs. Riley’s lost wages from being recognized as a proper subject for compensation. Only the truncated version of the definition used in *Riley* precludes seeing her lost wages as an “expense.”⁷⁶

This issue arose again in *Hocraffer*,⁷⁷ where a child experienced a mild case of Reye’s Syndrome after a vaccination. The court denied compensation to the child’s mother for her time away from work while caring for the child.⁷⁸ In the court’s view, an expense is “something paid out to attain a goal or accomplish a purpose,” and not a lost opportunity.⁷⁹ The *American Heritage Dictionary* relied on by the *Hocraffer* court, like the *Black’s* relied on in *Riley*, does not limit its definition of the word expense to something paid out.⁸⁰ It does just the opposite, as recognized in a Texas appellate case: “Similar to ‘cost,’ the term ‘expense’ has both narrow and broad meanings.⁸¹ ‘Expense’ means either ‘[s]omething

73. See *infra* note 74.

74. *Expense*, BLACK’S LAW DICTIONARY (6th ed. 1990). Two earlier editions of *Black’s Law Dictionary* use similarly inclusive language. See *Expense*, BLACK’S LAW DICTIONARY (4th ed. 1968) (“[t]hat which is expended, laid out or consumed; an outlay; charge; cost; price . . . the expenditure of time, labor, and thought; the employment and consumption of time and labor . . . laying out or expending of money or other resources, as time or strength.”); *Expense*, BLACK’S LAW DICTIONARY (5th ed. 1979) (“[t]hat which is expended, laid out or consumed . . . The expenditure of money, time, labor, resources, and thought.”).

75. See *Riley*, 1991 WL 123583, at *5 (explaining that Mrs. Riley believed that she had to “forego her legal career and devote herself” to her son’s recovery).

76. The next reported case in which a parent’s claim for lost wages was considered is *Edgar v. Sec’y of Health & Hum. Servs.*, 26 Cl. Ct. 286 (1992), vacated on other grounds, 989 F.2d 473, 477 (Fed. Cir. 1993) which deemed a claim for parents’ lost wages “questionable” but not providing analysis.

77. *Hocraffer v. Sec’y of Health & Hum. Servs.*, No. 99-533V, 2007 WL 914914, at *1 (Fed. Cl. Feb. 28, 2007), *rev’d in part on other grounds*, No. 99-533V, 2007 WL 5180525 (Fed. Cl. July 13, 2007).

78. *Id.* at *8–9.

79. *Id.* at *8. The *Hocraffer* court cites *Warner* for this proposition, a case which interprets the word expense as it appears in a different section of the Act. *Warner v. Sec’y of Health and Hum. Servs.*, No. 92-0201V, 1992 WL 405286, at *1 (Fed. Cl. Dec. 29, 1992) (citing *Expense*, AM. HERITAGE DICTIONARY (2d College ed. 1985)).

80. See *supra* note 74 and accompanying text.

81. *Glidden Co. v. CDNE, Inc.*, No. 12-09-00283-CV, 2011 WL 686286, at *4 n.1 (Tex. Ct. App. Feb. 28, 2011).

paid out . . . to accomplish a purpose’ or ‘[s]omething given up for the sake of something else’ or ‘sacrifice.’”⁸²

Neither *Riley* nor *Hocraffer* offers an explanation about why one definition should be preferred over another. In 2019, the United States Supreme Court decided a case that turned on whether the word “expense” included fees for the government’s attorneys in the context of a cost-shifting provision under the Patent Act.⁸³ In denying the government’s claim, the Court emphasized that the dictionary definition of expenses “provide[s] scant guidance” because the term “encompasses wide-ranging ‘expenditure[s] of money, time, labor, or resources to accomplish a result.’”⁸⁴ Choosing one part of a definition over another cannot be done randomly; instead, the choice must be consistent with the use of the word in the context of the statute.⁸⁵

In the context of the Act, limiting the word expense to mean monetary outlays is inconsistent with the compensation scheme of the statute.⁸⁶ Family involvement in caring for the vaccinated child, whether the child is a minor or an adult, is integral to the compensation scheme. Importantly, the statute mandates that home-based caregiving is to be preferred over other care plans, regardless of cost.⁸⁷ Nothing in the statute expressly precludes compensation for parents who undertake unusual caregiving efforts to meet the needs of a vaccinated child.⁸⁸ As discussed earlier, compensation awards routinely include elements that help parents of minor and adult children ensure that they can provide care at home.⁸⁹

C. Courts’ Interpretation of Compensation for Parental Care

McCollum provides a second argument justifying the denial of compensation to parents who provide an unusual level of care to a vaccinated child: parents should not be paid to do what parents are supposed to do.⁹⁰ In *McCollum*, a three-month-old child named Grant developed a seizure disorder and brain abnormalities after receiving a vaccination.⁹¹ The compensation award

82. *Id.*

83. *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365 (2019).

84. *Id.* at 372 (quoting *Expenses*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

85. *See id.* (holding that “[r]eading the term “expenses” alongside neighboring words in the statute. . . supports a conclusion excluding legal fees from the scope of” the statute).

86. *See supra* notes 41–42 and accompanying text.

87. *See* 42 U.S.C. § 300aa-15(c) (“The amount of any compensation for residential and custodial care and service expenses under subsection (a)(1) shall be sufficient to enable the compensated person to remain living at home.”).

88. *Id.*

89. *See supra* notes 42, 46, 50 and accompanying text.

90. *McCollum v. Sec’y of Health & Hum. Servs.*, 91 Fed. Cl. 86, 91-92 (2010), *aff’d per curiam*, 412 Fed.Appx. 307 (Fed. Cir. 2011).

91. *Id.* at 87. During 1992, Grant was one of about 125 infants under the age of six months who experienced a serious adverse reaction to a DPT vaccine from which the infant did not recover. *About the Vaccine Adverse Event Reporting System (VAERS)*, *supra* note 20.

under the Act contemplated that Grant would eventually leave home to enter residential care.⁹² Over the years, however, Grant's health deteriorated, and residential care became inappropriate.⁹³ Grant's parents proposed a revised plan under which Grant would remain at home, and Grant's father would retire so he could provide a large percentage of the care that would otherwise be provided by a home health care aide.⁹⁴ The proposal included funding for Grant's father which was characterized as both a replacement for the father's lost wages and a salary for the father who acted as Grant's home health aide.⁹⁵

Shortly before Grant's eighteenth birthday, the Special Master denied the motions.⁹⁶ In its review of the Special Master's decision, the Court of Federal Claims agreed that compensation under the Act does not include compensation for the parents of the vaccinated child.⁹⁷ The court relied on the earlier caselaw that excludes lost wages from the definition of expense.⁹⁸ The court also concluded that Grant's father's request "in essence, asks the Federal Government to pay Mr. McCollum to care for his son."⁹⁹ Under the Act, the court reasoned that parents bear the primary duty of caring for their children.¹⁰⁰ The Act supports a preference for caring for a child at home rather than "forc[ing] young children to be institutionalized"; but nothing in the Act "exempt[s] parents from caring for their children."¹⁰¹ In sum, the Act "does not permit Mr. McCollum to be paid for fulfilling his duties as a parent, regardless of how difficult that may be."¹⁰²

As a formal matter, whether the court is correct in asserting that Mr. McCollum owes the usual parental duties to Grant is questionable. At the time of the decision, Grant was about to enter adulthood.¹⁰³ Generally, the legal duty of parents to support their children ends at that time,¹⁰⁴ although many parents

92. *McCollum*, 91 Fed. Cl. at 88.

93. *Id.* at 88, 89.

94. *Id.* at 89.

95. *Id.* at 89, 91.

96. *See id.* at 87, 89 (clarifying the Grant was born on April 21, 1992 and that the Special Master denied the petitioners' motion on July 27, 2009).

97. *Id.* at 92.

98. *Id.* at 91 n.10.

99. *Id.* at 92.

100. *See id.* (clarifying that while "[h]ome attendant care provides *assistance* to parents and gives them some relief from the constant needs of an injured child, . . . [h]ome attendant care does not . . . exempt parents from caring for their own children.").

101. *Id.*; 42 U.S.C. § 300aa-15(c).

102. *McCollum*, 91 Fed. Cl. at 92.

103. *Id.* at 87; *see infra* note 104.

104. *See, e.g.,* IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 505 (5th ed. 2010) (stating that the duty of a parent to provide financial support to an adult disabled child is available in many states as an exception to the usual rule that the duty of child support ends at eighteen); *accord* Jeffrey W. Childers, *Hendricks v. Sanks: One Small Step for the Continued Parental Support of Disabled Children Beyond the Age of Majority in North Carolina*, 80 N.C. L. REV. 2094, 2095 (2002)

help their adult children out of a sense of moral duty.¹⁰⁵ A legal duty is imposed in most states as to adult children who are disabled,¹⁰⁶ but the exception imposes only a financial duty of support, not a duty to provide a home and caregiving.¹⁰⁷ Further, most adult children are self-sufficient, so daily parental physical care is unnecessary. Grant had continuing caregiving needs solely because his parents had done what the public health requires: agreed to vaccinate him.¹⁰⁸

The *McCollum* court also found support in the House Report on the Act, but the excerpt the court relied on is, at best, ambiguous.¹⁰⁹ The excerpt addresses the question of whether compensation should be provided for home care if institutionalization is an available option.¹¹⁰ According to the Report, Congress intended for the decision to be made by the vaccinated person and family, not by the government.¹¹¹ More importantly, Congress intended that the decision not be governed by cost.¹¹² If the choice is made to care for the person at home, the Act is described in the Report as providing for “in-home medical, rehabilitative, and custodial care, and such modifications to existing physical facilities (such as bathroom facilities) as are necessary to ensure that injured persons are not required to be institutionalized for purely economic reasons.”¹¹³

(stating that “[h]istorically, most jurisdictions . . . have followed the common law rule that parents are not obligated to support their adult children.”); accord Katherine Ellis Reeves, *Post-Majority Child Support Awards for Disabled Children: A Fifty State Survey*, 8 WHITTIER J. CHILD & FAM. ADVOC. 109, 109 (2008) (explaining the significance of the “common-law rule that a parent cannot be compelled to financially support his or her child after he or she reaches the age of majority.”).

105. See Sande L. Buhai, *Parental Support of Adult Children with Disabilities*, 91 MINN. L. REV. 710, 721 (2007) (“[O]nly nine states follow the traditional common law rule that a parent’s duty to support his or her child ends once that child reaches majority or is otherwise emancipated.”).

106. *Id.* at 723–24.

107. See *Corby v. McCarthy*, 840 A.2d 188, 219 (Md. Ct. Spec. App. 2003) (“We have not been provided with any authority to suggest that the court was entitled to *require* [mother] . . . to reside with [adult disabled child]. Although the applicable statute contemplates financial support for a destitute adult child, . . . it does not *compel* a parent physically to reside with such a child.”) (emphasis in original).

108. See *McCollum v. Sec’y of Health & Hum. Servs.*, 91 Fed. Cl. 86, 87 (2012), *aff’d per curiam*, 412 Fed. Appx. 307 (Fed. Cir. 2011) (explaining that after receiving a DPT vaccine, Grant was “diagnosed with a seizure disorder and various brain abnormalities.”).

109. See *id.* at 92 (citing H.R. REP. No. 99-908, pt. 1, at 21 (1986)).

110. See H.R. REP. No. 99-908, pt. 1, at 21 (1986) (“Any compensation award for residential and custodial care and service expenses is to be sufficient to allow the compensated person to remain living at home. This provision is not intended to prevent injured persons from receiving appropriate institutional care if they and their families request such services; neither is it intended to provide for the payment of family living expenses, the purchase of a home, or the construction of a major addition. The Committee intends that this provision allow for in-home medical, rehabilitative, and custodial care, and such modifications to existing physical facilities (such as bathroom facilities) as are necessary to ensure that injured persons are not required to be institutionalized for purely economic reasons.”).

111. *Id.*

112. See *id.* at 20 (“The Committee recognizes that injured children often have special or unusual health care and education needs and has attempted to provide flexibility in compensation awards by its broad description of compensable care.”).

113. *Id.* at 21.

At the same time, the Act precludes “payment of family living expenses, the purchase of a home, or the construction of a major addition.”¹¹⁴

The *McCollum* court relied on the House Report’s language about precluding the payment of “family living expenses” in denying Grant’s father’s demand.¹¹⁵ The quoted language, however, does not address whether compensation is permissible for a parent who is providing care in a way not normally provided by parents. The language also fails to address the situation of a parent who could combine caregiving with paid labor until the child’s caregiving needs required more time and attention. Mr. McCollum, for example, was offering to provide home care for his adult child, which is beyond the scope of usual parental duties as well as inconsistent with his earlier practice of combining caregiving with paid labor.¹¹⁶ Similarly, in *Riley*, Mrs. Riley was providing many hours a day of physical therapy to her child, which is something that parents are rarely called upon to do.¹¹⁷ By foregoing her occupation to respond to her child’s exceptional needs, Mrs. Riley became an exception herself, because nearly all parents – including a majority of those with a disabled child – engage in both caregiving and paid labor.¹¹⁸

When read in context, the term “family living expenses” could cover indirect as well as direct costs that bear on a parent’s decision to care for a child at home.¹¹⁹ Understanding what motivates parents to choose institutionalization over custodial care at home is essential. Direct expenses, such as medical care and equipment and home modifications are plainly covered by the Act.¹²⁰ Therefore, parental decisions about institutionalization should not turn on those considerations. Denial of compensation for indirect costs, however, can also burden a parental decision about whether a child should be institutionalized. Foremost among the indirect costs is the loss of parental income if a parent, usually a mother, leaves the labor force or reduces labor force participation in order to provide the unusual degree of care that the child needs because of the

114. *Id.*

115. *McCollum v. Sec’y of Health & Hum. Servs.*, 91 Fed. Cl. 86, 92 (2010), *aff’d per curiam*, 412 Fed. Appx. 307 (Fed. Cir. 2011).

116. *Id.* at 91.

117. *Riley v. Sec’y of Dep’t of Health & Hum. Servs.*, No. 90-466V, 1991 WL 123583, at *5 (Fed. Cl. June 21, 1991).

118. *Id.*; see also DENNIS HOGAN, *FAMILY CONSEQUENCES OF CHILDREN’S DISABILITIES* 39 (Russell Sage Foundation 2012) (reporting that most mothers, even those who have children with disabilities, “eventually return to paid employment and work during a substantial portion of their children’s lives.”).

119. See Mark Stabile & Sara Allin, *The Economic Costs of Childhood Disability*, 22 *FUTURE CHILD*. 65, 69 (2012) (“Direct monetary costs include expenditures on health care, therapeutic, behavioral, or educational services; transportation; caregivers; and other special needs services. Indirect costs consist primarily of reductions in parents’ ability to sustain paid employment.”).

120. 42 U.S.C. § 300aa-15(c).

vaccination injury.¹²¹ The likelihood that a mother of a disabled child works for pay is three to eleven percentage points less than other mothers.¹²² Where a child is severely disabled, the likelihood that the mother works for pay is thirteen to fifteen percentage points less than other mothers.¹²³ Reduced labor force participation because of the child's unusual needs costs a family, on average and in 2011 dollars, \$3,150 a year, with a range of \$1,050 to \$7,000.¹²⁴ Pure financial rationality, in other words, could push a family to choose institutionalization over custodial care at home, which directly contradicts congressional intent as described in the statute's guarantee that compensation "shall be sufficient to enable the compensated person to remain living at home."¹²⁵ Further, this is counter to the full message of the sole congressional report addressing the statute's compensation language.¹²⁶

In concluding that the Act precludes paying parents to care for their children, the *McCullum* court is drawing a distinction between damages under the Act and damages typically available in tort law for the healthcare services a child receives from their parent. The usual rule, however, is that "the plaintiff is entitled to recover the reasonable value of such services."¹²⁷ Generally, damages are available in tort where the child's caregiving needs exceed those of a child who has not been injured.¹²⁸ The amount of damages is usually tied to the reasonable value of the services, so the plaintiff recovers the value of nursing

121. *Stabile & Allin*, *supra* note 119, at 68–69, 75.

122. *Id.* at 72.

123. *Id.*

124. *Id.* at 84 tbl.1.

125. 42 U.S.C. § 300aa-15(c); *see generally* *Lerwick v. Sec'y of Health & Hum. Servs.*, No. 06-847V, 2014 WL 3720309, at *14 (Fed. Cl. June 30, 2014), *aff'd*, 119 Fed. Cl. 745 (2015) (interpreting 42 U.S.C. § 300aa-15(c) to demonstrate Congressional preference for home care).

126. H.R. REP. No. 99-908, pt. 1, at 21 (1986).

127. JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES* pt. 2, § 7:11 (3d ed. 1997); *see* *Roberts v. Tardif*, 417 A.2d 444, 452 (Me. 1980); J. A. Connelly, Annotation, *Damages for Personal Injury or Death as Including Value of Care and Nursing Gratuitously Rendered*, 90 A.L.R.2d 1323 § 5(a) (1963); FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* § 25.22 (2d ed. 1986); RESTATEMENT (SECOND) OF TORTS § 920(A) (AM. LAW INST. 1979).

128. Haley Hermanson, *The Right Recovery for Wrongful Birth*, 67 *DRAKE L. REV.* 513, 559 (2019); *see* *Jones v. Carvell*, 641 P.2d 105 (Utah 1982) (finding that "[s]pecial kinds of expenditures or sacrifices . . . which exceed the ordinary manner of rearing a child" is relevant in awarding damages to parents).

services provided by a parent.¹²⁹ Some courts go further, however, and allow the value to be established based on the wages lost by the parent.¹³⁰

If the rule generally applicable in tort cases were applied in the *McCollum* case, a compensation award would have included at least the wages that Grant's father requested, in the same amount paid to anyone else providing the same services to Grant.¹³¹ In the *Ku* case, an award equivalent to the wages of a skilled home healthcare provider might have been equivalent to the mother's lost wages.¹³² In the *Riley* case, however, the only way to make the family whole would be to include the mother's lost wages in the compensation award, as is permitted in a minority of cases.¹³³ Compensating the family at the rate paid to a physical therapist aide would deprive the family of the much greater amount that the mother was earning as a tax attorney.¹³⁴

129. See, e.g., *Laughner v. Bryne*, 22 Cal. Rptr. 2d 671, 674 (Cal. Ct. App. 1993); *Worley v. Bargar*, 807 N.E.2d 1222, 1227 (Ill. App. Ct. 2004) (while "it is reasonably foreseeable that an injury to a minor child would result in his or her parent expending time in caring for the child and that there is a sufficient likelihood of the parent suffering pecuniary injury . . . [t]he consequence of placing the burden on the defendant to pay the reasonable value of the services rendered to the minor child by the parent is no greater than if the expense had been incurred in employing a third person to deliver the service. We decline plaintiff's request for lost wages because it would insert a level of foreseeability that is not necessary in order for plaintiff to receive a reasonable recovery for the care of the minor child."); *Roberts v. Tardiff*, 417 A.2d 444, 452 (Me. 1980); *Hamlin v. N.H. Bragg & Sons*, 151 A. 197, 199 (Me. 1930); *Armstrong v. ONufrock*, 341 P.2d 105, 107 (Nev. 1959).

130. See, e.g., *Worley*, 807 N.E.2d at 1227 (citing *Lester v. Dunn*, 475 F.2d 983 (D.C. Cir. 1973)); *Fields v. Graff*, 784 F. Supp. 224, 226 (E.D. Pa. 1992); 130 AM. JUR. TRIALS 447 § 13 (2013 & Supp. 2020); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in Torts Course*, 1 YALE J. L. & FEMINISM 41, 53–54 (1989) ("A closely related damages issue arises when a family member is injured and requires home care, and a female member of the family provides that care at the cost of leaving paid work outside the home. Using stereotyped notions about woman's 'natural' caretaking role and nurturing sensibilities, some courts and commentators have characterized this care as gratuitous, and thus not compensable unless actual expenditures have been made. . . . The idea that a woman renders caretaking services out of love and devotion as part of her natural role precludes recognition of the woman's economic and personal sacrifice. . . . [E]ven if a woman gives up wages earned in employment outside the home, the measure of damages frequently is only the court's assessment of the value of the home care, rather than the value of the wages foregone by the woman, despite the obvious importance of those wages at a time when another family earner is disabled."); Haley Hermanson, *The Right Recovery for Wrongful Birth*, 67 DRAKE L. REV. 513, 559 (2019).

131. *McCollum v. Sec'y of Health & Hum. Servs.*, 91 Fed. Cl. 86 (2010), *aff'd per curiam*, 412 Fed.Appx. 307 (Fed. Cir. 2011).

132. *Ku v. Sec'y of Health & Hum. Servs.*, No. 04-1370V, 2012 WL 6858039 (Fed. Cl. Mar. 29, 2012). No exact figure is provided in the case reports about the wages lost when Tiffany Ku's mother stopped working to provide her with fulltime care. See *id.* Assuming that the mother was in a relatively low-paid job, the lost wage might have been comparable to that paid to a home health aide. *Id.* In 2003, the median annual salary of home health aides was \$18,200.00. KIM SOLOMON ET AL., *DEFINING THE FRONTLINE WORKFORCE* 28 tbl.5 (2005). Tiffany was vaccinated as an infant, so compensation based on the mother's caregiving prior to the compensation award and continuing, at minimum, until Tiffany reached adulthood, would total \$327,600.00. See *id.*; see also *Ku*, 2012 WL 6879061, at 7.

133. See *supra* note 130 and accompanying text.

134. In the *Riley* case, for example, Mrs. Riley left work as a tax attorney so she could provide physical therapy to her child many hours a day for two years. *Riley v. Sec'y of the Dep't of Health &*

Several kinds of damage awards that are usually available in civil litigation are not available or are restricted under the Act. Notably, claimants under the Act cannot be awarded punitive damages, and awards for pain and suffering and for wrongful death are capped.¹³⁵ The fact that nothing in the Act expressly precludes an award to a parent for time spent caring for a child is significant, therefore, since Congress demonstrated knowledge of how to preclude or limit specific forms of tort damages. Further, as the Court of Federal Claims said in a decision denying a claim for lost income for a minor child who died before the compensation award was entered, the preferred interpretation under the Act is for results that are consistent with awards under state tort law.¹³⁶

II. DENYING COMPENSATION TO CAREGIVING PARENTS OF A VACCINATED CHILD IS UNJUSTIFIED

Multiple groups of people are disadvantaged because the Act has been misinterpreted to deny parents compensation for lost wages. Primary among these groups are (1) children who experience a disability after a vaccination, (2) mothers and fathers who are meeting a child's unusual levels of caregiving needs, and (3) parents who cannot afford to hire substitute caregivers. Legitimate claims for equity as to each of these vulnerable groups demonstrate how the flawed interpretation of the Act is inconsistent with public policy.¹³⁷

Hum. Servs., No. 90-466V, 1991 WL 123583, at *5 (Fed. Cl. June 21, 1991). In 2003, the median annual salary of a physical therapy aide was \$21,070, which yields an average hourly rate of \$10.13 (21,070/2080). SOLOMON ET AL., *supra* note 132, at 27 tbl. 4. If Mrs. Riley is providing therapy for four hours a day, 365 days a year for two years, she “earned” \$29,580.00. *Riley*, 1991 WL 123583, at *5. That is less than 20% of the lost wages but considerably more than zero. SOLOMON ET AL., *supra* note 132, at 27 tbl.4. Tiffany Ku’s mother was providing her with fulltime care. *Ku*, 2012 WL 6879061, at *7 n.10. In 2003, the median annual salary of home health aides was \$18,200.00. SOLOMON ET AL., *supra* note 132, at 28 tbl.5. Tiffany was vaccinated as an infant, so compensation based on the mother’s caregiving prior to the compensation award and continuing, at minimum, until Tiffany reached adulthood, would total \$327,600.00. *Ku*, 2012 WL 6879061, at *7.

135. 42 U.S.C. § 300aa-15(a)(2)–(4) (limiting the award for vaccine-related death and for pain and suffering and emotional distress for vaccine-related injury to \$250,000; placing limits on calculation of lost earnings award); § 300aa-15(d) (“Compensation awarded under the Program may not include the following: (1) Punitive or exemplary damages. (2) Except with respect to compensation payments under paragraphs (2) and (3) of subsection (a), compensation for other than the health, education, or welfare of the person who suffered the vaccine-related injury with respect to which the compensation is paid”).

136. *See Tembenis v. Sec’y of Health & Hum. Servs.*, 733 F.3d 1190, 1196 (Fed. Cir. 2013), *cert. denied sub nom. Tembenis v. Burwell*, 573 U.S. 945 (2014) (justifying analysis, in part, on consistency between result under the Act and result under state tort law).

137. AARP FAM. CAREGIVING, NAT’L ALLIANCE FOR CAREGIVING, CAREGIVING IN THE U.S. 9 (2020), https://www.caregiving.org/wp-content/uploads/2020/06/AARP1316_RPT_CaregivingintheUS_WEB.pdf (explaining that in 2020, approximately 14.1 million adults in the United States are providing unpaid care for a child with special needs, an increase of nearly four million since 2015).

A. Disability

The Act can be viewed as a celebration of health rather than as a response to disability because a core purpose of the Act is to prevent death and disability by protecting the supply of vaccines that prevent people from getting deadly and disabling diseases.¹³⁸ The other purpose, compensating people who experience poor health after a vaccination, inevitably involves disability.¹³⁹ Disability theory, I argue, suggests that denying compensation for the parent's lost wages denies justice to the disabled person, not just the parent-caregiver.

Professor Samuel Bagenstos argues that disability rights must be grounded in a claim for justice, which he describes this way:

People with disabilities deserve to be treated as full and equal participants because it is the just thing to do. Basic principles of equality should be understood to prohibit societal decisions that attach disadvantage to stigmatized group statuses. And, even if total monetary costs exceed the monetizable benefits, those of us “who have a choice between participating in a subordinating system and working (at reasonable cost) against such a system have a moral obligation to respond in a way that reduces subordination.”¹⁴⁰

A common way to understand disability is the social model under which the focus is not on the mental or physical situation of the person with a disability but on the social environment in which the person lives and the dynamic interface between the two.¹⁴¹ In many situations, the social environment can be altered in such a way that the experience of the person with a disability is no different from the experience of everyone else in the environment. For example, a person who uses a wheelchair can go from one floor to another if the building has ramps or an elevator. If the building only has steps, however, the person in the wheelchair experiences a mobility barrier.

Equity for a child who is disabled after a vaccination requires the same inclusive approach. All children require care from a parent or from someone who is willing to fulfill the caregiving role of a parent, but not all children require the same number of hours of care over many years or the same level of medical expertise. Children claiming under the Act experience a wide variety of disabilities affecting their general health, mobility, cognition, behavior, and development. If a parent can provide care directly or can intervene on behalf of

138. See Parasidis, *supra* note 8, at 2209–11.

139. *Id.* at 2210.

140. Samuel R. Bagenstos, *Disability Rights and the Discourse of Justice*, 73 SMU L. REV. F. 26, 33–34 (2020) (quoting Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 838 (2003)).

141. Mark C. Weber, *Disability Rights, Welfare Law*, 32 CARDOZO L. REV. 2483, 2484–85 (2011).

the child to secure needed services, some of these children will get the chance to thrive or, at minimum, avoid greater loss up to, and including, death.

Using the social model to understand vaccine-related disability helps to make sense of what the parent's effort means for the child. If the parent is enabled to spend more time with and attention on the child, the child's medical fragility, developmental delays, or mobility limitations may have less impact on the child's capacity to learn, to interact with others, or to enjoy life. More parental time and attention could open the door to the child having a life that is comparable to the life enjoyed by other children whose needs are less substantial. The child's claim for justice, in other words, has an impact on the child's family. Fairness for the child is advanced by fairness for the child's parents.

The *Riley* case provides a vivid example of how increased parental time and attention can ensure that a child with unusual caregiving needs enjoys the same chances in life that average parents provide for their children while combining paid work with usual levels of caregiving. Keith's need for many hours of physical therapy a day required Keith's parents to make a choice: both could continue to earn their salaries, or one could sacrifice a salary to provide Keith with therapy.¹⁴² They chose the latter, which meant that Keith got more hours of physical therapy.¹⁴³ Keith's family, however, paid the price of the loss of nearly \$200,000 in income over two years, a sum that had to affect the long-term financial well-being of the family.¹⁴⁴ The substitute income that should have been provided under the Act would have ensured that Keith could have access to appropriate parental resources while protecting Keith's family from the financial loss.

B. Vulnerability

Professor Martha Fineman argues that legal thinkers must respond to the inevitable vulnerability that is part and parcel of the human experience.¹⁴⁵ A responsive state, in her view, "recognizes the universality and constancy of vulnerability, as well as the need for providing mechanisms for building resilience."¹⁴⁶ "Resilience is what provides an individual with the means and ability to recover from harm or setbacks," and "[t]he degree of resilience an

142. Bagenstos, *supra* note 140, at 33–34.

143. *Id.*

144. *Id.*; see also Julie L. Hotchkiss & M. Melinda Pitts, *The Role of Labor Market Intermittency in Explaining Gender Wage Differentials*, 97 AM. ECON. REV. 417 (2007) (examining the impact on women's lifetime earnings of intermittent market labor).

145. See MARTHA ALBERTSON FINEMAN, INTRODUCTION TO PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE 4 (Martha Albertson Fineman et al. eds., 2017).

146. *Id.*

individual has is largely dependent on the quality and quantity of resources . . . that they have at their disposal or command.”¹⁴⁷

Vulnerability can be experienced by society broadly as well as by individuals; the Act responds at both levels. When an infectious disease cannot be prevented or treated, everyone is vulnerable, as has been made plain by COVID-19. The first purpose of the Act is to respond to societal vulnerability by insulating pharmaceutical companies from liability to encourage them to invest in vaccine development.¹⁴⁸ When vaccine development succeeds, most people never experience the illness or its disabling and deadly consequences.¹⁴⁹ A few people may get ill because of the vaccine, however, and a few may die.¹⁵⁰ The second purpose of the Act is to respond to the vulnerability of these individuals who are vaccinated for the good of the whole but whose opportunity for compensation from vaccine manufacturers is curtailed under the Act.¹⁵¹ The two purposes do not have an impermeable dividing line. If all goes well with a vaccine, enough people accept vaccination for themselves and their children to provide herd immunity for those who are too vulnerable for vaccination. Fair treatment of those injured by vaccination, including just compensation, offers a limited response.

In terms of vulnerability theory, compensation under the Act should support an opportunity for resilience for the few people who suffer harm after a vaccination. Obviously, the opportunity for resilience requires access to medical treatment, rehabilitation and other support, all of which are provided under the Act. Denying compensation for the financial losses suffered by caretaking parents, however, means that the response is incomplete, at least to the extent that opportunities for resilience depend on parental caregiving. The vaccinated child, or the “vulnerable subject” in Fineman’s terms, loses opportunities for resilience, “the essential, but incomplete antidote to our vulnerability,” when the child’s parent cannot afford to be present to help the child recover and develop.¹⁵²

If parents sacrifice income to provide family care for the child, the family’s resources may be inadequate to secure what the child needs in order to thrive. The Act promises reimbursement for the cost of hiring help or for

147. Martha Albertson Fineman, *The Limits of Equality: Vulnerability and Inevitable Inequality*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 73, 86–87 (Robin West & Cynthia Grant Bowman eds., 2019).

148. See Schwartz & Mahshigian, *supra* note 2, at 394 (“Congress set out to achieve two objectives: to provide an expeditious method of compensating children who are injured because of vaccines and to make liability for vaccine manufacturers more predictable so that the supply of vaccines in the United States will be adequate.”).

149. See Parasidis, *supra* note 8, at 2222.

150. *Id.*

151. *Id.* at 2219.

152. Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 307, 320 (2014).

institutionalization, but both may be an inferior alternative. Parents who can provide care for the child may have the incentive to do a better job than a hired caregiver. The parents and the child may prefer parental care rather than being dependent on people who may have less investment in the child's capacity to thrive, or even in the child's survival. Both negative scenarios are avoided, or at least mitigated, by a compensation scheme which allows parents to be compensated for the costs they incur and income they lose when devoting themselves to supporting the resilience of their vulnerable child.¹⁵³

C. Lower Income Families

Because the Act is misinterpreted as denying compensation for the economic consequences suffered by caregiving parents, the economic value of the Act to many families depends on whether the family enjoys higher or lower income at the time the child is vaccinated. This occurs because wages paid to a substitute caregiver are compensable under the Act, but the lost wages of the parent are not.¹⁵⁴ Higher income parents and parents with higher levels of education are more likely to maintain their employment while caring for a disabled child, in part, because they can afford to hire substitute care for the child at home.¹⁵⁵ In this regard, *Riley* presents a highly unusual scenario where a high-income parent leaves work to provide care for a child.¹⁵⁶ The cost of the substitute caregiver is reimbursed under the current interpretation of the Act.¹⁵⁷ If a family lacks the money to pay for a substitute caregiver or cannot afford to wait years for reimbursement of the money paid to the substitute caregiver,¹⁵⁸ one of the parents, usually the mother, stays home to care for the child.¹⁵⁹ Unlike wages paid to a substitute caregiver, the parent's lost income is not reimbursable under the current interpretation of the Act.

In the average American family, married mothers who are employed fulltime outside the home spend 9.24 hours in an average week caring for children in their household, while married fathers with fulltime employment

153. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 213–17 (1995) (explaining the costs associated with motherhood and suggesting policy reforms to encourage effective mothering); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2181–209 (1995); see generally Michael Ashley Stein, *Disability Human Rights*, in NUSSBAUM AND LAW (Robin West ed., 2015); see also Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75 (2007).

154. 42 U.S.C. § 300aa-15(a).

155. See HOGAN, *supra* note 118, at 39.

156. See *supra* notes 28–33 and accompanying text.

157. 42 U.S.C. § 300aa-15(a).

158. See *supra* notes 20–26 and accompanying text.

159. See HOGAN, *supra* note 118, at 37–39.

spend, on average, 6.23 hours weekly.¹⁶⁰ Although not without stress, most parents combine the roles of homemaker and provider.¹⁶¹ Whether the family includes two parents or one, the mother's income is often essential.¹⁶² Indeed, increased workforce participation by women accounts for most of the increase in household income in recent decades.¹⁶³ Interruptions in workforce participation to care for a family member can depress the family's financial well-being in the short term because of the loss of a paycheck and in the long term because interruptions affect women's pay even after they return to work.¹⁶⁴

The economic life of parents whose children have a disability is commonly worse than that of parents of other children. Many report spending time equivalent to full-time employment providing care for the child, ranging from feeding and toileting to therapy and medication to interacting with medical, therapeutic, and educational providers.¹⁶⁵ The stress on these parents who are trying to combine paid work with childrearing exceeds that of other parents.¹⁶⁶ A quarter of unpaid adult caregivers for children experience ill health, a third report the caregiving situation to be "emotionally stressful," and nearly two-thirds report that caregiving "limits the time they spend with other family and

160. *American Time Use Survey*, BUREAU LAB. STATS. tbl.A-6A (2018), <https://www.bls.gov/tus/tables/a6-1317.htm> ("Time spent in primary activities and the percent of married mothers and fathers who did the activities on an average day by employment status, average for the combined years 2013-17: Own household child under age 18").

161. See Press Release, Bureau Lab. Stats., *Employment Characteristics of Families – 2019*, 2 (Apr. 21, 2020), <https://www.bls.gov/news.release/pdf/famee.pdf> ("Among married-couple families with children, 97.5 percent had at least one employed parent in 2019, and 64.2 percent had both parents employed").

162. See Isabel V. Sawhill & Katherine Guyot, *Women's Work Boosts Middle-Class Incomes but Creates a Family Time Squeeze That Needs to be Eased*, BROOKINGS INSTITUTION 5 (May 2020), <https://www.brookings.edu/essay/womens-work-boosts-middle-class-incomes-but-creates-a-family-time-squeeze-that-needs-to-be-eased/> ("Over 40 percent of all mothers are either the sole or the primary breadwinners for their families. This includes many who are single parents but also a rising number in two-paycheck families where the wife earns more than her husband"; two-earner families now account for 70% of all families).

163. See *id.* ("By our estimates, based on a method initially proposed by Heather Boushey at the Center for Equitable Growth and using pre-tax money income in the Current Population Survey, average middle-class household income grew from \$57,420 in 1979 to \$69,559 in 2018. If the average contribution of women to household income had not changed, most of these gains would not have been seen. Average income would have increased to just \$58,502 in 2018. Women therefore accounted for 91 percent of the total income gain for their families.").

164. See *id.*; Markus Gangl & Andrea Ziefle, *Motherhood, Labor Force Behavior, and Women's Careers: An Empirical Assessment of the Wage Penalty for Motherhood in Britain, Germany, and the United States*, 46 DEMOGRAPHY 341, 341 (2009).

165. NAT'L ALLIANCE FOR CAREGIVING, *supra* note 137, at 3–4 (finding adult unpaid caregivers of children, primarily parents, provided, on average, nearly thirty hours a week of care; more than two-fifths reported spending twenty-one hours a week or more; nearly three-quarters reported being the primary caregiver for the child and only a third reported that the child received paid help as well).

166. *Id.* at 4.

friends.”¹⁶⁷ Not unexpectedly, many parents – most often mothers – reduce their time at work or leave work altogether.¹⁶⁸ The lost income then becomes an added source of concern.¹⁶⁹

Reinterpreting the Act to reflect the usual tort rule described earlier would improve the economic outcome for the child and family. Lower-income parents who leave work to care for the vaccinated child would be entitled to reimbursement for past and future income, at least to the extent that their lost wages do not exceed the amount a medically-trained person would be paid to provide caregiving services.¹⁷⁰ The reimbursement would contribute to equity for lower-income families as compared with higher-income families whose payments for a substitute caregiver are already reimbursable.¹⁷¹ A preferable outcome would be reimbursement up to the amount of income actually lost, regardless of what would be paid to a substitute caregiver.

In the absence of a reinterpretation of compensation under the Act, lower income families lack reliable alternative sources of income to replace income lost when a parent reduces or terminates paid employment to care for their disabled child.¹⁷² Cash assistance under Temporary Assistance for Needy Families (TANF) is generally tied to a work requirement that closes the door to mothers exercising autonomy about whether a child should receive her care or

167. *Id.*

168. *See id.* at 8 (finding only a third of adult unpaid caregivers of special needs children report being employed full time at time of the survey; three-fourths reported a change in employment ranging from reducing hours through to giving up work entirely); HOGAN, *supra* note 118, at 36 (“[M]others of children with disabilities are less likely to return to the labor force within the first two years after their child is born, compared to mothers whose children do not have disabilities. What is important, however, is that even when their children have serious disabilities, most mothers eventually return to paid employment and work during a substantial portion of their children’s lives. . . . [B]y the time children are twelve years old, mothers are employed during 62 percent of children’s lives if there is no disability versus 56 percent for children with moderate limitations. For children with serious disabilities, mothers have still been employed during more than one-half (53 percent) of their children’s lives. While work delays are more likely after a child with a disability is born and subsequent interruptions in employment are more frequent, it is clear that many children with disabilities experience life in a home with a working mother.”).

169. *See* HOGAN, *supra* note 118, at 38–42.

170. 42 U.S.C. § 300aa-15(c); *see* *Lerwick v. Sec’y of Health & Hum. Servs.*, No. 06-847V, 2014 WL 3720309, at *13 (Fed. Cl. June 30, 2014), *aff’d*, 119 Fed. Cl. 745 (Fed. Cl. 2015) (explaining Congressional preference for home care in 42 U.S.C. § 300aa-15(c)).

171. *See* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 513 n.190 (1998) (explaining that by allowing tort damages for a paid substitute caregiver but not for a parental caregiver discriminates against lower-income parents).

172. NAT’L ALLIANCE FOR CAREGIVING, *supra* note 137, at 7 (finding over a quarter of unpaid adult caregivers of children experience a “high degree” of financial hardship, as compared with 13% of unpaid adult caregivers of adults); *see generally* Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515 (2013) (explaining how tax credits fail to provide a safety net for low-income families).

be placed with a paid caregiver.¹⁷³ The Family and Medical Leave Act (FMLA) entitles parents in covered jobs to a limited amount of unpaid time off to care for a sick child.¹⁷⁴ Not only is the leave unpaid, it is also not indefinite since employers are not required to hold the job open for the duration of the child's illness or disability.¹⁷⁵ The Americans with Disabilities Act (ADA) requires employers to accommodate employees who leave work to care for a sick child, but only to the same degree that the employer accommodates other employees who experience a disability.¹⁷⁶ If the employer provides no pay to employees to care for an ill family member, no pay is required for the parent who misses work to care for a vaccinated child.¹⁷⁷ Unemployment insurance is usually unavailable if the child's caregiving needs reduce the parent's availability for employment.¹⁷⁸ Even within the family, if one parent leaves paid work to care for a couple's child, the other parent has no obligation to provide additional funding in the form of alimony or child support.¹⁷⁹ Medicaid is a rare exception because states are allowed to use Medicaid funding to provide compensation to parents who are caring for a disabled child.¹⁸⁰ The amount of compensation is small, however, and usually covers a relatively small number of hours a week.¹⁸¹

173. See Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions about Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029, 1030–31, 1040–41 (2004) (examining “the impact of welfare reform on low-income women’s ability to make decisions about caregiving and paid employment”; identifying women’s economic freedom as recognition “that both caregiving and paid employment have economic value and affect women’s economic welfare. . . . Another way of rejecting the dichotomous thinking that characterizes work/caregiving debates is to enable low-income mothers to make their own decisions about whether and when to work inside and outside the home.”).

174. 42 U.S.C. §§ 12111–12117.

175. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 5 U.S.C. §§ 6381–6387; 29 U.S.C. §§ 2601–2654 (1994)); see Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 146–48 (2003) (describing the FMLA and some of its limitations).

176. 42 U.S.C. §§ 12111–12117; see Williams & Segal, *supra* note 175, at 149–151 (describing the ADA and some of its limitations).

177. See *supra* note 176 and accompanying text.

178. See Marley S. Weiss, *Commentary: Women's Employment Rights in the Maryland Workplace Of 2007 and 2027*, 9 U. MD. L.J. RACE, RELIG., GENDER & CLASS 63, 69–70 (2009) (explaining how unemployment benefits are typically skewed towards full time male employees).

179. See HOGAN, *supra* note 118, at 32–34 (finding higher rates of divorce and separation among parents with disabled children, with highest rates among parents of child with most severe disability); Karen Syma Czapanskiy, *Chalimony: Seeking Equity Between Parents of Children with Disabling Conditions and Chronic Illnesses*, 34 N.Y.U. REV. L. & SOC. CHANGE 253, 270–73 (2010).

180. See *supra* note 172 and accompanying text.

181. See Karen Syma Czapanskiy, *Disabled Kids and Their Moms: Caregivers and Horizontal Equity*, 19 GEORGETOWN J. ON POVERTY L. & POL'Y 43, 59–65 (2012). Some state programs provide more robust help for caregiving parents. *Id.* In the case of *Lerwick v. Secretary of Health and Hum. Servs.*, for example, Braden's mother elected to use a state benefit to pay herself the hourly wage available for an unlicensed care provider. No. 06-847V, 2014 WL 3720309 (Fed. Cl. June 30, 2014), *aff'd*, 119 Fed. Cl. 745 (Fed. Cl. 2015). Initially, the benefit covered forty-four hours a week, but it was later reduced to thirty-six hours a week. *Id.* at *2. Based on the California State's website, however, the

Whether a parent has enough income to support the family affects, without a doubt, family decisions about the provider, the quality, and the quantity of care a disabled child will receive, regardless of what may be optimal for the child. As just described, in most situations involving disabled children, discrimination on the basis of family income is a given, because the system lacks any guarantee of financial security. There is no indication that Congress intended to embed economic discrimination into the Act, however, and such discrimination is good reason to reject decisions denying compensation for lost wages.

D. Gendered Assumptions about Parenting

Nearly three-quarters of the adults who provide unpaid care for a special-needs child are women.¹⁸² Gender fairness for caregivers of disabled children could provide significant improvement to the lives of caregiving mothers and their children. While meeting the needs of these mothers and children is a big agenda, providing compensation for lost wages under the Act is one useful step.

Consider again the *Riley* case, where the court recognized the legitimacy of the father's employment-related claim but rejected the mother's claim.¹⁸³ Keith's father wants to change jobs but worries that any new employer will refuse health insurance for the vaccinated child.¹⁸⁴ The court says that the father's employment preference should be respected, so the continuation of the father's health insurance cannot determine the costs for medical care included in the compensation package.¹⁸⁵ Keith's mother leaves her paid work as a tax attorney for two years to provide Keith with the level of physical therapy that Keith's doctor recommends.¹⁸⁶ Her claim for lost wages is denied.¹⁸⁷ Why is one claim accepted and one denied? A possible but unacceptable explanation is that men are "supposed to be" providers, so a father's employment opportunities must be protected for the sake of the child. Women, by contrast, are "supposed to be"

program no longer appears to authorize payments to parents for providing care for the child. See *In-Home Supportive Services (IHSS) Program*, CAL. DEP'T SOC. SERVS., <https://www.cdss.ca.gov/ihs-for-children> (last visited June 18, 2020).

182. NAT'L ALLIANCE FOR CAREGIVING, *supra* note 137, at 1 (finding 72% of caregivers are female). Nearly half of the children who were not infants or toddlers required help with "activities of daily living" (ADLs) such as toileting, feeding, or getting in and out of bed. *Id.* at 2. Most needed their adult caregiver to advocate for them, perform treatments or therapies, give medicines or injections, among other tasks. *Id.* at 3. On average, adult caregivers provided nearly thirty hours a week of care; more than two-fifths reported spending twenty-one hours a week or more. *Id.* Nearly three-quarters reported being the primary caregiver for the child and only a third reported that the child received paid help as well. *Id.* at 4.

183. See generally *Riley v. Sec'y of the Dep't of Health & Hum. Servs.*, No. 90-466V, 1991 WL 123583 (Fed. Cl. June 21, 1991)

184. *Id.* at *7.

185. *Id.*

186. *Id.* at *11.

187. *Id.* (denying Mrs. Riley's lost wages as an incurred expense because lost wages are considered a contribution rather than an expense).

homemakers, so the mother's decision to forego paid work for caregiving is only appropriate and not cause for recognition.¹⁸⁸ Further, a woman should be financially dependent on her husband, so he bears the burden of support; her lost opportunity to earn wages need not be compensable.¹⁸⁹

Gender stereotypes are more obvious in *Riley*, but they are not limited to that case. In *McCollum*, the court criticized Grant's father's plan to take early retirement so he could participate more fully in Grant's care.¹⁹⁰ According to the court, Grant's father was only doing his parental duty by caring for Grant.¹⁹¹ The court conveniently overlooks the fact that Grant was about to turn eighteen, and parents do not owe a legal duty of care to their adult children. An alternative but unacceptable explanation for the court's denial is gender stereotyping. By undertaking caregiving, Grant's father is refusing to fulfill his provider role and instead fulfilling a role more properly performed by a woman.¹⁹²

The *McCollum* court applies a second stereotypical norm when concluding that appropriate parenting means people who parent (usually female) should act altruistically and dedicate their lives to their children, regardless of the child's age or needs, and regardless of the economic consequences to the parent and family.¹⁹³ A parent with a disabled adult child like Grant has the same duty as

188. See Williams & Segal, *supra* note 175, at 94–98 (describing gender stereotyping as it affects women and men in the workplace). Not unsurprisingly, in light of economic stresses on families with seriously disabled children, “[t]hey more often adopt traditional relationships in which the mother is the primary caregiver and the father is the breadwinner.” HOGAN, *supra* note 118, at 46. Gendered stereotyping about providers and homemakers is dying but hardly dead. See Sawhill & Guyot, *supra* note 162 (“Many Americans continue to believe that men should be the primary breadwinners and that women should take care of home and family. For example, among high school seniors, 23 percent believe that this model of men as breadwinners and women as homemakers is the most desirable. These beliefs affect both women’s aspirations and employers’ assumptions and thus women’s opportunities to get ahead”).

189. See John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 L. & SOC. INQUIRY 717, 744–45 (2000) (stating a mother’s lost opportunity costs are not compensable in tort not just because families were more likely to be dependent on father’s earnings but because “legislatures believed that widows and children ought to be dependent”); Reva B. Siegel, *Home as Work: The First Women’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1078, 1183 (1994) (“women’s economic dependence on men was a condition imposed and enforced by law;” loss of wife’s labor was compensable in tort as loss to husband, not as a claim for wife’s share in property).

190. *McCollum v. Sec’y of Health & Human Servs.*, 91 Fed. Cl. 86, 90–91 (Fed. Cl. 2010), *aff’d per curiam*, 412 Fed. Appx. 307 (Fed. Cir. 2011) (unpublished opinion).

191. *Id.*

192. See Chamallas, *supra* note 171, at 469 (“Because devaluation affects the construction of categories, not simply individuals, men whose lives and activities follow ‘female’ patterns are also disadvantaged”); Williams & Segal, *supra* note 175, at 101–02; Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1056–57 (1994).

193. See Williams & Segal, *supra* note 175, at 92–94 (describing “gold standard” ideal of motherhood); Chamallas, *supra* note 171, at 528 (“Until quite recently, the law placed no economic value on a homemaker’s domestic services, a category which encompasses not only cleaning the house, but also caring for children and other dependents.”).

the parent of an infant to provide physical care without compensation. A similar expansive view of motherhood is found in *Lerwick*, where Braden sometimes experienced life-threatening seizures during the night.¹⁹⁴ At the time of the hearing on compensation, when Braden was about ten years old, Braden's mother woke up to check on him every two hours.¹⁹⁵ According to the life-planning expert who testified about the kind of professional help Braden needed, the mother's sleep interruptions were "extraordinary," and she needed to be "able to sleep like regular people sleep, not wake up every hour and a half or two hours."¹⁹⁶ The Special Master disagreed. According to him, "[p]eriodically, all children will wake their parents with various complaints. Ms. Lerwick has not demonstrated that her experience with [Braden] at night is sufficiently out-of-line with another parent's nighttime care to support the need for a licensed nurse for all hours of the day."¹⁹⁷

The court provided no source to support the assertion that ten-year-olds routinely need parental checks every two hours every night. In my own experience as a parent, grandparent, and friend of many other parents, the moment when a baby sleeps through the night is cause for celebration because, up until then, parents have a hard time resuming pre-baby functioning.¹⁹⁸ Braden's mother's decade-long experience is, at the very least, extraordinary.

The unspoken assumption of these cases is that mothers (and fathers who undertake the traditionally defined role of mother) should be all things at all times to their children. No child, therefore, has unusual needs that may be beyond the scope of usual mothering. Adherence to an all-encompassing and altruistic vision of motherhood obscures the unusual caregiving efforts of parents of children disabled due to vaccinations and, in the case of the Act, imposes financial costs on them that most parents do not experience.

The gender stereotyping that characterizes cases under the Act denying parents compensation for lost wages is startling because, for at least a decade before the Act was adopted, courts and Congress were rejecting gender stereotyping in law.¹⁹⁹ For example, in a series of cases beginning in 1971, the

194. *Lerwick v. Sec'y of Health & Hum. Servs.*, No. 06-847V, 2014 WL 3720309, at *8 (Fed. Cl. June 30, 2014), *aff'd*, 119 Fed. Cl. 745, 746 (2015)

195. *Id.* at *6, *11.

196. *Id.* at *10.

197. *Id.* at *9.

198. See ADAM MANSBACH, *GO THE FUCK TO SLEEP* (2011).

199. Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 474 (1999) (exploring gender bias issues in custody cases); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1892-93 (2000) (diminishing impact of separate spheres ideology as it affects women's employment); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 963-65 (2005) (examining the judicial rejection of gendered standards in child custody cases); see Witt, *supra* note 189, at 745 (examining changes in tort law in the twentieth century).

Supreme Court employed, for the first time, a heightened scrutiny standard under the Equal Protection Clause to test whether a law illegitimately failed to treat men and women equally.²⁰⁰ Congress, not long after, passed the Equal Rights Amendment and sent it to the states for ratification.²⁰¹ Rejecting an interpretation that reifies gendered roles simply means interpreting the Act to reflect the growing movement toward gender-equality legal norms.

IV. CONCLUSION

The National Childhood Vaccine Injury Act validates a social norm that infectious diseases put everyone in the same boat.²⁰² If one person decides to drill a hole in the bottom of the boat, everyone will drown, not just the driller.²⁰³ Keeping vaccinations available is important to everyone, most particularly those who are vulnerable to the infectious disease but who are too fragile or too young to be vaccinated themselves. A vanishingly small group of adults and children experience an adverse reaction after getting vaccinated, but some experience severe illness, disability, and even death.²⁰⁴ When Congress adopted legislation protecting vaccine manufacturers from liability for these adverse events, it created an alternative compensation program. While the alternative program is not a complete alternative to the preexisting tort claim, most costs are covered. As a result of unsupportable interpretations of the compensation provisions of the Act, however, a key form of compensation is unavailable: relief for parents who experience financial losses when they leave work to care for a child experiencing a severe illness or disability after vaccination.

200. See *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (holding that denying financially self-sufficient widowers Social Security benefits payable to self-sufficient widows violates equal protection and not justified by “assumptions as to dependency” that male workers’ earnings are vital to their families’ support, while female workers’ earnings do not significantly contribute to families’ support); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (holding that denying widower survivor’s benefits that are granted to widows violates equal protection; sex-based distinction not tolerated because based on an “archaic and overbroad” generalization that male workers’ earnings are vital to their families’ support, while female workers’ earnings do not significantly contribute to families’ support); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 839–40 (1990) (“The shift began in 1971 with the Supreme Court’s ruling on a challenge by Sally Reed to an Idaho statute that gave males preference over females in appointments as estate administrators. Although the Court in *Reed* did not address the separate spheres ideology directly, it rejected arguments of the state that ‘men are as a rule more conversant with business affairs than . . . women,’ to find the statutory preference arbitrary and thus in violation of the equal protection clause. This decision was followed by a series of other successful challenges by women arguing that beneath the protective umbrella of the separate spheres ideology lay assumptions that disadvantage women in material, significant ways.”).

201. H.J. Res. 208, 92d Cong. (1972) (“Proposed Amendment to The Constitution of The United States”); Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

202. JUDITH SCHINDLER & JUDY SELDIN-COHEN, RECHARGING JUDAISM 4 (2017).

203. *Id.*

204. See *supra* note 15 and accompanying text.

This article explains the flaws in the legal reasoning applied by courts denying relief.²⁰⁵ Policy reasons also counsel against perpetuating the flawed interpretation.²⁰⁶ People denied equity include the children injured by vaccines as well as their mothers and fathers. Rationales advanced by courts denying relief reinforce discrimination based on disability, vulnerability, and income as well as perpetuate outdated stereotypes about parenthood and gender. It is time for this particular injustice to come to an end.

205. *See supra* Section I.

206. *See supra* Section II.