

SAME DEBATE, DIFFERENT RESULT: PARENTAL OPT-OUTS OF A MANDATED HPV VACCINE

INTRODUCTION

American public health has increasingly relied upon vaccinations to eliminate large health threats from the population.¹ The introduction of a vaccine for the human papillomavirus (HPV), and the possibility that it could be added to the mandatory series of vaccines, has generated significant debate.² While states have been able to mandate vaccines in the past,³ legislation involving the HPV vaccine has proven more difficult to implement than previous measures.⁴ Due to the political pressure on legislators to protect the perceived morality of today's youth, states' interest in eliminating cervical cancer has fueled the ongoing debate about sexuality and minors.⁵ Requiring vaccination against HPV for school age girls may turn into more than a debate in the state legislature.

1. Sylvia Law, *Human Papillomavirus Vaccination, Private Choice, and Public Health*, 41 U.C. DAVIS L. REV. 1731, 1733 (2008) (citing Ctrs. for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Ten Great Public Health Achievements — United States, 1900-1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 241 (1999), at www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm (last visited Feb. 9, 2009)).

2. *Id.*; see The Henry J. Kaiser Family Found., *HPV, Cervical Cancer, and the New Vaccine: Background Brief*, at www.kaiseredu.org/topics_im.asp?parentID=72&imID=1&id=609 (last visited Feb. 9, 2009) [hereinafter Kaiser Background Brief] (emphasizing that “[t]he key to the success of this new [mandate] will be in how policymakers, health care providers, parents, and women and girls respond”); see also Jane E. Brody, *HPV Vaccine: Few Risks, Many Benefits*, N.Y. TIMES, May 15, 2007, at F7; see also Elisabeth Rosenthal, *Researchers Question Wide Use of HPV Vaccines*, N.Y. TIMES, Aug. 21, 2008, at www.nytimes.com/2008/08/21/health/21vaccine.html?ref=health (last visited Feb. 9, 2009).

3. See generally *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (affirming Massachusetts' law requiring all residents to be vaccinated against Small Pox and declaring mandatory vaccines a compelling state interest that does not violate the Fourteenth Amendment).

4. See Lane Wood, *A Young Vaccine for Young Girls: Should the Human Papillomavirus Vaccination Be Mandatory for Public School Attendance?*, 20 HEALTH LAW., June 2008, at 30, 30 (discussing Texas Governor Rick Perry's failed attempt to mandate administration of the vaccine).

5. Kaiser Background Brief, *supra* note 2; Law, *supra* note 1, at 1755-57; Stephanie Saul & Andrew Pollack, *Furor on Rush to Require Cervical Cancer Vaccine*, N.Y. TIMES, Feb. 17, 2007, at A1; see also Brody, *supra* note 2; Rosenthal, *supra* note 2.

Legal precedent regarding vaccinations has not addressed a sexually transmitted infection (STI) like HPV.⁶ To determine whether the HPV vaccine should join the list of mandatory vaccines, states should look to cases beyond the code of health. When dealing with a STI, looking to the role of minors, sex, and parental challenges, previous debates regarding sexual education and condom distribution programs may give more guidance to this new world of public health. Supreme Court decisions addressing the constitutionality of mandatory vaccinations suggest that states are legally permitted to mandate HPV vaccination.⁷ However, the sexual nature of the disease may lead to both a political and legal compromise—a parental opt-out clause.

The emergence of new STI vaccines may preclude traditional legal justifications for compulsory vaccines;⁸ the compelling state interest in protecting children and young adults is not enough to pass a test of strict scrutiny without a parent's ability to opt-out. This paper examines both the constitutionality of compulsory vaccines and parental liberty regarding the rearing of children and concludes that the controversial opt-out clause a matter of necessity.

I. HPV, CANCER, AND THE VACCINES

A. Background

HPV is the most common STI in the United States,⁹ with a prevalence rate of almost twenty million people and 6.2 million new incidences a year.¹⁰ HPV is contracted through sexual activity.¹¹ Unlike other STIs, condoms reduce the chances of contracting HPV, but they do not fully protect against it, even if used properly.¹² Over fifty percent of sexually active persons, both men and women, will contract HPV at some point

6. See Wood, *supra* note 4, at 31-34 (discussing constitutional scrutiny of mandatory vaccination programs and compelling state interests served by such programs).

7. See Law, *supra* note 1, at 1751-55 (asserting that mandatory HPV vaccination does not violate the Constitution).

8. See Sean Coletti, Note, *Taking Account of Partial Exemptors in Vaccination Law, Policy, and Practice*, 36 CONN. L. REV. 1341, 1355-56 (2004).

9. Ctrs. for Disease Control & Prevention, HPV Vaccine – Questions & Answers for the Public About the Safety and Effectiveness of the Human Papillomavirus (HPV) Vaccine, at www.cdc.gov/vaccines/vpd-vac/hpv/hpv-vacsafe-effic.htm (last visited Feb. 9, 2009) [hereinafter CDC, Q&A for the Public].

10. Nat'l Conference of State Legislatures, HPV Vaccine, at www.ncsl.org/programs/health/HPVvaccine.htm (last visited Feb. 9, 2009) [hereinafter NCSL, HPV Vaccine]; Kaiser Background Brief, *supra* note 2.

11. See Kaiser Background Brief, *supra* note 2.

12. See CDC, Q&A for the Public, *supra* note 9.

during their lives.¹³ Most cases go undetected because the disease is commonly “asymptomatic and transient”.¹⁴ Cases of HPV, however, can progress into genital warts, cervical cancer in women, penile or anal cancer in men, or respiratory tract warts in children.¹⁵ Strands of HPV known to cause greater problems are split into two categories: high-risk (known to cause cancer) and low-risk (known to cause warts).¹⁶

HPV is best known as a source of cervical cancer in women—the most prevalent and dangerous consequence of HPV.¹⁷ If HPV does not clear on its own, as it does for ninety percent of women, the infection begins to develop into cancer.¹⁸ In 2007, over 500,000 women worldwide were diagnosed with cervical cancer, and approximately 260,000 women died from it.¹⁹ In the United States alone, the American Cancer Society estimated that there were 11,000 new cases of invasive cervical cancer and 3,700 fatalities from that cancer in 2007.²⁰ The widespread use of the Papanicolaou Test (commonly referred to as the Pap smear) has been credited with lowering the rate of cervical cancer in the United States, as compared to other countries.²¹ This test is a major tool for the detection and diagnosis of cervical cancer. American women commonly undergo routine Pap smears and thus are able to catch any potential problems sooner than later. The earlier abnormalities are detected, the better the patient’s chance of surviving the cancer.²²

In addition to causing cervical cancer in women, there is a small chance that HPV in men will develop into penile or anal cancer.²³ While approximately half of all sexually active men will have HPV at some point

13. CTRS. FOR DISEASE CONTROL & PREVENTION, HPV AND HPV VACCINE: INFORMATION FOR HEALTHCARE PROVIDERS (2006), available at www.cdc.gov/std/HPV/hpv-vacc-hcp-3-pages.pdf (last visited Feb. 9, 2009) [hereinafter CDC, HPV INFORMATION FOR PROVIDERS].

14. *Id.*

15. *Id.*

16. *Id.*

17. THE HENRY J. KAISER FAMILY FOUND., FACT SHEET, HPV VACCINE: IMPLEMENTATION AND FINANCING POLICY (2007), available at www.kff.org/womenshealth/upload/7602.pdf (last visited Feb. 9, 2009) [hereinafter KFF, HPV VACCINE].

18. *Id.*; CDC, HPV INFORMATION FOR PROVIDERS, *supra* note 13.

19. Kaiser Background Brief, *supra* note 2.

20. *Id.*

21. *Id.*; Am. Cancer Soc’y, Detailed Guide: Cervical Cancer – Can Cervical Cancer Be Found Early?, at www.cancer.org/docroot/CRI/content/CRI_2_4_3X_Can_cervical_cancer_be_found_early_8.asp?sitearea= (last visited Feb. 9, 2009).

22. *Id.*

23. CTRS. FOR DISEASE CONTROL & PREVENTION, CDC FACT SHEET: HPV AND MEN (2007), available at www.cdc.gov/std/hpv/HPV&Men-Fact-Sheet.pdf (last visited Feb. 9, 2009) [hereinafter CDC, HPV AND MEN].

during their life, only one percent of them will contract genital warts.²⁴ Penile and anal cancers are even rarer.²⁵ Penile cancer affects approximately one in 100,000 men.²⁶ The American Cancer Society estimates that 1,530 men were diagnosed with penile cancer in 2006.²⁷ Approximately 1,900 men were diagnosed with anal cancer in 2007, another rare disease not to be confused with colorectal cancer, a more common yet unrelated cancer.²⁸ Men, while affected by HPV, do not encounter the same risks as women.²⁹ For this reason pharmaceutical companies began investigating options to protect women first.³⁰

On June 8, 2006, Merck's HPV vaccine, Gardasil, was approved by the Food and Drug Administration (FDA) for girls and women ages nine to twenty-six.³¹ Due to the wide spread prevalence of HPV and its role as a pre-cancer, the vaccine targets HPV types 16, 18, 6, and 11.³² Types 16 and 18 cause seventy percent of the cases of cervical cancer, and types 6 and 11 cause ninety percent of the cases of genital warts.³³ The vaccine is administered in a series of three shots spread over six months.³⁴ In addition to Gardasil, GlaxoSmithKline is waiting for approval for its HPV vaccine Cervarix.³⁵ Cervarix will only protect against types 16 and 18, making it only effective against cervical cancer.³⁶ Because the efficacy of the vaccine is dependent on administration before contracting HPV, the recommended age for vaccination is eleven or twelve years of age.³⁷ The grounds for this recommendation are two-fold. First, girls ages ten to fifteen are believed to have a greater immune response to the vaccine than those aged sixteen to

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. CDC, HPV AND MEN, *supra* note 23.

29. CDC, Q&A for the Public, *supra* note 9; Wood, *supra* note 4, at 31.

30. See CDC, HPV INFORMATION FOR PROVIDERS, *supra* note 13. HPV's importance was originally based on its causal effect to cervical cancer. While some testing is now occurring on men and boys, its efficacy and indirect benefits on cervical cancer are not yet known. *Id.*

31. CDC, HPV INFORMATION FOR PROVIDERS, *supra* note 13.

32. See *id.*

33. *Id.*; Kaiser Background Brief, *supra* note 2.

34. See CDC, HPV INFORMATION FOR PROVIDERS, *supra* note 13.

35. See NCSL, HPV Vaccine, *supra* note 10.

36. *Id.*; see also Kaiser Background Brief, *supra* note 2 (discussing HPV types 16 and 18 leading to cervical cancer).

37. CTRS. FOR DISEASE CONTROL & PREVENTION, HPV VACCINE QUESTIONS AND ANSWERS (2006), available at www.cdc.gov/std/hpv/hpv-vaccine.pdf (last visited Feb. 9, 2009) [hereinafter CDC, HPV VACCINE Q&A]; see also Kaiser Background Brief, *supra* note 2; see also CDC, HPV INFORMATION FOR PROVIDERS, *supra* note 13.

twenty-five.³⁸ Second, the hope is to vaccinate girls before they become sexually active, therefore preempting exposure to HPV.³⁹ By associating sexual activity with the efficacy of the vaccine, the debate over the HPV vaccine has quickly turned to one of sexual morality rather than disease prevention.⁴⁰

While men and boys are also carriers of HPV, the only vaccine on the market is approved for females. The efficacy of the vaccine in males is still not known, though trials are currently underway.⁴¹ The hope is that a vaccine for men will have both direct and indirect benefits.⁴² The direct benefits of vaccinating men against HPV include preventing genital warts as well as the rare cases of penile and anal cancer.⁴³ Indirectly, vaccinating both men and women against HPV could lower the chances of contraction by both genders.⁴⁴

Regardless of who receives the vaccine, the cost of its administration is a major factor in determining how many people will receive it. Each dose of Gardasil retails at \$120 for a total price of \$360.⁴⁵ Most private insurers follow the guidelines and recommendations of the Advisory Committee on Immunization Practices (ACIP) and therefore many cover the vaccine.⁴⁶ Coverage, however, is contingent upon the recipient being a member of the targeted age group.⁴⁷ For those without private insurance, there are many public options as well. Vaccines for Children, the Immunization Grant Program, Medicaid, and State Children's Health Insurance Program (SCHIP) all provide the vaccine to those who qualify for the individual program.⁴⁸ In addition, many states have enacted legislation covering various groups of non-covered girls.⁴⁹

38. Kaiser Background Brief, *supra* note 2.

39. CDC, HPV VACCINE Q&A, *supra* note 37.

40. NCSL, HPV Vaccine, *supra* note 10; see generally Brody, *supra* note 2 (discussing arguments against the HPV vaccine, including the perception that it is linked to promiscuity, and advocating for the implementation of the vaccine despite the controversy); Saul & Pollack, *supra* note 5.

41. CDC, HPV VACCINE Q&A, *supra* note 37.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. KFF, HPV VACCINE, *supra* note 17.

47. *See id.*

48. *Id.*

49. *See* NCSL, HPV Vaccine, *supra* note 10. Seventeen states have enacted legislation that either requires, funds, or educates the public about the HPV vaccine. *Id.*

B. *The Policies Shaping the Debate*

The vaccination itself is marketed as a vaccine for cervical cancer and not HPV.⁵⁰ While not fully accurate, this marketing scheme seems to be an attempt to assuage concerns and criticisms of vaccinating against a STI. There are many concerns from family groups about the possible correlation between the vaccine and future sexual activity.⁵¹ While mandating a vaccine would increase its insurance coverage,⁵² additional non-financial arguments against the HPV vaccine have been articulated.

In the general interest of public health, vaccines have been made mandatory on the state level to prevent diseases such as polio, measles, mumps, rubella, and recently chicken pox.⁵³ The CDC currently recommends twelve distinct vaccinations for all children.⁵⁴ There are no vaccines mandated on the Federal level, only through state health departments.⁵⁵ However, the political and legislative process of mandating a vaccine for a disease such as HPV is accompanied by considerable debate.⁵⁶ Mandating the HPV vaccine is not merely adding another vaccine to the list, it is mandating that all girls be protected against a STI that they may or may not be exposed to before marriage. While the goals are the same—to protect against the disease and make insurance companies cover the costs—the morality question has superseded the public health goals in most state legislatures.

Those in favor of the vaccine look at the overall effect on the community.⁵⁷ By protecting girls from certain strains of HPV, they are significantly reducing the incidence of cervical cancer.⁵⁸ No other vaccine

50. Merck, What is Gardasil®, at www.gardasil.com/what-is-gardasil/ (last visited Feb. 9, 2009).

51. Renee Gerber, *Mandatory Cervical Cancer Vaccinations*, 35 J.L. MED. & ETHICS 495, 496 (2007); Gregory D. Zimet, *Improving Adolescent Health: Focus on HPV Vaccine Acceptance*, 37 J. ADOLESCENT HEALTH (SUPPLEMENT 1) S17, S19 (2005); Saul & Pollack, *supra* note 5.

52. NCSL, HPV Vaccine, *supra* note 10.

53. Ctrs. for Disease Control & Prevention, *Catch-up Immunization Schedule for Persons Aged 4 Months -18 Years Who Start Late or Who Are More Than 1 Month Behind* (2008), available at www.cdc.gov/vaccines/recs/schedules/downloads/child/2008/08_catch-up_schedule_bw_pr.pdf (last visited Feb. 9, 2009).

54. Robert Giffin et al., *Childhood Vaccine Finance and Safety Issues*, 23 HEALTH AFF., Sept.-Oct. 2004, at 98, 100.

55. Kaiser Background Brief, *supra* note 2.

56. See generally NCSL, HPV Vaccine, *supra* note 10. Though the HPV vaccine is approved by the FDA and recommended by the ACIP, the debates in states centers around funding, availability without a mandate, concerns about cost, safety, parents' rights to refuse, and morality. For a state by state survey of proposed or enacted bills see *id.*

57. Zimet, *supra* note 51, at S18-19.

58. *Id.*

has been created to prevent cancer of any kind.⁵⁹ By requiring the vaccine, it is argued, cervical cancer could be eliminated.⁶⁰ The cost of the vaccine is significantly lower than the cost of oncology procedures.⁶¹ The cost to society via insurance payments or taxes to government funding will be greatly reduced by preventing an infection that is as prevalent as HPV and theoretically cervical cancer.⁶²

Additionally, supporters argue, the vaccine for middle school-aged girls is similar to currently mandated vaccines such as the Hepatitis B vaccine.⁶³ While HPV is directly related to sexual activity, this taboo topic is not one to go away, supporters argue.⁶⁴ Many girls are sexually active without parental knowledge, much less approval.⁶⁵ According to a national survey, twenty-four percent of females "reported being sexually active" by the age of fifteen.⁶⁶ Forty percent reported sexual activity by age sixteen and seventy percent of women reported being sexually active by eighteen years old.⁶⁷ Studies also show that teenagers "generally do not make sexual decisions based on fear of contracting a sexually transmitted infection."⁶⁸ If all girls are required to be vaccinated against HPV, those who are too embarrassed or afraid to talk to their parents or even doctors will still be protected. "If the decision is left up to the children once they leave the family home, they are less likely to be vaccinated."⁶⁹

Some may argue that this problem can be alleviated by advocating greater communication and education.⁷⁰ While education is always necessary, especially regarding STIs, the George W. Bush administration advocated an abstinence only curriculum from 2000 to 2008.⁷¹ An

59. Pauline Self, Note, *The HPV Vaccine: Necessary or Evil?*, 19 HASTINGS WOMEN'S L.J. 149, 161 (2008).

60. *Id.*

61. Jessica A. Kahn, *Vaccination as a Prevention Strategy for Human Papillomavirus-Related Diseases*, 37 J. ADOLESCENT HEALTH (SUPPLEMENT 1) S10, S12 (2005); Jane Brody, *supra* note 2 (citing the March 2007 issue of the American Journal of Obstetrics and Gynecology).

62. Kahn, *supra* note 61.

63. Gerber, *supra* note 51, at 496.

64. *See id.*

65. *Id.*

66. Self, *supra* note 59 (citing Debbie Saslow et al., *American Cancer Society Guideline for Human Papillomavirus (HPV) Vaccine Use to Prevent Cervical Cancer and Its Precursors*, 57 CAL. CANCER J. FOR CLINICIANS 7, 16 (2007)).

67. *Id.*

68. Gerber, *supra* note 51, at 496.

69. Self, *supra* note 59, at 162.

70. Zimet, *supra* note 51, at S18.

71. *See generally Domestic Abstinence-Only Programs: Assessing the Evidence Before the H. Comm. on Oversight and Government Reform*, 110th Cong. (2008) (statement of Charles

abstinence-only approach not only limits the educational conversations in schools, but it also exacerbates the stigma associated with sex, therefore compromising the chances of open communication. This concentration on abstinence-only education is seemingly at odds with the goals of the HPV vaccine.

On the other hand, the opponents of the vaccine have strongly voiced concerns. First and foremost, Gardasil has been on the market for only a short period of time, and the long term effects and efficacy are not yet fully known.⁷² To mandate a vaccine with unknown long-term effects is unnecessarily risky to some.⁷³ In addition, HPV is not like the other diseases and infections that are currently mandated.⁷⁴ For example, "HPV is not airborne or otherwise contagious in a traditional school setting."⁷⁵ The chance of contraction decreases with protected sex and the chance of detection increases with regular Pap smears.⁷⁶ Vaccinating against an STI is perceived as an incentive for girls to partake in sexual activity that would otherwise not happen.⁷⁷

C. Current State HPV Vaccine Legislation

States have taken different approaches to address the HPV vaccine issue.⁷⁸ In 2007, Texas Governor Rick Perry signed an executive order mandating that girls get the vaccine before the sixth grade, but it was overturned by the state legislature a few months later.⁷⁹ Virginia is the first state to successfully pass a mandate, but its scope exceeds the current vaccine exemptions laws by allowing parents to refuse or to opt-out of that

Keckler, Acting Deputy Assistant Sec'y for Policy and External Affairs, Admin. for Children and Families, U.S. Dep't of Health and Human Servs.), available at <http://oversight.house.gov/documents/20080423132100.pdf> (last visited Feb. 9, 2009).

72. Gail Javitt et al., *Assessing Mandatory HPV Vaccination: Who Should Call the Shots?*, 36 J.L. MED. & ETHICS 384, 385-88 (2008); Saul & Pollack, *supra* note 5; Gerber, *supra* note 51, at 496.

73. Javitt et al., *supra* note 72, at 387-88.

74. *Id.* at 384-85.

75. Gerber, *supra* note 51, at 496.

76. *Id.*

77. *Id.*

78. See NCSL, *HPV Vaccine*, *supra* note 10.

79. Exec. Order RP65, Relating to the Immunization of Young Women From the Cancer-Causing Human Papillomavirus, by Governor of State of Texas, Feb. 2, 2007; H.B. No. 1098, 2007 Leg., (Tex. 2007); see Pam Belluck, *For One State, Soft Sell Eases Vaccine Fears*, N.Y. TIMES, May 12, 2007, at A1 (stating that "[i]n Texas, a lawmakers' revolt overwhelmingly overturned Gov. Rick Perry's effort to mandate vaccinations."); MSNBC.com, *The Associated Press, Texas Governor Backs Down on HPV Vaccine Bill*, at www.msnbc.msn.com/id/18575675/ (last visited Feb. 9, 2008) [hereinafter *Texas Governor Backs Down*].

particular shot for their own personal reasons.⁸⁰ New Hampshire put a different spin on covering everyone by providing the vaccine free of charge to all girls eleven to eighteen.⁸¹ In addition, eight states have passed legislation that either provides funding for state coverage of the vaccine or requires insurance companies to do so.⁸²

Texas was the first state to enact a plan involving the new HPV vaccine.⁸³ Governor Rick Perry surprised his party, the state, and the country when he signed an executive order mandating that all girls receive the HPV vaccine before entering the sixth grade.⁸⁴ While there was a bill on the floor of the Texas Legislature, the Republican governor took matters into his own hands, hoping to avoid making sexual health a larger political issue.⁸⁵ Texas has the second highest rate of cervical cancer in the country, and Governor Perry was making an effort to protect girls and women.⁸⁶ The executive order was to go into effect in September 2008, meaning that by then all sixth grade girls had to be vaccinated.⁸⁷ The order allowed parents to opt-out “for reasons of conscience, including religious beliefs.”⁸⁸ Unfortunately for Governor Perry, the predominantly conservative legislature did not approve of his order.⁸⁹ It overwhelmingly passed a bill overturning the executive order, in essence reversing the vaccine mandate.⁹⁰

Later in 2007, the General Assembly in Virginia passed a bill similar to the Executive Order in Texas.⁹¹ The bill required girls to get the vaccine before entering high school, although parents could opt out by signing an

80. H.B. 2035, 2007 Leg., Reconvened Sess. (Va. 2007); Belluck, *supra* note 79.

81. H.B. 2035, 2007 Leg., Reconvened Sess. (Va. 2007); Belluck, *supra* note 79; see New Hampshire Dep’t of Health & Human Servs., Free Vaccines for Children, at www.dhhs.nh.gov/DHHS/IMMUNIZATION/LIBRARY/Fact+Sheet/free-vaccines.htm (last visited Feb. 9, 2009) [hereinafter N.H. Free Vaccines for Children].

82. See NCSL, HPV Vaccine, *supra* note 10 (discussing legislation in Colorado, Maine, Nevada, New Mexico, New York, North Dakota, Rhode Island, and South Carolina).

83. Ralph Blumenthal, *Texas Is First to Require Cancer Shots for Schoolgirls*, N.Y. TIMES, Feb. 3, 2007, at A9.

84. *Id.*; Exec. Order RP65, Relating to the Immunization of Young Women from the Cancer-Causing Human Papillomavirus, by Governor of State of Texas, Feb. 2, 2007.

85. Blumenthal, *supra* note 83.

86. *Id.*

87. *Id.*; Exec. Order RP65, Relating to the Immunization of Young Women from the Cancer-Causing Human Papillomavirus, by Governor of State of Texas, Feb. 2, 2007.

88. Blumenthal, *supra* note 83; Exec. Order RP65, Relating to the Immunization of Young Women from the Cancer-Causing Human Papillomavirus, by Governor of State of Texas, Feb. 2, 2007.

89. *Texas Governor Backs Down*, *supra* note 79.

90. *Id.*

91. Tim Craig, *Kaine Says He’ll Sign Bill Making Shots Mandatory*, WASH. POST, Mar. 3, 2007, at B10.

objection form.⁹² Parents do not have to cite a reason on the objection form and their decision regarding the HPV vaccine does not affect receipt of the other vaccinations.⁹³ Virginia's law went into effect in September 2008 for the 2008-2009 school year.⁹⁴

Lawmakers in New Hampshire chose not to pursue a mandate and instead allowed parents to choose whether their daughters should receive the vaccine. One argument for adding the HPV vaccine to the list of required vaccines is that insurance companies would then cover the cost of the shots.⁹⁵ The HPV vaccine was offered free of charge in New Hampshire for girls ages eleven through eighteen.⁹⁶ Instead of finding themselves in the middle of political controversy, New Hampshire is now faced with a different problem—a vaccine shortage.⁹⁷ Many medical centers have an extensive waiting list because they go through the vaccine so quickly.⁹⁸ Despite legislative proposals and discussions of cancer prevention benefits, a significant concern that is still not being addressed is that many parents do not think or want to believe that their daughters are sexually active, so they fail to bring their child in for the vaccine.⁹⁹ This population is not addressed by New Hampshire's funding, but may require a mandate to ensure that these girls are covered.

II. TRADITIONAL CONSTITUTIONALITY OF VACCINES

A. *Jacobson v. Massachusetts*¹⁰⁰

States have been mandating vaccines since the early 1800s.¹⁰¹ Courts recognized that a state's substantial public health interest in protecting its citizens against preventable diseases outweighed any complaint by a citizen of improper governmental intervention.¹⁰² In 1905, the Supreme Court held

92. *Id.*

93. H.B. 2035, 2007 Leg., Reconvened Sess. (Va. 2007).

94. Craig, *supra* note 91; H.B. 2035, 2007 Leg., Reconvened Sess. (Va. 2007).

95. See Tracy Solomon Dowling, Note, *Mandating a Human Papillomavirus Vaccine: An Investigation into Whether Such Legislation Is Constitutional and Prudent*, 34 AM. J.L. & MED. 65, 73 (2008) (finding that the federal government may provide the vaccine under the Vaccines for Children Act).

96. Belluck, *supra* note 79; see N.H. Free Vaccines for Children, *supra* note 81.

97. Belluck, *supra* note 79.

98. *Id.*

99. *Id.*

100. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

101. Javitt et al., *supra* note 72, at 388.

102. See generally *Jacobson*, 197 U.S. 11. *Jacobson*, a Massachusetts man compelled to receive a smallpox vaccination by a public health statute, argued that his Fourteenth Amendment right to due process was infringed by the mandatory vaccine; the Court disagreed

that a Massachusetts statute requiring that “all of the inhabitants of the city [of Cambridge] . . . be vaccinated or revaccinated[]” with the smallpox vaccine was constitutional.¹⁰³ Jacobson refused to receive the free small pox vaccination required by the city of Cambridge and was fined as a result.¹⁰⁴ Jacobson argued that the Fourteenth Amendment to the United States Constitution, “providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws” was contrary to the Massachusetts vaccination mandate.¹⁰⁵ However, the Court rejected the idea that Jacobson’s liberty was invaded, asserting that freedom and liberty does not mean absolute autonomy, for that would result in anarchy.¹⁰⁶ The Court stated that:

[s]ociety based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that ‘persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.’ ‘The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the *safety, health, peace, good order, and morals of the community.*’¹⁰⁷

For a state’s police powers to be constitutional, the state must show four things: 1) “there must be a public health necessity”; 2) “there must be a reasonable relationship between the intervention and public health objective”; 3) “the intervention must not be arbitrary or oppressive”; and 4) “the intervention should not pose a health risk to its subject.”¹⁰⁸ Based upon the *Jacobson* decision, states have required a number of vaccines over the years in an effort to contain public health problems.¹⁰⁹

and reasoned that the state’s compelling interest in preventing a smallpox epidemic outweighed Jacobson’s liberty interest. *Id.* at 14.

103. *Id.* at 27.

104. *Id.* at 13.

105. *Id.*

106. *Id.* at 26.

107. *Jacobson*, 197 U.S. at 26 (citations omitted) (emphasis added).

108. Javitt et al., *supra* note 72, at 388.

109. Coletti, *supra* note 8, at 1346-47 (examples include measles and diphtheria).

B. Exemptions to Mandatory Vaccines

Though a vaccine may be deemed mandatory, there are still ways to legally refuse the treatment. All states recognize some form of exemption from mandatory vaccinations.¹¹⁰ The three types of exemptions recognized across the nation are medical, religious, and philosophical.¹¹¹ All states recognize a medical exemption.¹¹² To be exempted from a vaccine, a medical doctor must determine and sign a statement declaring that the vaccine would be detrimental to the health of the patient.¹¹³ The acceptance standard varies by state—some states automatically accept a doctor's determination, while others may reject the exemption if the state's department of health reviews the decision and feels that it is unjustified.¹¹⁴ All but two states also recognize a religious exemption.¹¹⁵ A religious exemption is for people who believe that administration of vaccines in general is contrary to their religious beliefs.¹¹⁶ Much like with the medical exception, some states are more lenient with their religious exemptions than others.¹¹⁷ Some states require that those requesting the exemption be a Christian Scientist or a member of another "bonafide" religion.¹¹⁸ The most liberal and controversial of exemptions is the philosophical exemption. Currently, eighteen states allow parents and children an exception for a philosophical objection to *all* vaccines.¹¹⁹ Many states require that "individuals must object to all vaccines, not just a particular vaccine in order to use the philosophical or personal belief exemption."¹²⁰ Thus, parents would not be able to invoke a philosophical exemption for just the HPV vaccine due to their personal beliefs and accept the rest of the mandated vaccines. States are in effect giving parents an all or nothing ultimatum.¹²¹

Generally, vaccines themselves are not what parents oppose, since they are the main way to minimize or eradicate a disease.¹²² Some people are

110. See generally Nat'l Vaccine Info. Ctr., Legal Exemptions to Vaccination, at www.909shot.com/state-site/legal-exemptions.htm (last visited Feb. 9, 2009) [hereinafter NVIC, Legal Exemptions]. Discusses each state's exemptions and the various burdens of proof that parents must satisfy. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. See NVIC, Legal Exemptions, *supra* note 110 (Mississippi and West Virginia are the only states that do not allow a religious exemption).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. See NVIC, Legal Exemptions, *supra* note 110.

121. See Coletti, *supra* note 8, at 1370-71.

122. See *id.* at 1348-49, 1350.

opposed to vaccinations or the government's ability to mandate them in general, but the HPV vaccine is the first example where the activity required to contract the disease is the main source of the controversy.¹²³ It would be very difficult to find someone who was opposed to vaccinating against cervical cancer. However, because the vaccine is actually for HPV, an STI, the debate becomes much different. Some states mandate the Hepatitis B vaccine, another STI.¹²⁴ However, the stigma of Hepatitis B is not the same as HPV. The discussion about the HPV vaccine is no longer about eradicating a disease, but rather its causes and the social implications associated with STIs.¹²⁵ Diseases such as measles, mumps, rubella, and even chicken pox are not associated with an activity based on choice.¹²⁶ The argument is that people choose to be sexually active or to have multiple partners.¹²⁷ Therefore, the public health implications are more behavioral as opposed to medicinal. Mandating that people be vaccinated for a perceived consequence is different than a disease that can be contracted anywhere or anytime. In addition, the fact that Gardasil is only approved for women means that there is an inherent inequity in protection.¹²⁸

Because HPV is perceived differently than previously vaccinated conditions, legislation is and has been controversial, heavily debated, and even a source of great media attention.¹²⁹ Each state has experienced a different political process, but the source is the same.¹³⁰ If we start vaccinating against HPV, what does that say about the morality of our society and are we ready for the greater implications?

123. See *id.* at 1359-66 (listing objections such as moral, rites of passage, vaccine safety, contents of vaccines, and scheduling).

124. CTRS. FOR DISEASE CONTROL & PREVENTION, *CHILDCARE AND SCHOOL IMMUNIZATION REQUIREMENTS 2005-2006*, at 13-14, available at www.cdc.gov/vaccines/vac-gen/laws/downloads/izlaws05-06.pdf (last visited Feb. 9, 2009).

125. See Coletti, *supra* note 8, at 1351 (stating that arguments against Hepatitis B vaccine claimed it was unacceptable to vaccinate against diseases mostly contracted because of "behavioral choices."); Brody, *supra* note 2.

126. Javitt et al, *supra* note 72, at 389.

127. *Id.*

128. See Ariel Pizzitola, Comment, *The Constitutionality of Opting Out of Adolescent Sex: HPV Vaccine-Mandate Legislation Raises Constitutional Questions*, 24 J. CONTEMP. HEALTH L. & POL'Y 399, 416-18 (2008).

129. See Elisabeth Rosenthal, *Drug Makers' Push Leads to Cancer Vaccines' Fast Rise*, N.Y. TIMES, Aug. 20, 2008, at A1 (discussing Merck's marketing of the HPV vaccine and how they sold the importance of an HPV vaccine via media attention, even though some question its importance).

130. See generally *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (seminal case discussing the state's ability to mandate vaccines).

C. Mandating Hepatitis B

Public knowledge about HPV and its effects have greatly increased since the introduction and debate over the vaccine.¹³¹ While the public has a general knowledge about STIs, awareness about the prevalence and danger about HPV is low.¹³² However, the thought of vaccinating against a disease contracted through sexual contact, a voluntary activity, stirred many emotions across the country.¹³³ Challenging the moral underpinnings of a vaccine is not a new concept. A similar debate, though on a smaller scale, surrounded the release of the Hepatitis B vaccine in the late 1980s and early 1990s.¹³⁴

Hepatitis B is a liver condition and the leading cause of chronic liver disease and cirrhosis.¹³⁵ The primary ways of contracting Hepatitis B are through intravenous drug use and sexual contact with infected persons.¹³⁶ Because most people get the disease through activities judged immoral, many parents and family rights groups heavily objected to compulsory Hepatitis B vaccination.¹³⁷ In 1991, the CDC decided that Hepatitis B immunization was not reaching those determined to be high-risk, and therefore recommended that all newborns be vaccinated before leaving the hospital.¹³⁸ When Hepatitis B was added to the standard child immunization schedule, parents with religious concerns fought the administration of the vaccine to their children.¹³⁹

A case decided by the Eastern District of Arkansas, *Boone v. Boozman*, showcases the struggle of parents opposed to the Hepatitis B vaccine.¹⁴⁰ Arkansas' immunization requirement was upheld, but the Court reviewed the state's standard for religious exemption.¹⁴¹ In *Boone*, Boone opposed vaccines in general but specifically the Hepatitis B vaccine.¹⁴² Her daughter, Ashley, was refused enrollment in a new public school because she had not received the Hepatitis B vaccine, pursuant to the Rules and Regulations of

131. See Rosenthal, *supra* note 129.

132. Zimet, *supra* note 51, at S18.

133. See Brody, *supra* note 2 (stating that the vaccine has been "mired in controversy.").

134. Coletti, *supra* note 8, at 1351-52.

135. Ctrs. for Disease Control & Prevention, Hepatitis B, FAQs for the Public, at www.cdc.gov/hepatitis/B/bFAQ.htm (last visited Feb. 9, 2009).

136. *Id.*

137. See Coletti, *supra* note 8, at 1351-52.

138. *Id.* at 1352.

139. *Id.*

140. *Boone v. Boozman*, 217 F. Supp. 2d 938, 942 (E.D. Ark. 2002).

141. *Id.*

142. *Id.*

the Arkansas Department of Health.¹⁴³ Boone's request for a religious exemption was denied because her belief that vaccinations are "part of the devil's plan" was not a tenet and practice of a "recognized church or religious denomination," the standard for Arkansas' exceptions.¹⁴⁴ Boone challenged the Arkansas Department of Health's standard of requiring a recognized church's or denomination's beliefs under the First Amendment Free Exercise Clause.¹⁴⁵ While the Court repealed the standard requiring a recognized church or religious denomination to satisfy the religious exemption, the injunction on Ashley's enrollment was not lifted and she was still required to get the vaccination.¹⁴⁶

Vaccines such as Hepatitis B and HPV showcase a general concern that dominates politics—what is the role of a parent and society in protecting the morals of school aged children? More and more, efforts are being taken to prevent STIs nationwide.¹⁴⁷ Many parents are afraid that their efforts to prevent STIs will in effect encourage pre-marital sex.¹⁴⁸ Moral and religious children, it is argued, will not engage in sexual activities and therefore do not need to be protected against or taught about sex or STIs.¹⁴⁹ This argument has also influenced sexual education curriculums in addition to STI vaccines.¹⁵⁰

III. THE COURTS AND SEXUAL EDUCATION

Parents' liberty and freedom to raise their children in their own way is a fundamental interest in the eyes of the Supreme Court.¹⁵¹ The Court continually holds, however, that no liberty interest, regardless of how fundamental it is, can avoid governmental intervention should a state have a compelling interest.¹⁵² While the *Jacobson* Court determined that the state's right to make some vaccines compulsory outweighed individual liberty, the state interest of vaccinating against STIs has not fully been

143. *Id.* at n.4 (citing Rules and Regulations promulgated on July 27, 2000 pursuant to ARK. CODE ANN. §6-18-702(a) (1999) stating "[t]he requirements[] for entry into school[.] . . . three doses of Hepatitis B vaccine and one dose of Varicella (chickenpox) vaccine are required before entering Kindergarten. Three doses of Hepatitis B are required for Transfer students (students not in your school district last school year) and students entering the seventh grade.").

144. *Id.* at 942, 945.

145. *Boozman*, 217 F. Supp. 2d at 952.

146. *Id.* at 957.

147. See Coletti, *supra* note 8, at 1355-56.

148. Brody, *supra* note 2; Self, *supra* note 59, at 162.

149. See *Boozman*, 217 F. Supp. 2d at 945.

150. Miranda Perry, Comment, *Kids and Condoms: Parental Involvement in School Condom-Distribution Programs*, 63 U. CHI. L. REV. 727, 728. (1996).

151. *Id.* at 727-28.

152. *Jacobson v. Massachusetts*, 197 U.S. 11, 26-27 (1905).

established.¹⁵³ States have a compelling interest in protecting its citizens against the threat of communicable diseases.¹⁵⁴ However, is that interest the same when dealing with a disease that could technically be prevented? Does this analysis change when dealing with a topic that is combined with a Free Exercise Clause concern? Does the type of vaccine change the state's interest? Would another STI vaccine be treated the same as the HPV vaccine? Due to HPV's unique position in the world of vaccine debates, the outcome to its possible legislation is not as predictable as the vaccines before it. Should legislation be enacted, it must protect both the Due Process and Free Exercise Clauses of the United States Constitution.

While a vaccine for a STI is new, many of the issues surrounding the compulsory vaccine have been addressed before in non-vaccine debates. A parent's protected liberty interest in their children's upbringing is not absolute and must go through the same Due Process analysis postured for HPV.¹⁵⁵ Two examples of this analysis are sexual education and providing condoms to students in public schools.¹⁵⁶ Schools are given a great amount of autonomy when it comes to their curriculum and the education of children.¹⁵⁷ When the education involves family relationships, discussions of sex, and sexually transmitted infections, the role of the school versus the parents is not as clear.

A. *Due Process of Parental Liberty and Free Exercise*

Debates regarding sexual education and condom distribution center on the perceived violation of the Fourteenth Amendment right to liberty.¹⁵⁸ The Fourteenth Amendment grants parents and the family unit the fundamental liberty of certain areas or zones of privacy.¹⁵⁹

This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.' While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government

153. *Id.*

154. *Id.*

155. See Perry, *supra* note 150, at 728.

156. See, e.g., *id.* at 729.

157. Citizens for Parental Rights v. San Mateo County Board of Educ., 51 Cal. App. 3d 1, 28-29 (1975) (the "State Board is directed to determine the educational policies of the state and to enact bylaws for the administration of the public school system . . .").

158. U.S. CONST, amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

159. Roe v. Wade, 410 U.S. 113, 152 (1973).

interference are personal decisions 'relating to marriage, contraception, family relationships, and child rearing and education.'¹⁶⁰

While these rights are not absolute, the right to liberty is considered fundamental and therefore follows a strict scrutiny standard of review when that liberty is limited.¹⁶¹ A limitation of a fundamental right is allowed if it is both necessary and narrowly tailored to promote a compelling governmental interest.¹⁶²

The 1920s produced a wave of cases that questioned the rights and roles of parents in raising their children.¹⁶³ The first of these cases is *Meyer v. Nebraska*, in which the ability of the state to prohibit the teaching of foreign languages to students before finishing the eighth grade was challenged.¹⁶⁴ Liberty, according to the *Meyer* Court, could not be defined in exact terms:

. . . [I]t denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁶⁵

While the rights of the parent were phrased in the terms of education, the role of family liberty was established and expanded just two years later.¹⁶⁶

In *Pierce v. Society of the Sisters*, the Supreme Court strengthened the liberty of parents to raise their children in by overturning an Oregon law requiring students to attend public school instead of pursuing other types of education.¹⁶⁷ The Court found that the provision had "no reasonable relation to some purpose within the competency of the state."¹⁶⁸ *Pierce* also introduced a balancing of state and parental interests with respect to the upbringing of youth, noting that "[t]he child is not the mere creature of the

160. *Carey v. Population Services Int'l*, 431 U.S. 594, 678, 684-85 (1977) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (regarding important decisions) (citations omitted); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (regarding interracial marriage); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972) (regarding contraception); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (regarding family relationships); and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (regarding child rearing and education)).

161. *Carey*, 431 U.S. at 686.

162. *Id.*

163. *Perry*, *supra* note 150, at 730.

164. *Meyer v. Nebraska*, 262 U.S. 390, 396-97 (1923).

165. *Id.* at 399.

166. *Perry*, *supra* note 150, at 731.

167. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925).

168. *Id.* at 535.

state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹⁶⁹

Along with the Fourteenth Amendment fundamental right to liberty, the right to free exercise of religion is also given to parents when it comes to raising their children and dictating their health and education.¹⁷⁰ The primary example of parents' rights to free exercise of religion with regard to their children is *Wisconsin v. Yoder*, a challenge by the Amish community to Wisconsin's mandatory school attendance until a student is sixteen years old.¹⁷¹ The Court, recognizing the Amish community and religious practice of family and home life, struck down the Wisconsin statute.¹⁷² The right to free exercise of religion requires that the belief to be grounded in religion and not secular beliefs.¹⁷³ Once this is established, "religiously grounded conduct" is also given a similar balancing test to the due process fundamental liberty rights.¹⁷⁴ Should the interest of free exercise of religion outweigh the State's interest and broad police power, those rights must not be denied to a citizen.¹⁷⁵

While it has expanded the role of parents in the eyes of the state, the Supreme Court has also reigned in parental liberty and given credence back to compelling state interests. In *Prince v. Massachusetts*, Ms. Prince was charged with allowing the nine-year-old she served as guardian for sell magazines for the Jehovah's Witnesses.¹⁷⁶ Though she contested this law based on both her Fourteenth Amendment parental liberties as well as her right to free exercise of religion, the Court rejected these arguments as beyond the scope of the Constitution.¹⁷⁷ The Court noted that "neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways."¹⁷⁸ *Prince* established that in balancing the rights of state versus parent, it remains part of the state's role to protect children against "some clear and present danger", be it child labor or communicable disease or ill health.¹⁷⁹ States

169. *Id.*

170. See *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

171. *Id.*

172. *Id.* at 235-36.

173. *Id.* at 215.

174. *Id.* at 220-21.

175. *Yoder*, 406 U.S. at 220-21.

176. *Prince v. Massachusetts*, 321 U.S. 158, 161-62 (1944).

177. *Id.* at 166.

178. *Id.*

179. *Id.* at 167.

have enjoyed the ability to dictate educational curriculums and health policy within this stated role.

B. *Sexual Education in Public Schools*

States enjoy the power to write and enforce educational curriculum requirements.¹⁸⁰ One such requirement in most states are sexual education classes discussing human anatomy, reproductive systems, sexually transmitted infections, and issues surrounding maturity.¹⁸¹ However, many parents have challenged these classes under the Free Exercise and Due Process clauses in hopes of retaining the right to direct and control their child's education.¹⁸² In many cases, a challenge based on Free Exercise requires that parental objections be religious, and not merely philosophical or personal.¹⁸³ In all cases, provisions excusing students of objecting parents are upheld, while compulsory programs require a substantial interest of both the state and the student.¹⁸⁴

Cases in which parents are given an opt-out clause do not violate either Free Exercise clause or Due Process clause of the Constitution.¹⁸⁵ In *Citizens for Parental Rights v. San Mateo County Board of Education*, a California Appellate Court focused on coercion, an element upon which the Free Exercise Clause is predicated.¹⁸⁶ The case involved a state statute requiring that all parents be notified of any class involving family life or sexual education and then be given the right to remove their child from the program.¹⁸⁷ The Court found that parents' right to refuse to send their children to such classes does not harm the students, nor are social pressures enough to constitute compulsion, thus negating the parents' claim that the program was coerced.¹⁸⁸ The Court reasoned that even without coercion, and therefore without infringement on any constitutionally protected rights, the state interests of education and public health outweighed a parent's due process claim.¹⁸⁹

California's requirement that schools allow parents to opt out of sexual education classes protects schools from more litigation regarding sexual

180. *Davis v. Page*, 385 F. Supp. 395, 402 & n.6 (D.N.H. 1974).

181. See *id.* (describing the state's curricula requirements).

182. See *Perry*, *supra* note 150, at 728.

183. *Davis*, 385 F. Supp. at 402.

184. *Id.* at 406 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972)).

185. See *Citizens for Parental Rights v. San Mateo County Board of Educ.*, 51 Cal. App. 3d 1, 18, 27-29 (1975).

186. *Id.* at 17-18.

187. *Id.* at 5 n.3.

188. *Id.* at 19-20.

189. *Id.*

education programs.¹⁹⁰ However, many states do not require a parental opt-out provision and thus schools are at risk when they make programs compulsory.¹⁹¹ In many cases, the interest of the state mixed with the secular curriculum usually provides schools with the legal authority to mandate these programs.¹⁹² Two cases highlight that these programs do not violate due process or the right to free exercise.¹⁹³

Cornwell v. State Board of Education was a case brought in Maryland by taxpayers seeking to enjoin the implementation of sexual education programs in public schools.¹⁹⁴ The District Court rejected the plaintiffs' due process claims on the grounds that there was not "an arbitrary or unreasonable exercise of the authority vested in the State Board to determine a teaching curriculum"¹⁹⁵ While the right to raise children has been established, the specific right to teach children "about sexual matters in their own homes" was not recognized by the Court.¹⁹⁶ In its analysis of the plaintiffs' free exercise of religion claim, the Court looked to *Epperson v. Arkansas* and its holding that a state cannot ban a teaching "solely because it conflicts with a particular doctrine of a particular religious group."¹⁹⁷ The Court also cited the reasoning in *Prince* that "the State's interest in the health of its children outweighs claims based upon religious freedom and the right of parental control."¹⁹⁸

Similarly, in *Davis v. Page*, the District Court in New Hampshire ruled that philosophical or personal objections to curriculum based on religious tenants do not require protection.¹⁹⁹ As members of the Apostolic Lutheran Church, the Davis family objected to many aspects of the New Hampshire school curricula, including sexual education classes.²⁰⁰ While recognizing the fundamental liberty of parents to nurture and raise their children, the District Court applied the *Yoder* and *Prince* balancing tests of the rights of

190. See *Citizens for Parental Rights*, 51 Cal. App. 3d at 19-20.

191. Laurent B. Frantz, Annotation, *Validity of Sex Education Programs in Public Schools*, 82 A.L.R. 3d 579, § 3(b) (1978).

192. *Id.*

193. See e.g., *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (holding that Arkansas statutes forbidding public schools from teaching evolution violates the First Amendment as contrary to freedom of religion); *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340, 342 (D. Md. 1969) (affirming a motion to dismiss due to the sexual education curriculum not having the primary effect of establishing a particular religious dogma or precept).

194. *Cornwell*, 314 F. Supp. at 341.

195. *Id.* at 342.

196. *Id.*

197. *Id.* at 343 (citing *Epperson*, 393 U.S. at 104 (1968)).

198. *Id.* at 344 (citing *Prince v. Massachusetts*, 321 U.S. 158, 168-69 (1944)).

199. *Davis v. Page*, 385 F. Supp. 395, 402 (D.N.H. 1974).

200. *Id.* at 397.

parents and the obligations of the state to educate and prepare children.²⁰¹ After examining a letter written by the parents to the school outlining their complaints, the Court determined that the parents' political and philosophical beliefs were offended as opposed to their religion.²⁰²

While a parental opt-out clause is not always necessary when providing sexual education classes, the line between education and providing for protection is fairly clear. When the state begins to take preventative measures in schools, the analysis becomes very different.

C. Condom Distribution

The distribution of condoms in public schools is notably more controversial than the administration of the HPV vaccine. Of the hundreds of schools that provide condoms for their students, approximately forty percent of these schools do not require parental permission or allow parents to opt out of the program on behalf of their children.²⁰³ Some parents see a distribution program as a violation of their privacy and their fundamental liberty to raise their children.²⁰⁴ Due to two contradicting cases, the constitutionality of condom distribution programs and whether they violate the Fourteenth Amendment Due Process Clause remains unresolved.²⁰⁵

In the early 1990s, parental consent to condom distribution in New York City public schools was not necessary, nor were parents given the ability to opt their children out of the condom distribution program.²⁰⁶ A group of parents challenged the program, claiming that it violated their right to consent to the health services of their children, their Fourteenth Amendment parental liberty interests, and their right to free exercise of religion.²⁰⁷ The parents' consent argument was a statutory claim, and was successful in this case, but their two constitutional claims carried greater weight for the court.²⁰⁸ The *Alfonso* Court reiterated that parents "enjoy a well-recognized liberty interest in rearing and educating their children in accord with their own views."²⁰⁹ The United States Supreme Court has held that this liberty is

201. *Id.* at 399.

202. *Id.* at 402-04.

203. Perry, *supra* note 150, at 739.

204. *Id.* at 728-29.

205. *Id.* at 740; see, e.g., *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 261 (1993); *Curtis v. School Committee of Falmouth*, 652 N.E. 2d 580, 587 (Mass. 1995).

206. *Alfonso* 606 N.Y.S.2d at 261.

207. *Id.* at 263, 265, 267.

208. *Id.* at 268.

209. *Id.* at 265 (citing U.S. CONST. amend. XIV; N.Y. CONST. art. I, § 6).

fundamental, and accordingly the *Alfonso* Court evaluated the facts of the case with strict scrutiny.²¹⁰

First, the Court determined that the rights of the parents were interfered with before it determined whether the condom distribution program was allowable.²¹¹ The stated aim of the condom distribution program was to decrease the spread of AIDS.²¹² While it did not contest the purpose of the program, the Court noted that it could not be “blinded by the concept that the end justifies the means.”²¹³ Instead of focusing on health education, the Court saw the program as offering “the means for students to engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases”, and therefore interfering with parental decision-making when it comes to access to contraceptives.²¹⁴ Access to contraceptives in an environment that minors are required to attend is “a decision which is clearly within the purview of the petitioners’ constitutionally protected right to rear their children,” and that the schools have “forced that judgment on them.”²¹⁵

Because the program infringed the parents’ Fourteenth Amendment right to liberty, the Court determined that the compelling state interest to control AIDS could be enacted in forms other than providing condoms in schools.²¹⁶ The Court noted that, for example, minors are allowed to purchase condoms legally and without much difficulty after being educated by the schools regarding the dangers of STIs.²¹⁷ In addition, the Court found that an opt-out clause for parents to refuse participation on behalf of their children would alleviate the interference on parents’ constitutionally protected rights.²¹⁸

In contrast to the *Alfonso* Court’s holding, the Massachusetts Supreme Court determined that a condom distribution program did not infringe upon parental liberty even in the absence an opt-out clause.²¹⁹ The Falmouth Schools provided condoms to junior high and high school students either by

210. See *Alfonso*, 606 N.Y.S.2d at 265; *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Perry*, *supra* note 150, at 728-29.

211. *Alfonso*, 606 N.Y.S.2d at 266.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Alfonso*, 606 N.Y.S.2d at 266-67.

217. *Id.* at 267 (citing *Carey v. Population Services International*, 431 US 678, 696 (1977)).

218. *Alfonso*, 606 N.Y.S.2d at 267.

219. *Curtis v. School Committee of Falmouth*, 652 N.E. 2d 580, 587 (Mass. 1995).

request for free, or by purchase through available vending machines.²²⁰ Based on the nature of the program, the Court focused on the coercive element of the program, and stated that it was implied and inherent to previous Fourteenth Amendment cases.²²¹ The Court stated that “[c]oercion exists where the governmental action is mandatory and *provides no outlet* for the parents, such as where refusal to participate in a program results in a sanction or in expulsion.”²²² Unlike in *Alfonso*, the mere fact that school attendance was compulsory did not correlate with participation in the condom distribution program.²²³ Additionally, the Court noted that exposure itself neither negated the parents’ “role as advisor” nor “amount[ed] to unconstitutional interference with parental liberties without the existence of some compulsory aspect to the program.”²²⁴

IV. THE FUTURE OF HPV LEGISLATION AND PARENTAL OPT-OUTS

In light of the HPV’s unique status as both a disease and a product of sexual activity, the debate surrounding the mandate of the HPV vaccine reaches beyond the normal arguments of state power. As vaccines for STIs develop, the role of the state in requiring those vaccinations may increasingly parallel the case law addressing sexual education programs as opposed to that of traditional vaccines. Can states make the HPV vaccine mandatory for girls, and if so, is a parental opt-out clause necessary? The answer to the first question will always be yes in accordance with *Jacobson*.²²⁵ When dealing with a STI, the answer to question two is also yes as future litigation moves forward.

The *Jacobson* Court viewed the public health interest of the state as compelling enough to validate an infringement on personal liberty as by requiring vaccinations.²²⁶ However, much like the case of smallpox at the turn of the century, all required vaccinations targeted communicable diseases that threatened society as a whole.²²⁷ As vaccines such as Gardasil are developed for STIs, the compelling state interest of protecting

220. *Id.* at 582-83.

221. *Id.* at 585.

222. *Id.* at 586 (emphasis added).

223. *Curtis*, 652 N.E. 2d at 586 (“The students are not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use.”).

224. *Id.* at 587. “[T]he mere fact that parents are required to send their children to school does not vest the condom . . . program with the aura of ‘compulsion’ necessary to make out a viable claim of deprivation of a fundamental constitutional right.” *Id.*

225. See *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905).

226. *Id.* at 29.

227. See *Javitt et al.*, *supra* note 72, at 388.

the public health is no longer as cut and dry—especially for a conservative court.

To assess the state's interest in protecting girls against HPV and cervical cancer, courts will consider a state's interest in educating students about sexual activity and STIs and protecting the population against AIDS.²²⁸ Unfortunately, how courts will evaluate this interest is not clear and thus requires much speculation. In all cases involving a parental opt-out clause, state programs have been consistently upheld as not violating parents' fundamental liberty interest in raising their children.²²⁹ Where a parental opt-out clause is present, the coercion element does not exist and the program does not sufficiently infringe any constitutionally protected liberty interest.²³⁰

All other vaccines have been upheld without a voluntary opt-out clause because the compelling state interest outweighs its liberty infringement even under the strict scrutiny test applied to fundamental liberties.²³¹ A state has an undeniable interest in the health and education of its residents.²³² This interest is why health and education are linked so closely together. For example, vaccine requirements are enforced when children enroll in school.²³³ As articulated in *Davis*, the State's duty "to provide for the health, welfare, and safety of its citizens" is "paramount."²³⁴ However, like the distribution of condoms, is the interest in preventing a STI enough to require mandatory vaccination? The elements in *Jacobson* can and should be applied to the question of compulsory HPV vaccination, with particular attention to whether such a mandate would be considered "oppressive."²³⁵

First, a HPV vaccine must be considered a public health necessity.²³⁶ Whether the vaccine is in fact a public health necessity has received much scrutiny in the past year.²³⁷ Unlike other vaccinated diseases, HPV is not

228. See *supra* Part III (discussing legal precedent pertaining to sexual education and condom distribution in schools).

229. See *supra* Part III; see, e.g., *Citizens for Parental Rights v. San Mateo County Board of Educ.*, 51 Cal. App. 3d 1, 18 (1975); *Alfonso v. Fernandez*, 606 N.Y.S. 2d 259, 267 (1993).

230. See, e.g., *Curtis v. School Committee of Falmouth*, 652 N.E.2d at 587.

231. *Id.*

232. *Davis v. Page*, 385 F. Supp. at 404 (D.N.H. 1974).

233. See *Dowling*, *supra* note 95, at 69.

234. *Davis*, 385 F. Supp. at 404.

235. See *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905). Whether a government intervention is constitutionally permissible is assessed using the following elements: 1) Is the intervention a public health necessity? 2) Is there a reasonable relationship between the intervention and the public health objective? 3) Is the intervention arbitrary or oppressive? 4) Does the intervention pose a health risk to its subject? *Id.*

236. *Id.*

237. *Javitt et al.*, *supra* note 72, at 389 (stating that the "HPV infection presents no public health necessity, as that term was used in the context of *Jacobson*."); see generally Rosenthal,

particularly contagious through everyday contact.²³⁸ In addition, the number of women in the U.S. that actually contract cervical cancer from HPV is much lower than what may be considered a public health necessity.²³⁹ However, Gardasil is the first vaccine that aims to combat cancer at a time when cancer rates continue to rise.²⁴⁰ In addition, HPV is the most common and widespread STI in the U.S.; this fact alone may be enough to consider it a public health necessity.²⁴¹

"Second, there must be a reasonable relationship between the intervention and the public health objective."²⁴² Again, whether a reasonable relationship exists between the HPV vaccine and a public health objective has also been questioned due to both low "prevalence of HPV types associated with cervical cancer" and the widespread use of Pap smears in the U.S.²⁴³ In addition, not all women have an equal risk of exposure to the virus and therefore do not have an equal need for a widespread vaccine initiative.²⁴⁴ Other alternatives to the HPV vaccine are required annual Pap smears, or "measures to provide for HPV testing of lower-income and minority women at a higher risk for developing cervical cancer, in lieu of mandating the HPV vaccine."²⁴⁵ However, the vaccine has proven to be very effective against precancerous cervical lesions, vaginal and vulvar lesions, and genital warts.²⁴⁶ The administration of the vaccine to younger girls (ages eleven through thirteen years old) is near imperative, as the vaccine's efficacy requires that it be given before a girl is exposed to HPV and ideally before her sexual debut.²⁴⁷

supra note 129 (discussing the media's role in making HPV sound more dangerous than it may be).

238. See Javitt et al., *supra* note 72, at 389 (unlike tetanus, which is not airborne like HPV, but has a high exposure in a school environment).

239. See Rosenthal, *supra* note 129.

240. See Dowling, *supra* note 95, at 65 (noting that "cervical cancer is a major public health concern."); see also World Health Organization, *Global Cancer Rates Could Increase by 50% to 15 Million by 2020*, Apr. 3, 2003, at www.who.int/mediacentre/news/releases/2003/pr27/en/print.html (last visited Feb. 9, 2009).

241. NCSL, HPV Vaccine, *supra* note 10; Q&A for the Public, *supra* note 9; KFF, HPV VACCINE, *supra* note 17.

242. See Javitt et al., *supra* note 72, at 388; *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

243. Wood, *supra* note 4, at 33.

244. *Id.*; Javitt et al., *supra* note 72, at 389.

245. Wood, *supra* note 4, at 33.

246. *Id.* at 31.

247. *Id.*; Law, *supra* note 1, at 1742 (quoting Dr. Andrew Weil: "This is a big public health step forward. More than half of all men and women pick up HPV within a year of becoming sexually active. The vaccine won't work for women who already are infected with HPV, which is why it is so important to immunize young girls before they become sexually active.").

Because HPV is a STI, it is theoretically preventable, or at least less likely to be contracted with preventive action. Examples of such preventive action include abstinence or a limited number of sexual partners. However, unlike other STIs, any sexual contact is enough to spread the disease, and condoms are only partially effective.²⁴⁸ Some may consider it reasonable that a woman could contract the disease after marriage with only one sexual partner. Others argue that HPV does not necessarily result in cervical cancer or other types of complications associated with the disease, and therefore HPV itself is not the threat.²⁴⁹ The likelihood of developing cervical cancer itself can be reduced by regular gynecological visits and early detection.²⁵⁰ Therefore, if cervical cancer is a state's sole concern, the vaccine itself may be viewed as excessive.

If HPV is the main concern, then the vaccine may be the necessary preventative. A primary goal of mandating the HPV vaccine is to ensure that insurance companies cover it.²⁵¹ The interest of the state in protecting the health of its residents extends to assisting with health care costs either through Medicaid or by requiring insurance companies to cover programs.²⁵² However, New Hampshire's free vaccine program is an example of a way to cover costs and protect against a disease without a mandated vaccine.²⁵³ If a state does not have the available resources for a similar plan, as many may not, then compulsory vaccines (or laws requiring insurance coverage) are most likely necessary.²⁵⁴

The third and fourth elements of the *Jacobson* test are that the vaccine must not be arbitrary and oppressive and should not pose a health risk.²⁵⁵ The health risk of the vaccine is still yet to be determined and may be cause for concern.²⁵⁶ Thus, in litigation concerning mandatory HPV vaccination, the most likely issue is whether compulsory administration of the HPV vaccine is oppressively intrusive.

In the balance of State's interest and parental liberty, the test of strict scrutiny for fundamental rights requires that the compelling state interest outweigh the parental liberty.²⁵⁷ As is evidenced by parents' outrage in Texas, a significant group of parents do not want their children to receive

248. CDC, Q&A for the Public, *supra* note 9.

249. CDC, HPV INFORMATION FOR PROVIDERS, *supra* note 13.

250. Kaiser Background Brief, *supra* note 2.

251. NCSL, HPV Vaccine, *supra* note 10.

252. See Kaiser Background Brief, *supra* note 2.

253. *Id.*

254. NCSL, HPV Vaccine, *supra* note 10.

255. *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905).

256. Javitt, *supra* note 72, at 386.

257. JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 241 (2007).

the HPV vaccination either for philosophical or religious reasons.²⁵⁸ Like the *Boozman* case in Arkansas, parents believe that religious children will not get HPV because they will not have pre-marital sex.²⁵⁹ In addition, some parents do not want the state interfering with the medical choices that they make on behalf of their children.²⁶⁰

In response to the perceived invasive nature of a compulsory HPV vaccine, as well as a legal compromise, both the Virginia²⁶¹ and Texas²⁶² laws allowed parents to opt their children out of the vaccine.²⁶³ At first glance, this concession seems to be more of a political cop-out than a legally required opt-out. The effectiveness of the HPV vaccine for young girls would thus decrease due to the ease with which parents could refuse it. However, a vaccine mandate that is weak on a *Jacobson* analysis requires this safety feature. As Governor Perry discovered in Texas, mandating the HPV vaccine is politically risky.²⁶⁴ Like the mandate of the Hepatitis B vaccine, some parents may be quick to challenge the constitutionality of the mandate on many grounds.²⁶⁵ As has been shown in sexual education and condom distribution cases, both First and Fourteenth Amendment challenges are very unlikely to succeed where a broad opt-out option for parents exists.²⁶⁶ While the existing vaccine exemption procedures should by no means be weakened, but a new mandated vaccine needs the strength of the state and its legislature to succeed. For a HPV vaccine mandate to succeed, an opt-out is legally necessary at this time to avoid the unclear precedent that surrounds analogous sexual education and condom distribution program legislation.

CONCLUSION

The statistics regarding HPV and cervical cancer in this country are enough to make anyone acknowledge that HPV is a growing problem among girls and women.²⁶⁷ The creation of a vaccine for the strains of HPV that cause most cases of cancer has stimulated debate among state

258. See *Texas Governor Backs Down*, *supra* note 79; see Brody, *supra* note 2; see, e.g., *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002).

259. *Boozman*, 217 F. Supp. 2d at 945.

260. *Texas Governor Backs Down*, *supra* note 79.

261. See Craig, *supra* note 91; H.B. 2035, 2007 Leg., Reconvened Sess. (Va. 2007).

262. See Blumenthal, *supra* note 83; H.B. No. 1098, 2007 Leg., (Tex. 2007).

263. See Pizzitola, *supra* note 128 at 414-15; H.B. 2035, 2007 Leg., Reconvened Sess. (Va. 2007); H.B. No. 1098, 2007 Leg., (Tex. 2007).

264. See *Texas Governor Backs Down*, *supra* note 79.

265. See generally Pizzitola, *supra* note 128 (arguing that mandating vaccine for girls only opens states up to an Equal Protection case; until the vaccine is approved for and mandated for boys, this challenge may still exist. This challenge is beyond the scope of this paper).

266. See *supra* Part III B & C.

267. See *supra* Part I A.

legislators as to whether or not the vaccine should be mandatory for girls during their school years.²⁶⁸ States have the ability to mandate vaccines if a compelling state interest in the health of its citizens exists.²⁶⁹ However, the balancing of personal liberty and state interest is not necessarily a carbon copy of other mandated vaccinations due to the nature of HPV.

In order to re-evaluate the tipping point of a vaccine for a STI, one should look to the precedent set by the courts regarding sexual education and condom distribution by states in public schools.²⁷⁰ Sexual education is more likely than not to be upheld as a compelling state interest on the grounds of education and health standards.²⁷¹ However, when providing contraceptives like condoms, which also protect against STIs, the rights of parents to opt their children out of state programs is more likely to outweigh the interest of the state.²⁷² Regardless of whether the state is protecting against AIDS or HPV, parental involvement can not be overlooked.

The HPV vaccine is a very significant advancement of science and the fight against cancer. The greater interest of public health for all girls may require them to be vaccinated before they become sexually active in order to reduce the incidence of cervical cancer. However, states cannot ignore the parental interest in their daughters' sexual health. While, assumedly, most girls do not consult their parents when making choices regarding sex, the fundamental liberty of parents to dictate the upbringing of their child is much more affected by the HPV vaccine than previous vaccinations. Much like sexual education curriculums, it may be in the best interests of both states and schools to provide an opt-out clause for parents with qualifications. While a parental opt-out may limit the efficacy of the vaccine in the immediate future, the threat of future litigation and political pressure make it a necessary evil. How courts will analyze HPV vaccine mandates in light of its status as an STI is unknown, but it should not be taken for granted that an HPV vaccine mandate will be treated like any other vaccine the Court has addressed before.

FELICIA B. ESHRAGH*

268. NCSL, HPV Vaccine, *supra* note 10.

269. *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

270. See *supra* Part III B & C.

271. See *Davis v. Page*, 385 F. Supp. at 402 (discussing state's curricula requirements).

272. See *Curtis v. School Committee of Falmouth*, 652 N.E. 2d at 580, 585 (Mass. 1995).

* JD/MPH in Health Policy, Saint Louis University School of Law, anticipated January 2010; BA, International Relations, Michigan State University, 2004. I would like to thank the Staff and Executive Board of the *Saint Louis University Journal of Health Law & Policy* for all of their help and tireless work. I would also like to thank Professor Elizabeth Pendo for her continued advice, feedback, and input on this paper and throughout law school.