

NOT STRICTLY SPEAKING: WHY STATE PROHIBITIONS
AGAINST PRACTICING SEXUAL ORIENTATION
CHANGE EFFORTS ON MINORS ARE
CONSTITUTIONAL UNDER FIRST AMENDMENT
SPEECH PRINCIPLES

*Brian McGinnis**

"I am not broken. I am not confused. I do not need to be fixed"
-Parsippany High School student Jacob Rudolph¹

I. INTRODUCTION

While the history of treatment of lesbian, gay, bisexual, and transgender ("LGBT") people in America is largely shameful, recent days have seen real change, with additional progress on the horizon. Although there have been setbacks, the past decade has seen a string of legal and political victories for LGBT² individuals in American society—creating unmistakable momentum for full equality under the law. Setting the stage for these victories has been a burgeoning sense of societal acceptance and affirmation of non-heterosexual sexual orientations. At present, one cannot help but get the sense that it is only a matter of time

* Candidate for J.D. May 2015 Rutgers School of Law–Camden. This Note is dedicated to my friend, the late David Rosenblum, Legal Director of the Mazzoni Center in Philadelphia, whose towering intellect and fierce advocacy were exceeded only by his warmth and generosity of spirit.

1. Susan K. Livio, *Gay-to-Straight Conversion Therapy Ban OK'd by N.J. Assembly Panel*, STAR-LEDGER (June 14, 2013), http://www.nj.com/politics/index.ssf/2013/06/straight-to-gay_conversion_therapy_okd_by_nj_assembly_panel.html. Rudolph is openly LGBT. *Id.*

2. In this Note, I use the term LGBT as a shorthand umbrella term to include all persons of non-heterosexual sexual orientation. It should not be construed as a limiting term, but rather as an inclusive term.

before the final waves of equality sweep in and erode the remaining legal, political, and social barriers to full LGBT equality.

Still, a significant segment of society clinging to historically traditional paradigms continues to resist the coming tides. On some level, this is intuitive—an expected outcome of any social movement involving significant progress and disruption of traditional social norms. This segment of individuals clings to and seeks to restore a different vision of America—an America that uses institutions of law and levers of politics to enshrine disapproval, stigma, and discrimination and condemns LGBT people and their families to the dark corners of society. A major driver of this vision of America is the notion that non-heterosexual sexual orientations are not natural or innate but rather are a form of mental illness that may be reversed through medical interventions and psychotherapy.

The school of thought that seeks to pathologize LGBT individuals in this way has historically engaged in sexual orientation change efforts (“SOCE”). While specific SOCE practices have varied from the historically barbaric to today’s talking therapies that resemble traditional psychotherapy, there is a wide consensus among the nation’s leading medical and scientific organizations that rejects the legitimacy of SOCE practices.³ Despite this growing consensus, forty-eight states continue to permit their state-licensed mental health professionals to practice SOCE on minors. Only California and New Jersey have enacted statutory bans⁴ of this practice, and these prohibitions are currently being challenged in the courts on constitutional grounds.⁵ Perhaps the most significant ground upon which SOCE’s proponents challenge the laws is the Free Speech Clause of the First Amendment. In this Note, I will explore the constitutionality of the California and New Jersey laws under First Amendment speech principles and argue that these statutes pass constitutional muster under these principles.

Part II of this Note describes recent political and legal developments in the treatment of LGBT individuals. Part III explores the history of SOCE practices, examines modern SOCE practitioners and proponents, and surveys the positions of the relevant major scientific and medical professional organizations on SOCE. Part IV recounts the histories of the California and New Jersey statutes that prohibit licensed mental health professionals from practicing SOCE on minors. Part V focuses on the First Amendment speech analysis of the statutes. This part analyzes the

3. See *infra* Part III.

4. SB-1172, Ch. 835 Stat. 2012; N.J. STAT. ANN. § 45:1-55 (2013).

5. *Pickup v. Brown*, 740 F.3d 1208, 1215 (9th Cir. 2013); *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013).

differences between protected speech and unprotected conduct in the context of First Amendment speech challenges to these SOCE bans, concludes that the statutes are constitutional, and examines the implications of the speech/conduct analysis.

II. POLITICAL CONTEXT

In order to best understand the legal context of statutory bans on SOCE, one must first understand the broader political context of LGBT Americans over the past several decades. An old saying declares that in politics, with its rapid and often-shifting electoral, demographic, and governing coalitions, a year is equivalent to a lifetime. If this popular axiom holds true, it might be more accurate to characterize the past twenty years as ushering in a new era, particularly as it concerns the legal rights of LGBT individuals in America.

It was not long ago that LGBT individuals in this country were severely marginalized—easy and obvious targets of adverse political agendas. President Clinton's early fight to allow LGBT men and women to serve openly in the armed forces of the United States met with severe public backlash, resulting in the infamous "Don't Ask, Don't Tell" compromise.⁶ A 1993 decision by the Hawaii Supreme Court,⁷ invalidating that state's ban on same-sex marriages, ultimately led to the enactment⁸ of the Defense of Marriage Act ("DOMA") in 1996.⁹ Tellingly, prominent political strategists¹⁰ believed President Clinton's signing of DOMA was a strong political move, crucial to his successful re-election efforts.¹¹

6. See Meena Hartenstein, *Bill Clinton Regrets "Don't Ask, Don't Tell" Policy, Says It Was Meant to Protect Gay Soldiers*, N.Y. DAILY NEWS (Sept. 21, 2010), <http://www.nydailynews.com/news/politics/bill-clinton-regrets-don-don-policy-meant-protect-gay-soldiers-article-1.441841>.

7. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

8. H.R. REP. NO. 104-664, pt. 2, at 4 (1996).

9. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

10. See Hartenstein, *supra* note 6.

11. In a 1996 interview with the LGBT magazine *The Advocate*, Clinton noted that his position was that marriage was between a man and a woman. J. Jennings Moss, *Bill Clinton: The Advocate Interview*, ADVOCATE, June 25, 1996, at 44, 50. He later clarified that despite this view, he considered the issue "divisive and unnecessary" in a letter. Letter from Bill Clinton, former President of the United States, to Stephen (Aug. 7, 1996), available at <http://www.qrd.org/qrd/usa/federal/doma/1996/clinton.letter-08.07.96>. He would later note that he signed the legislation, which received veto-proof majorities in Congress, despite his personal opposition, in order to kill momentum for an amendment to the United States Constitution banning same-sex marriage. Peter Baker, *Now in Defense of Gay Marriage*,

The 2004 re-election campaign of President George W. Bush built a sophisticated political operation on top of the foundation DOMA had laid. With the Massachusetts Supreme Judicial Court's then-controversial decision¹² to legalize same-sex marriage in the Bay State in 2003, top Republican strategists Karl Rove¹³ and Ken Mehlman¹⁴ designed a strategy to exploit the unpopularity of marriage equality.¹⁵ The strategy was two-fold: first, their candidate would campaign aggressively to maintain the definition of marriage as the union of one man and one woman,¹⁶ drawing an implicit and uncomfortable contrast for opponent (and Massachusetts resident) John Kerry;¹⁷ second, Republicans and allied conservative organizations¹⁸ would design statewide referenda to ban "gay marriage"¹⁹ with the expectation that these ballot measures would turn out additional religious conservatives likely to support

Bill Clinton, N.Y. TIMES (Mar. 26, 2013), http://www.nytimes.com/2013/03/26/us/politics/bill-clintons-decision-and-regret-on-defense-of-marriage-act.html?pagewanted=all&_r=0at A1.

12. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

13. Rove was Bush's longtime top political strategist, both in Texas and in Bush's national campaigns. During his time as Bush's top political advisor, Rove became known as "Bush's brain." President Bush later thanked him in a speech for his efforts in 2004, calling him "the architect" of his re-election victory over U.S. Senator John Kerry in the general election. Press Release, White House, *President Bush Thanks Americans in Wednesday Acceptance Speech* (Nov. 3, 2004), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/11/20041103-3.html>.

14. Mehlman served as campaign manager for Bush's 2004 re-election bid and subsequently chaired the Republican National Committee. Richard Socarides, *Ken Mehlman's Gay-Marriage Mission*, THE NEW YORKER (Feb. 26, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/02/ken-mehlmans-republican-gay-marriage-mission.html>. Mehlman was widely considered a key player in Bush's political strategy team. *See id.* In 2010, Mehlman revealed he was gay and has since expressed regret for his role in attacking the LGBT community in various campaigns. *See id.*

15. *See* Daniel A. Smith, Matthew DeSantis, & Jason Kassel, *Same-Sex Marriage Ballot Measures and the 2004 Presidential Election*, 38 ST. & LOC. GOV'T REV. 78 (2006), available at <http://www.clas.ufl.edu/users/dasmith/SLGR2006.pdf>.

16. *See id.*

17. As a candidate who hailed from the very state that had just legalized same-sex marriage, Kerry faced particular difficulty in addressing this issue with the electorate.

18. *See* Smith et al., *supra* note 15.

19. Evan Wolfson, *Can Marriage Equality Be Compromised?*, THE ADVOCATE (Feb. 27, 2009, 1:00 AM), <http://www.advocate.com/politics/marriage-equality/2009/02/27/can-marriage-equality-be-compromised>. Evan Wolfson, of the national LGBT advocacy organization Freedom to Marry, has long derided the phrase "gay marriage" as being a false and insidious political frame. *Id.* Because LGBT couples, Wolfson reasons, seek only to access marital rights already bestowed on heterosexual couples, they simply seek to access "marriage," not a special "gay" kind of marriage. *Id.* Yet, opponents' labeling of it as "gay marriage," is inflammatory, continues Wolfson, as "[t]he core of the real opposition we face is not really about marriage—it's about gay." *Id.*

Republican candidates.²⁰ Decried as a particularly nasty brand of wedge politics,²¹ the strategy nonetheless yielded spectacular results: Bush won re-election,²² and Republican candidates swept nearly all competitive races for the U.S. Senate in 2004.²³ Subsequent analyses of the 2004 campaign would go on to show that this “gay-baiting”²⁴ strategy was a key component of Bush’s strategy.²⁵ Indeed, in 2008, the presidential candidates of both major parties publicly supported the definition of marriage as the union of one man and one woman;²⁶ at the same time, California’s Proposition 8 outlawing same-sex marriage passed with 52% of the vote.²⁷

The times were soon to change. Millennials,²⁸ the youth generation that turned out in unprecedented fashion in the 2008 presidential election,²⁹ overwhelmingly supported marriage equality.³⁰ Pointing to

20. James Dao, *Same-Sex Marriage Issue Key to Some G.O.P. Races*, N.Y. TIMES (Nov. 4, 2004), <http://www.nytimes.com/2004/11/04/politics/campaign/04gay.html>.

21. *See id.*

22. *Id.*

23. In fact, the only two notable Democratic election victories this cycle were Kenneth Salazar of Colorado and Barack Obama of Illinois. Republicans picked up a net of four U.S. Senate seats, winning previously-held Democratic seats in Florida, Georgia, North Carolina, South Carolina, Louisiana and South Dakota. South Dakota, in particular, is notable, as this pickup involved the defeat of the sitting Democratic Leader in the Senate—Thomas Daschle. *2004 Election Results*, CNN.COM, <http://www.cnn.com/ELECTION/2004/pages/results/senate/> (last visited Feb. 1, 2014).

24. Thomas Schaller, *Same Sex, Opposite Impact*, SALON (Mar. 2, 2012, 7:30 AM), http://www.salon.com/2012/03/02/same_sex_opposite_impact. Ken Mehlman himself, considered along with Rove to be the engineer of this strategy, explicitly characterized it in this way less than a decade later. *Id.*

25. Smith et al., *supra* note 15.

26. *Obama Says He Is Against Same-Sex Marriage But Also Against Ending Its Practice in Calif.*, ABC NEWS (Nov. 2, 2008, 6:36 PM), <http://abcnews.go.com/blogs/politics/2008/11/obama-on-mtv-i>; *see also* Amanda Terkel, *McCain Tells Ellen DeGeneres: You Shouldn't Have the Right to Get Married*, THINK PROGRESS (MAY 22, 2008, 10:14 AM), <http://thinkprogress.org/politics/2008/05/22/23640/mccain-ellen-gay-marriage/>.

27. *2008 Election Results*, CNN [hereinafter *2008 Election Results*], <http://www.cnn.com/ELECTION/2008/results/state/#val=CA> (last visited July 29, 2014).

28. Youth voters were a central component of the “new” electoral coalition that many observers concluded powered Obama’s winning presidential campaign. Alan Silverlieb, *Analysis: Obama’s New Democratic Majority*, CNN (Nov. 7, 2012, 4:29 PM) [hereinafter *New Demographic Majority*], <http://www.cnn.com/2012/11/07/politics/exit-polls-analysis/>. Although there are not precise dates to define the “millennial” generation, one definition suggests it encompasses individuals born between 1980 and 2000. “*Millennial*,” MERRIAM-WEBSTER, available at <http://www.merriam-webster.com/dictionary/millennial> (last visited Aug. 23, 2014).

29. *See* Scott Keeter, *Young Voters in the 2008 Election*, PEW RESEARCH CTR. (Nov. 13, 2008), <http://www.pewresearch.org/2008/11/13/young-voters-in-the-2008-election/>.

30. *See 2008 Election Results*, CNN, *supra* note 27.

favorable demographic trends,³¹ marriage equality advocates declared their ultimate success as inevitable.³² President Obama spearheaded a successful effort to repeal “Don’t Ask, Don’t Tell”³³ and enacted a range of pro-LGBT policies.³⁴ In the heat of his 2012 re-election campaign,³⁵ Obama became the first sitting President to announce his support for marriage equality³⁶ when he sat down for a television interview with popular morning show host Robin Roberts.³⁷ This position reportedly energized his supporters³⁸ in what appeared to be a close re-election

31. See Nate Silver, *Gay Marriage Opponents Now in Minority*, N.Y. TIMES (Apr. 20, 2011), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/gay-marriage-opponents-now-in-minority/>; see also *Growing Public Support for Same-Sex Marriage*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Feb. 7, 2012), <http://www.people-press.org/2012/02/07/growing-public-support-for-same-sex-marriage/>.

32. Jeremy Hooper, *Majority of NOM's Supporters Believe Marriage Equality Inevitable*, THE HUMAN RIGHTS CAMPAIGN (June 6, 2013), <https://www.hrc.org/nomexposed/entry/majority-of-noms-supporters-believe-marriage-equality-inevitable>.

33. Viola Gienger & Flavia Krause-Jackson, *Obama, Pentagon Certify End of Gay Ban Won't Harm Military*, BLOOMBERG (July 22, 2011, 5:08 PM), <http://www.bloomberg.com/news/2011-07-22/obama-pentagon-certify-end-of-gay-ban-won-t-harm-military-1-.html>.

34. *Obama Administration Policy & Legislative Advancements on Behalf of LGBT*, THE HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/obama-administration-policy-legislative-and-other-advancements-on-behalf-of-lgbt> (last visited Sept. 20, 2014). These achievements include ending a ban on HIV-positive immigrants, including data on same-sex couples in the United States Census; executive action instructing federal agencies to extend benefits to same-sex partners of federal employees; recognizing LGBT families for the purposes of federal housing programs; executive action to prohibit hospitals receiving Medicaid or Medicare funds to discriminate in visitation rights against LGBT families; and a wide variety of other measures. *Id.*

35. In May 2012, Obama trailed his opponent, former Massachusetts Governor Mitt Romney, in several national polls. *General Election: Romney vs. Obama*, REAL CLEAR POLITICS, http://www.realclearpolitics.com/epolls/2012/president/us/general_election_romney_vs_obama-1171.html#polls (showing polling margins of four points or fewer, with Romney leading in many surveys, in a number of prominent, reputable national polls between May 3–20, 2012).

36. Rick Klein, *Obama: “I Think Same-Sex Couples Should Be Able to Get Married,”* ABC NEWS (May 9, 2012, 2:57 PM), <http://abcnews.go.com/blogs/politics/2012/05/obama-comes-out-i-think-same-sex-couples-should-be-able-to-get-married/>.

37. Roberts herself, a nationally beloved news personality, would later publicly reveal that she was a lesbian. Cavan Sieczkowski, *Robin Roberts Comes Out, Thanks “Long Time Girlfriend,”* THE HUFFINGTON POST (Jan. 23, 2014, 1:38 AM), http://www.huffingtonpost.com/2013/12/29/robin-roberts-comes-out_n_4516537.html.

38. See Jeremy Stahl, *The Obama Gay Marriage Bounce is Steady, Racially Broad*, SLATE (June 5, 2012), http://www.slate.com/blogs/weigel/2012/06/05/minnesota_gay_marriage_poll_the_obama_bounce_is_steady_racially_broad_.html. For a discussion about this effect beyond the 2012 elections, see Scott Zumwalt, *How Marriage Equality Rallied the Democratic Base in 2013*, CAMPAIGNS & ELECTIONS (Nov. 18, 2013), <http://www.campaignsandelections.com/campaign-insider/247/how-marriage-equality-rallied-the-democratic-base-in-2013>.

effort,³⁹ and exit poll data from this election reveals the political advantage that this position provided.⁴⁰ The very next year, the Supreme Court struck down both DOMA⁴¹ and California's Proposition 8.⁴² As of this writing, marriage equality is the law of the land in thirty states and the District of Columbia.⁴³ Recent U.S. Census estimates suggest that nearly 55% of the population of the United States live in states that recognize marriage equality.⁴⁴ Many of these states enacted marriage equality through their regular legislative process.⁴⁵ In what is a particularly noteworthy shift, some states enacted marriage equality via the ballot box, with statewide majorities favoring referenda to accord same-sex couples full marriage rights.⁴⁶ Still others recognized same-sex marriages through legal challenges and subsequent judicial decision.⁴⁷ At present, eight states have seen their state-level bans on marriage equality struck down by federal courts, although these decisions have been stayed pending appeal.⁴⁸ Despite these successes, up to fifteen

39. See REAL CLEAR POLITICS, *supra* note 35.

40. CNN, *Presidential Race—2012 Election Center—Election & Politics from CNN.com*, CNN POLITICS (Dec. 10, 2012, 11:22 AM), <http://www.cnn.com/election/2012/results/race/president#exit-polls>.

41. See *United States v. Windsor*, 133 S. Ct. 2675 (2013).

42. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

43. *States*, FREEDOM TO MARRY (2014), <http://www.freedomtomarry.org/states/> (last visited Sept. 20, 2014). These states include: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, Vermont, Washington, West Virginia and Wisconsin. *Id.* In addition to these thirty states, judges in eight additional states—Arizona, Florida, Kentucky, Louisiana, Michigan, Ohio, Tennessee, and Texas—have issued favorable rulings on marriage equality but have issued stays pending appeal.

44. *Id.*

45. Vermont, Connecticut, New Hampshire, New York, Washington, Maryland, Rhode Island, Delaware, Minnesota, Hawaii, Illinois, and the District of Columbia enacted marriage equality via the regular legislative process. *States that Allow Same-Sex Marriage*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 21, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>. Unique among the legislatively enacting states, Vermont's statute became law when the Legislature overrode a veto by then Governor James Douglas. *Id.*

46. Maine, Maryland, and Washington State each underwent processes whereby marriage equality legislation passed through the Legislature was submitted to the voters for approval. *Id.* These measures were approved by the voters in the 2012 general election, receiving 53%, 52%, and 52% of the vote, respectively. Gizelle Lugo, *Same-Sex Marriage Ballot Initiatives: Voters in Strong Backing for Equality*, THE GUARDIAN (Nov. 7, 2012 1:44PM), <http://www.theguardian.com/world/2012/nov/07/same-sex-marriage-ballot-initiatives>.

47. See FREEDOM TO MARRY, *supra* note 43.

48. *Id.* at 43.

states remain with marriage bans in place as of this writing.⁴⁹ Legal challenges seeking the freedom to marry for same-sex couples have been filed and are currently pending in all the remaining states with same-sex marriage bans.⁵⁰

It is against this social and political backdrop that states have begun legislating against practicing SOCE on minors.

III. THE PRACTICES AND PRACTITIONERS OF SOCE

In order to properly evaluate SOCE-related legal issues, one must examine SOCE in its proper historical, political, scientific, and medical contexts. Various forms of SOCE have existed “at least since the coining of the term ‘homosexuality’ by Hungarian writer Karl Maria Kertbeny in 1869.”⁵¹ Historical SOCE practices have involved a wide variety of techniques.⁵² Some of these techniques—such as subjecting patients to rigorous physical⁵³ or mental⁵⁴ exercise—appear simplistic, if not comical. Other interventions—involving the use of chemical therapies,⁵⁵ attempts at behavior modification,⁵⁶ deprivation techniques,⁵⁷ as well as other

49. *Id.*

50. See *Marriage Litigation*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/litigation/> (last visited Mar. 4, 2014).

51. Timothy F. Murphy, *Redirecting Sexual Orientation: Techniques and Justifications*, 29 J. OF SEX RES. 501, 501–23 (1992).

52. *Id.* at 505–06; see also David Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1303–04 (1999).

53. As an example, Murphy describes the experience of a twenty-four-year-old male “suffering attraction for members of his own sex” in 1892. Murphy, *supra* note 51, at 502. The young man had resisted same-sex sexual desires, but feared he would not be able to sustain his resistance. *Id.* at 502. One doctor, noting that “nothing was so antagonistic to sexual appetite as physical fatigue . . . therefore prescribed severe and fatiguing bicycle riding” to eliminate “the man’s sexual appetite.” *Id.* at 502.

54. Murphy notes that, with respect to same-sex attractions, “the mental equivalent of physical exercise” might also be effective at reducing desire. *Id.* at 507. In particular, one point of view advocated “the severe study of abstract subjects like mathematics, science, literature, and ‘sociology from the evolutionary viewpoint.’” *Id.* at 507.

55. Cruz, *supra* note 52, at 1306–07. The types of chemical interventions vary from “cocaine solutions and strychnine injections” to “hormonal interventions,” and have even included using chemical injections “to induce grand mal seizures” in subjects, all with the purpose of eliminating same-sex attractions. *Id.*

56. Some SOCE practitioners instructed males with same-sex attractions to visit female prostitutes, thereby “to avoid the sexual temptations of men and to familiarize themselves with pleasures possible with women.” Murphy, *supra* note 51, at 502.

57. Murphy describes one technique in which male “subjects have been deprived of fluids and at the same time been given strong diuretics which induce the desire to urinate. They are told that they may have something to drink only if they show physiological sexual responses to slides of nude females.” *Id.* at 506.

aversion efforts⁵⁸—are more disturbing. And, some historically used SOCE practices—including lobotomy⁵⁹ and other psychosurgeries,⁶⁰ castration,⁶¹ genital transplantation,⁶² and electroshock therapies,⁶³ among others—can be described only as barbaric. Fortunately, these medieval-sounding practices⁶⁴ are no longer in widespread use.⁶⁵

Today, SOCE practitioners largely engage in talk therapy of the type practiced by psychotherapists⁶⁶—a concept with which many Americans are generally familiar. Leading proponents of SOCE have sought to present an academic and intellectually rigorous approach to justify their practices.⁶⁷ Indeed, modern SOCE's prominent proponents have

58. One form of aversion therapy encouraged visualization of “repulsive homoerotic encounters (sexual advances, for example, from a repulsive man)” under “anxiety-inducing circumstances (while police officers are watching).” Murphy, *supra* note 51, at 506. The theory here was that the subject would “gradually develop aversive reactions to all homoerotic desires and cues,” an outcome that was to be reinforced by means of “parallel imagery . . . associat[ing] women with positive images.” *Id.* Another aversion therapy technique involved requiring subjects to “sniff various repulsive substances (ammonium sulfide, butyric acid, aromatic ammonia) during homoerotic fantasies.” *Id.*

59. *Id.* at 514.

60. Cruz describes one technique in which SOCE advocates “perform[ed] surgical hypothalamotomies on seventy-five men in Germany—starting in 1962—before a moratorium was imposed.” Cruz, *supra* note 52, at 1304. Other types of surgical interventions have included “cauterizations of the neck, lower back and loins” as well as “clitoridectomies.” Murphy, *supra* note 51, at 514.

61. Cruz, *supra* note 52, at 1305.

62. Cruz recounts how “one researcher attempted . . . effectual sexual reorientations to heterosexuality by implanting testicles from heterosexual men into gay ones.” *Id.* Nor did this model of SOCE appear isolated, as “at least eleven men received testicular tissue transplants from 1916 to 1921.” *Id.*

63. Electroshock therapies comprised a particularly infamous genre of SOCE, in which “electrical shocks were . . . administered in conjunction with homoerotic stimuli and withheld in conjunction with heteroerotic stimuli.” *Id.* Murphy relates that “electrical aversion therapy . . . has seen many variants” in the historical practice of SOCE. Murphy, *supra* note 51, at 505.

64. These techniques have been described as “a litany of atrocities.” Cruz, *supra* note 52, at 1304.

65. The fact that “verbal conversion techniques in current circulation avoid the appearance of outright torture that marked many past practices” should not be confused for a legitimate justification for SOCE. *Id.* at 1309–10.

66. The American Psychological Association describes psychotherapy as “a collaborative treatment based on the relationship between an individual and a psychologist [who] . . . provides a supportive environment that allows [patients] to talk openly with someone who is objective, neutral, and nonjudgmental.” *Definition of “Psychotherapy,”* AM. PSYCHOLOGICAL ASS’N, <http://www.apa.org/topics/therapy/> (last visited March 3, 2014).

67. See generally Jack Drescher, M.D., *I’m Your Handyman: A History of Reparative Therapies*, *Journal of Gay & Lesbian Psychotherapy*, 5 J. OF GAY & LESBIAN PSYCHOTHERAPY, 5 (2001).

addressed Freudian theories⁶⁸ as a starting point of analysis.⁶⁹ In explaining psychological theories of SOCE and sexuality, leading proponents of SOCE often trace homosexuality to an individual's experience of parental conflict, seeking to identify and resolve these conflicts through talking therapy.⁷⁰

Despite their use of academic and scientific language, SOCE advocates appear significantly motivated by religious beliefs and political ideology.⁷¹ The "evolution" of SOCE proponents from "medically[-]concerned practitioners" to overtly "anti[-]gay political activists" casts

68. *Id.* Socarides seeks to "reshap[e] Freud's . . . metapsychological constructs" in advocating for SOCE:

Socarides contests Freud's view that homosexuality is a developmental arrest and redefines it as conflictual. His conflict model suggests therapeutic interventions to bring unconscious struggles into awareness in order to reduce homosexual symptoms. He . . . claims homosexuality is a neurotic condition in which the libidinal instinct has "undergone excessive transformation and disguise in order to be gratified in the perverse act. The perverted action, like the neurotic symptom, results from the conflict between the ego and the id and represents a compromise formation which at the same time must be acceptable to the demands of the superego."

Id. at 13. Having thus framed homosexuality as "a compromise between intrapsychic forces," Socarides concludes that "it meets the definition of an illness." *Id.*

69. One prominent school of thought has rejected Freud outright. *Id.* at 11. Drescher describes Rado's "theory of homosexuality" as finding roots in "the refutation of Freud's belief in psychological bisexuality." *Id.* Yet, Drescher notes that Rado's theory "declared, with great authority but without any supporting scientific research or evidence, that heterosexuality is the only non-pathological outcome of human sexual development." *Id.* at 12. Drescher observes that the Rado theory of homosexuality "dominated American psychiatry until a year after his death in 1972." *Id.*

70. Professor Cruz shares the writing of a leading "progenitor" of SOCE, Joseph Nicolosi, to illustrate this point:

[O]ne of the first goals . . . is to clarify the family dynamics that may have led to a man's homosexual condition. Making peace with the father is one early issue. Preliminary treatment goals include growth in self-acceptance and an alleviation of excessive guilt . . . In group therapy the client is challenged to develop self-assertion through effective verbalization. Male bonding is an especially important goal through the development of mutuality in non[-]erotic same-sex friendships.

Cruz, *supra* note 52, at 1308 (citing Joseph Nicolosi, Intervention Techniques of Reparative Therapy, Address to the Second National NARTH Conference (May 20, 1993); JOSEPH NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY: A NEW CLINICAL APPROACH xvi (1991)). In addition, Socarides also "holds the parents of gay men and women responsible for causing homosexuality." Drescher, *supra* note 67, at 13. It should be noted that Socarides himself has a gay son. See Chris Bull, *His Public Domain: His Private Pain*, WASH. POST MAGAZINE (1999).

71. See generally Drescher, *supra* note 67.

serious doubt as to the therapeutic validity of SOCE.⁷² Indeed, “expressly religion-based conversion efforts” comprise a significant segment of SOCE practitioners.⁷³ Tellingly, another major segment of SOCE defenders⁷⁴ are socially conservative political organizations,⁷⁵ such as the Family Research Council.⁷⁶ Indeed, the distinct fusion of religion, politics, and science by the SOCE movement’s intellectual⁷⁷ godfathers⁷⁸ further discredits the notion of SOCE as based in scientific and therapeutic techniques. Chief among organizations that defend SOCE is the National Association for Research and Therapy of Homosexuality (“NARTH”).⁷⁹

72. Drescher, *supra* note 67, at 7.

73. Cruz, *supra* note 52, at 1308. For a more thorough discussion of organizations and processes surrounding religiously-oriented SOCE, see *id.* at 1308–10.

74. In response to the New Jersey law banning SOCE practices on minors, the Family Research Council (“FRC”) accused the State’s Governor, Republican Chris Christie, of “undermin[ing] freedom” and “undermin[ing] the rights of minors, parents and therapists” with “the iron hand of the state” in a press release. Press Release, *New Jersey Governor Chris Christie Undermines Freedom By Banning Sexual Orientation Therapy*, FAMILY RESEARCH COUNCIL (Aug. 30, 2013), <http://www.frc.org/pressrelease/new-jersey-governor-chris-christie-undermines-freedom>. This same press release also includes a quote from FRC Senior Fellow for Policy Studies, Peter Sprigg, who declares “the risks associated with homosexual conduct . . . [include] high rates of depression and anxiety; high rates of tobacco, alcohol and substance use; a higher prevalence of certain cancers; and among men, high rates of sexually-transmitted diseases.” *Id.*

75. FRC has long played a prominent role in advancing social conservatism in politics. See Michelle A. Vu, *Presidential Hopefuls Highlight ‘Values’ to Christian Conservatives*, THE CHRISTIAN POST (Oct. 20, 2007), <http://www.christianpost.com/news/presidential-hopefuls-highlight-values-to-christian-conservatives-29775/>.

76. FRC describes as its core mission to promote “a culture in which human life is valued, families flourish, and religious liberty thrives.” *About Family Research Council*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/about-frc> (last visited Mar. 5, 2014). FRC’s website declares that homosexuality is “unnatural,” that “homosexual conduct is harmful to the persons who engage in it and to society at large, and can never be affirmed,” and that homosexuality is not “genetic or inborn[.]” and explicitly notes its commitment to fighting political battles to prevent homosexuality from being “accepted as equivalent to heterosexuality in law, in the media, and in schools.” *Homosexuality*, FAMILY RESEARCH COUNCIL, <http://www.frc.org/homosexuality> (last visited Mar. 5, 2014).

77. Drescher describes Joseph Nicolosi, one of the leading minds of modern SOCE, as “draw[ing] on literature from the field of pastoral counseling” and “offer[ing] a religious treatise on homosexuality thinly disguised as a scientific document. Drescher, *supra* note 67, at 18. This “religious *cum* scientific paradigm” led Nicolosi to “criticiz[e] contemporary normal variant theories of homosexuality with the fervor of a religious fundamentalist” who “argues not as a scientist, but as a preacher.” *Id.* at 18.

78. Drescher describes Socarides’s claims that he is “a defender of gay rights” as an “Orwellian approach” that twists the language of civil rights to defend “an individual’s right to seek treatment to change a homosexual orientation.” *Id.* at 19. Socarides claimed to support LGBT rights despite “fil[ing] affidavits in support of Colorado’s anti[-]gay Amendment Two,” the sweeping anti-gay voter initiative that the Supreme Court held unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996). *Id.*

79. NARTH’s website is viewable at <http://www.narth.com/>.

NARTH, however, has had a particularly controversial⁸⁰ and checkered⁸¹ history.⁸² Indeed, in 2012, the Southern Poverty Law Center (“SPLC”)⁸³ criticized NARTH for peddling “junk science.”⁸⁴

Leading scientific and medical organizations have criticized SOCE and its practitioners. The American Psychiatric Association rejects the premise that homosexuality is a mental illness⁸⁵ that requires treatment, and further rejects SOCE practices themselves.⁸⁶ In 2009, the American

80. In 2008, University of Utah psychologist Lisa Diamond accused NARTH of distorting her research in their publications. Brian Maffly, *U. Psychologist Says Sex Research Distorted*, THE SALT LAKE TRIBUNE (Nov. 11, 2008), http://www.sltrib.com/ci_10958958. In a scathing rebuke, Diamond called NARTH’s actions an “irresponsible . . . [.] illegitimate” misrepresentation of her work in order to serve “political purposes.” *Id.*

81. In 2010, NARTH board member and prominent SOCE practitioner George Rekers resigned in disgrace, after multiple media outlets reported he took a ten-day vacation to Europe with a male prostitute he hired online. John Schwartz, *Scandal Stirs Legal Questions in Anti-Gay Cases*, N.Y. TIMES (May 18, 2010), <http://www.nytimes.com/2010/05/19/us/19rekers.html>.

82. The Southern Poverty Law Center (“SPLC”) has reported that Gerald Schoenewolf, a member of NARTH’s Scientific Advisory Committee, published a 2006 essay in which he wrote that Africans benefited from being sold into slavery. *NARTH Becomes Main Source for Anti-Gay “Junk Science,”* S. POVERTY L. CTR. (2012) [hereinafter *Junk Science*], <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/queer-science> (last visited Mar. 5, 2014). SPLC has also reported that Schoenewolf’s essay called movements for civil rights, women’s rights, and gay rights “destructive.” *Anti-Gay Organization NARTH Publishes Essay on Gay Rights and Political Correctness*, S. POVERTY L. CTR. (2006), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/winter/one-more-enemy> (last visited Oct. 12, 2014).

83. The SPLC, a longtime watchdog of hate groups in America, dedicates itself “to fighting hate and bigotry and to seeking justice for the most vulnerable members” of society. *See What We Do*, S. POVERTY L. CTR., <http://www.splcenter.org/what-we-do> (last visited Mar. 5, 2014).

84. The SPLC describes NARTH’s emergence “as the preeminent source of what many regard as ‘junk science’ for the religious right—psychology that underpins the anti-gay movement’s fervent opposition to equal rights and stigmatizes LGBT people as mentally sick.” *See Junk Science*, *supra* note 82. The SPLC also notes that NARTH’s activism may inflame hate-inspired violence toward the LGBT community, a community that federal data suggest is already a disproportionate target of hate crimes. *Id.*

85. The American Psychiatric Association removed the designation of homosexuality as a mental illness in 1973, after reviewing the relevant scientific literature. *LGBT-Sexual Orientation*, AM. PSYCHIATRIC ASS’N, <http://www.psychiatry.org/lgbt-sexual-orientation> (last visited Mar. 5, 2014) (stating further that “[a]ll major professional mental health organizations have gone on record to affirm that homosexuality is not a mental disorder”).

86. *See id.* The American Psychiatric Association (APA) concludes that “there is no published scientific evidence supporting the efficacy of ‘reparative therapy’ as a treatment to change one’s sexual orientation.” *Id.* A 1998 position statement by the APA declared the organization’s opposition to “any psychiatric treatment, such as ‘reparative’ or ‘conversion’ therapy, which is based upon the assumption homosexuality per se is a mental disorder” *Id.*

Psychological Association completed a two-year, comprehensive review of the scientific literature and concluded that “efforts to change sexual orientation are unlikely to be successful and involve some risk of harm, contrary to the claims of SOCE practitioners and advocates.”⁸⁷ Bryant Welch, the American Psychological Association’s highly decorated former Executive Director for Professional Practice, has written that SOCE practices are “little more than social prejudice against gay men and lesbians garbed in psychological accoutrements.”⁸⁸ In addition to the condemnation by the American Psychiatric Association and the American Psychological Association, SOCE has also been condemned by the American Academy of Pediatrics,⁸⁹ the American Association for Marriage and Family Therapy,⁹⁰ the American Counseling Association,⁹¹ the American Medical Association,⁹² the American Psychoanalytic Association,⁹³ and the National Association of Social Workers.⁹⁴ The

87. JUDITH M. GLASSGOLD ET AL., REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION, AM. PSYCHOLOGICAL ASS’N (Aug. 2009), available at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

88. BRYANT WELCH, STATE OF CONFUSION: POLITICAL MANIPULATION AND THE ASSAULT ON THE AMERICAN MIND 72 (2008). Welch is “a Distinguished Practitioner of the National Academy of Practice and in 2005 was awarded the American Psychological Association Presidential Citation for ‘seminal contributions to professional psychology’” *Bryant Welch*, HUFFINGTON POST, <http://www.huffingtonpost.com/bryant-welch> (last visited Mar. 5, 2014).

89. American Academy of Pediatrics, *Homosexuality and Adolescence*, 92 PEDIATRICS 631, 633 (1993), available at <http://pediatrics.aappublications.org/content/92/4/631.full.pdf> (stating “[t]herapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation”).

90. *Position Statement on Non-Pathologizing Sexual Orientation*, AM. ASS’N FOR MARRIAGE & FAMILY THERAPY (Sept. 7, 2004), https://www.aamft.org/imis15/Content/About_AAMFT/Position_On_Couples.aspx (“tak[ing] the position that same-sex orientation is not a mental disorder . . . [that] requires treatment or intervention”).

91. *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel*, JUST THE FACTS COALITION (2008), available at <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf> (last visited Sept. 20, 2014) (citing American Counseling Association position statements “oppos[ing] portrayals of [LGBT] youth and adults as mentally ill” and “opposing the promotion of [SOCE] as a ‘cure’ for individuals who are homosexual”).

92. *AMA Policies on LGBT Issues*, AM. MED. ASS’N (2014), <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-advocacy-committee/ama-policy-regarding-sexual-orientation.page> (declaring opposition to “the use of ‘reparative’ or ‘conversion’ therapy” and expressing “that the physician’s non-judgmental recognition of sexual orientation and behavior enhances the ability to render optimal patient care”).

93. *Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression*, AM. PSYCHOANALYTIC ASS’N (June 2012), http://www.apsa.org/About_APsA/Position_Statements/Attempts_to_Change_Sexual_Orientation.aspx (declaring that “[p]sychoanalytic

consensus of leading scientific and medical professional associations in rejecting SOCE as a legitimate treatment is well established.⁹⁵ Many scholars have warned that SOCE may cause serious psychological and emotional harms to individuals,⁹⁶ while even prominent former practitioners of SOCE have rejected its legitimacy and acknowledged its harmful effects.⁹⁷

In light of the conclusions about SOCE reached by most medical and scientific organizations, it is unsurprising that SOCE opponents have sought to take action to discourage the practice. Indeed, opponents of SOCE have explored a variety of legal options. However, once particular causes of action are considered, direct legal attack on the practice or its practitioners does not appear promising.

technique does not encompass purposeful attempts to ‘convert,’ ‘repair,’ change or shift an individual’s sexual orientation . . . [s]uch directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes”).

94. National Committee on Lesbian, Gay, and Bisexual Issues, NASW, *“Reparative” and “Conversion” Therapies for Lesbians and Gay Men*, NAT’L. ASS’N OF SOC. WORKERS (Jan. 21, 2000), <http://www.socialworkers.org/diversity/lgb/reparative.asp?print=1> (condemning SOCE as “misleading therapies” promoted by religious and political “media campaigns, often coupled with coercive messages from family and community members . . . creat[ing] an environment in which lesbians and gay men often are pressured to seek reparative or conversion therapies, which *cannot and will not change sexual orientation*”) (emphasis in original).

95. Groups, such as NARTH and the American College of Pediatricians, reject the consensus position, but these organizations have been described as fringe organizations advocating more for ideological purposes than for legitimate scientific and medical principles. See, e.g., *Junk Science*, *supra* note 82; Ryan Lenz, *American College of Pediatricians Defames Gays and Lesbians in the Name of Protecting Children*, S. POVERTY L. CTR. (2012), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/-science-for-homophobes>.

96. See GLASSGOLD ET AL., *supra* note 87, at 42 (suggesting that “attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts[.]” and further concluding that “[t]he lack of rigorous research on the safety of SOCE represents a serious concern, as do studies that report perceptions of harm . . .”). For a full and at times, graphic, description of these harms, see Cruz, *supra* note 52, at 1350–60 (surveying a wide variety of harms SOCE causes to LGBT individuals).

97. *Former Ex-Gay Leaders United in Opposition to Conversion Therapy*, NAT’L. CTR. FOR LESBIAN RIGHTS, <http://www.ncrlrights.org/former-ex-gay-leaders-unite-in-opposition-to-conversion-therapy/> (last visited Sept. 29, 2014); see also *Former Founders, Leaders, and Promoters of the “Ex-Gay” Movement Denounce Conversion Therapy and Stand with NCLR’s #BornPerfect*, NAT’L. CTR. FOR LESBIAN RIGHTS, <http://www.ncrlrights.org/press-room/press-release/former-founders-leaders-and-promoters-of-the-ex-gay-movement-denounce-conversion-therapy-and-stand-with-ncrls-bornperfect/> (last visited Sept. 29, 2014).

Direct constitutional challenges to SOCE would likely prove unavailing due to lack of state action.⁹⁸ Nor do causes of action sounding in negligence appear likely to succeed.⁹⁹ Arguments that SOCE could legally constitute child abuse¹⁰⁰ appear to suffer from evidentiary problems¹⁰¹ that might make courts reluctant to wade into this area. Another argument suggests that, with respect to SOCE, there can be no informed consent¹⁰² by a patient in any meaningful sense of the term.¹⁰³

98. Jonathan Sacks, "Pray Away the Gay?" *An Analysis of the Legality of Conversion Therapy by Homophobic Religious Organizations*, 13 RUTGERS J. L. & RELIGION 67, 78 (2011). Sacks does not suggest a constitutional cause of action but alludes to "religiously driven" SOCE efforts—perhaps suggesting such challenges would sound in the First Amendment's Establishment clause. *Id.* Sacks argues that even in the event SOCE practitioners received federal funds, a challenge of this kind would likely fail. *See id.*

99. Sacks considers three legal theories in negligence: intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent malpractice. *Id.* at 80–84.

100. *See* Karolyn Ann Hicks, "Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse, 49 AM. U. L. REV. 505 (1999). Hicks argues that reasonably prudent parents would be required to investigate SOCE before subjecting their child to it, and that such an investigation would reveal SOCE to be discredited in the scientific and medical communities. *Id.* at 524. Writing in 1999, Hicks concedes that courts would likely reject this theory, due to a "hostile climate to [LGBT] people in society" and "the pervasive belief in the legal system that gays and lesbians are immoral." *Id.* at 543, 545. One wonders how Hicks might reformulate her argument in light of the decisions of *Lawrence*, *Windsor*, and *Perry*.

101. Sean Young, *Does "Reparative" Therapy Really Constitute Child Abuse?: A Closer Look*, 6 YALE J. HEALTH POL'Y L. & ETHICS 163, 172–200 (2006). Young considers Hicks's argument and notes that "the judicial determination of child abuse in the [SOCE] context rests largely on expert testimony." *Id.* at 172. Young argues that much of this testimony would be inadmissible as irrelevant, as prejudicial, or for lack of general acceptance, concluding that while "Hicks's data may support her assertion in the court of public opinion . . . it would not be able to support her assertion in the courtroom." *Id.* at 186. For further discussion, see Young, *supra* at 172–200.

102. Cruz, *supra* note 52, at 1304–08. Professor Cruz argues that "given historical [and] . . . social circumstances" it is highly doubtful "that a person's 'choice' to submit to sexual reorientation can be voluntary." *Id.* at 1344–45. Although submitting oneself to SOCE does involve a choice, Cruz argues this choice is essentially a societally-imposed form of coercion:

The argument . . . is an argument about the conditions for meaningful consent. For example, society would not doubt the sincerity of someone who expresses a preference for handing over her or his money to an armed robber rather than being shot, but neither is society likely to conclude that the robbery victim's decision was as voluntary (or as determined) as that of someone choosing a flavor of ice cream on a hot summer day. The best version of the argument against the possibility of consent to [SOCE] would insist that the conditions under which a decision to pursue reorientation is formed are, like the situation of one who has a gun to one's head, not adequately conducive to the exercise of free consent . . . [but rather constitute] coercion as a result of societal pressure.

While this idea has some merit in an academic and normative sense, it is unclear whether courts would embrace such an approach. Finally, at least one scholar has explored the idea that the state has no legitimate interest in promoting heteronormativity in children,¹⁰⁴ although it is not apparent how this argument would find legs in a legal challenge.¹⁰⁵

Lacking viable avenues to challenge SOCE through private action, opponents of SOCE have turned instead to state legislatures.

IV. STATE LEGISLATIVE PROHIBITIONS AGAINST PRACTICING SOCE ON MINORS

California and New Jersey have sought a legislative response to serious concerns about the legitimacy and potential harms of SOCE practices. As of this writing, they are the only two states to have banned licensed mental health professionals from engaging in SOCE practices

Id. at 1336–37.

103. Professor Cruz has also argued that the specter of anti-LGBT violence “is another force tending to make heterosexuality compulsory and not simply a matter of free ‘choice’ for [LGBT] persons who might ‘choose’ to pursue [SOCE].” Cruz, *supra* note 52, at 1342. Indeed, Cruz writes that in the face of “arbitrary, life-threatening, and significantly unpredictable risks” of LGBT individuals being targeted for violence, “it would be astounding if no one felt impelled to put on a heterosexual face.” *Id.* at 1344. Yet, the desire to appear or attempt to become heterosexual in hopes of “avoiding serious bodily harm . . . are not conditions conducive to consent” as it relates to SOCE. *Id.*; see also Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1435 (1992) (describing the history of “persistent and pervasive” violence targeting the LGBT community).

104. See generally Clifford J. Rosky, *No Promo Hetero: Children’s Right to Be Queer*, 35 CARDOZO L. REV. 425 (2013). Professor Rosky argues that “objections to children’s homosexuality . . . represent a desire to minimize the number of people who become [LGBT]—and thus, the number of people who will someday be [LGBT]. It is difficult to think of a clearer example of animosity” toward a class of people. *Id.* at 450.

105. Professor Rosky goes on to frame his argument explicitly in equal protection terms:

Under *Romer* and *Windsor*, the [S]tate does not have any legitimate interest in discouraging children from being [LGBT] or encouraging them to be heterosexual—not by any methods, however implausible, ill-conceived, or banal they may be. The desire to discourage children from becoming gay is nothing more than an especially old and insidious form of animus against [LGBT] people; it is not a legitimate state interest under the Constitution’s equal protection guarantees.

Id. at 453.

Professor Rosky’s argument is resonant and compelling; however, the lack of state action involving private SOCE practitioners once again appears to be an obstacle. Following this line of argument, SOCE opponents might contend that the State’s licensing of SOCE practitioners would be considered state action.

with minors. To determine whether these statutory prohibitions are constitutional, the principles of First Amendment speech analysis require courts to determine whether SOCE is unprotected conduct or protected speech. Although I further develop and attempt to answer this question in Part V of this Note, the conduct/speech distinction is particularly relevant in considering the legislative histories of the statutory prohibitions from California (SB-1172)¹⁰⁶ and New Jersey (A-3371).¹⁰⁷ This Part considers the text and history of these legislative efforts.

The texts of SB-1172 and A-3371 evince several legislative goals: the desire to regulate each state's licensed professions consistent with widely-accepted professional standards, the intent to regulate medical conduct, and the goal of protecting the well-being of minors.¹⁰⁸

The statutes' legislative findings and declarations are nearly identical.¹⁰⁹ Both statutes include an explicit finding and declaration of the Legislature that "being lesbian, gay or bisexual is not a disease, disorder, illness, deficiency or shortcoming."¹¹⁰ Both statutes extensively recount the consensus in opposition to SOCE of the leading scientific and medical organizations, including the American Psychiatric Association, the American Psychological Association, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, and the American Academy of Child and Adolescent Psychiatry.¹¹¹ Significantly, both the California and New Jersey Legislatures declared:¹¹²

Minors who experience family rejection based on their sexual orientation face especially serious health risks. In one study, lesbian, gay, and

106. In order to avoid confusing the reader, I am referring to these bans in the main text using the Senate designation from the California legislation and the Assembly designation from the New Jersey legislation.

107. These bill numbers come from the 2011–2012 session of the California Legislature and the 2012–2013 session of the New Jersey Legislature. In the interests of full disclosure, I worked as a member of legislative staff and contributed to efforts on the staff level to pass A-3371. Specifically, I was employed as the Communications Director to Louis Greenwald, Majority Leader of the New Jersey General Assembly, and Pamela Lampitt, Chairwoman of the Assembly Women and Children Committee, at the time the legislation was passed.

108. See SB-1172, Ch. 835 Stat. 2012; N.J. STAT. ANN. § 45:1-54 (2013).

109. See SB-1172, Ch. 835 Stat. 2012 § 1; N.J. STAT. ANN. § 45:1-54(1) (2013).

110. SB-1172, Ch. 835 Stat. 2012 § 1(a); N.J. STAT. ANN. § 45:1-54(1)(a) (2013).

111. SB-1172, Ch. 835 Stat. 2012 § 1; N.J. STAT. ANN. § 45:1-54(1) (2013). For a more detailed discussion about the positions of these organizations, see *supra* Part III.

112. SB-1172, Ch. 835 Stat. 2012 § 1(m); N.J. STAT. ANN. § 45:1-54(1)(m) (2013).

bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse compared with peers from families that reported no or low levels of family rejection.¹¹³

In addition, both Legislatures explicitly asserted their respective state's "compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth" as well as "in protecting its minors against exposure to serious harms caused by sexual orientation change efforts."¹¹⁴

The texts of the statutes themselves strongly suggest California and New Jersey sought to regulate professional and medical conduct, rather than speech. First, the statutes apply only to licensed mental health professionals.¹¹⁵ Next, the statutes forbid licensed mental health professionals from practicing SOCE only on individuals under eighteen years of age.¹¹⁶ Under the statutes, SOCE is defined as "the practice"¹¹⁷ or "any practices"¹¹⁸ by mental health professionals that attempt to

113. For more information about the study, see SB-1172, Ch. 835 Stat. 2012 § 1(m); N.J. STAT. ANN. § 45:1-54(1)(m) (2013).

114. SB-1172, Ch. 835 Stat. 2012 § 1(n); N.J. STAT. ANN. § 45:1-54(1)(n) (2013).

115. SB-1172 defines "mental health provider" as:

a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any other person designated as a mental health professional under California law or regulation.

SB-1172, Ch. 835 Stat. 2012 § 2(a). A-3371's text on this point is slightly different but is functionally the same:

[a] person who is licensed to provide professional counseling under Title 45 of the Revised Statutes, including, but not limited to, a psychiatrist, licensed practicing psychologist, certified social worker, licensed clinical social worker, licensed social worker, licensed marriage and family therapist, certified psychoanalyst, or a person who performs counseling as part of the person's professional training for any of these professions.

N.J. STAT. ANN. § 45:1-55(2)(a) (2013).

116. See SB-1172, Ch. 835 Stat. 2012 § 2(b)(2); N.J. STAT. ANN. § 45:1-55(2)(a)(2013).

117. N.J. STAT. ANN. § 45:1-55(2)(b) (2013).

118. SB-1172, Ch. 835 Stat. 2012 § 2(b)(1).

change “an individual’s sexual orientation . . . includ[ing] efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.”¹¹⁹ Furthermore, SOCE does not include “counseling” about gender transitions.¹²⁰ Nor does SOCE include “psychotherapies” or “counseling” that provides acceptance, strengthens coping skills, promotes a supportive environment, encourages positive emotional development, or seeks to address unsafe or unlawful conduct—provided those efforts do not attempt to change sexual orientation.¹²¹ In writing the statutes, the California and New Jersey Legislatures use words that direct their prohibitions (as well as exemptions) toward the therapeutic or medical acts of providing mental health services, not expressive speech. Moreover, SB-1172 provides that violating the statute shall be deemed “unprofessional conduct” subject to disciplinary action by the relevant licensing entity.¹²² In addition, the statutes are drawn narrowly, specifically targeting the dangers that SOCE can pose to minors. Under SB-1172 and A-3371, SOCE practitioners remain free to engage in SOCE with patients who are eighteen years-old or older. In addition, private or religious counselors may still engage in SOCE practices with minors—so long as they do not seek licensure by the State as a mental health professional.

As might be expected, contemporaneous news accounts reveal charged rhetoric and spirited debate over SB-1172.¹²³ In the California State Senate’s debate, the bill’s sponsor argued in favor of passage because “[t]he entire house of medicine has rejected this phony and sham therapy. It . . . is junk science.”¹²⁴ Opponents countered that the California Legislature should not “meddl[e] in that level of a decision that families would need to make on whether psychiatric help is

119. See SB-1172, Ch. 835 Stat. 2012 § 2(b)(1); see also N.J. STAT. ANN. § 45:1-55(2)(b) (2013).

120. SB-1172, Ch. 835 Stat. 2012 § 2(b)(2); N.J. STAT. ANN. § 45:1-55(2)(b) (2013).

121. SB-1172, Ch. 835 Stat. 2012 § 2(b)(2); N.J. STAT. ANN. § 45:1-55(2)(b) (2013).

122. See SB-1172, Ch. 835 Stat. 2012 § 2(b)(2); N.J. STAT. ANN. § 45:1-54(l) (2013). A-3371 prescribes no specific penalty for a violation. With respect to New Jersey, presumably the relevant licensing entities would—in consideration of the law and the positions of the leading national professional organizations on SOCE—consider disciplinary action against offenders.

123. Josh Levs, *California Governor OKs Ban on Gay Conversion Therapy, Calling it “Quackery,”* CNN (Oct. 2, 2012), <http://www.cnn.com/2012/10/01/us/california-gay-therapy-ban/>.

124. *Legislature Votes to Ban Sexual-Orientation Conversion Therapy for Minors*, L.A. TIMES (Aug. 30, 2012), <http://latimesblogs.latimes.com/california-politics/2012/08/legislature-votes-to-ban-sexual-orientation-conversion-therapy-for-minors.html>.

needed.”¹²⁵ In signing SB-1172, Governor Jerry Brown declared his view that the “bill bans non-scientific therapies that have driven young people to depression and suicide” and applauded the effort to “relegat[e] [SOCE] to the dustbin of quackery.”¹²⁶

Debate in New Jersey over A-3371 proceeded similarly.¹²⁷ Supporters of the bill challenged the science behind SOCE¹²⁸ and shared emotional stories¹²⁹ about its dangers. In a particularly poignant moment, Jacob Rudolph, an openly LGBT teenage student at Parsippany High School, testified: “I am not broken. I am not confused. I do not need to be fixed.”¹³⁰ Those who opposed the bill threatened legal action and urged legislators not to interfere with a legitimate form of psychotherapy.¹³¹ One legislator noted that he would support the bill because it would not “preclude clergy members from providing this form of counseling if they do not seek a state license to practice professionally.”¹³² Opponents of the bill invoked the name of an infamous serial child molester, calling the bill the “Jerry Sandusky Victimization Act.”¹³³ When Governor Chris Christie

125. *Id.*

126. *California Gay “Conversion” Therapy Ban Generating Hot Debate*, L.A. TIMES (Oct. 2, 2012), <http://latimesblogs.latimes.com/lanow/2012/10/california-gay-conversion-therapy-ban-generating-hot-debate.html>.

127. *See* Livio, *supra* note 1.

128. *Id.*; *see* Oral and Written Testimony of Jean Mercer Ph.D, Professor Emerita of Psych., Stockton Coll., in Support of Bill A-3371 (June 13, 2013) (on file with RUTGERS U. L. REV.).

129. Testimony of Troy Stevenson, Exec. Dir. of Garden State Equal., In Favor of Bill A-3371 (June 13, 2013) (on file with RUTGERS U. L. REV.).

130. Livio, *supra* note 1.

131. *See id.*

132. *Id.*

133. Matt Friedman, *Opponents of Gay ‘Conversion Therapy’ Bill Invoke Jerry Sandusky’s Name*, STAR-LEDGER (May 6, 2013), http://www.nj.com/politics/index.ssf/2013/05/opponents_of_gay_conversion_th.html. This phrase was coined by Gregory Quinlan, “[D]irector of [G]overnment [A]ffairs for socially-conservative New Jersey Family First.” *Id.* Quinlan argued that same-sex attractions frequently find root in an individual being sexually abused as a child. *Id.* Banning SOCE, he continued, would deny the opportunity for those victims to recall and heal the emotional trauma from their own molestations, preventing future child molesters from being caught. *Id.* Sandusky, a former assistant football coach at Pennsylvania State University, was accused and later convicted of sexually abusing several young boys in a scandal that made national headlines and plunged Pennsylvania State University and its football program into turmoil. *Jerry Sandusky Gets 30–60 Years for Molesting Boys*, PENNLIVE (Oct. 9, 2012), http://www.pennlive.com/midstate/index.ssf/2012/10/jerry_sandusky_gets_30-60_year.html; *see also* FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012), available at http://progress.psu.edu/assets/content/REPORT_FINAL_071212.pdf.

expressed initial skepticism about A-3371 at a news conference,¹³⁴ he received sharp rebukes.¹³⁵ Within forty-eight hours, Christie backpedaled, expressing opposition to the practice of SOCE without taking a position on the bill.¹³⁶ Just a few months later, Christie signed the legislation into law.¹³⁷

Perhaps providing unintentional assistance to the statute's constitutionality, many of those who testified in opposition described the legislation as regulating conduct, not speech. Dr. Joseph Nicolosi, a founding member of NARTH, described SOCE as "*treatment* for children with gender identity confusion."¹³⁸ Michelle Cretella, Vice President of the American College of Pediatricians,¹³⁹ protested that "[t]his *therapy* should not be denied to children."¹⁴⁰ Explaining further, Cretella argued

134. Jenna Portnoy, *Christie Undecided on Ban of Controversial "Gay Conversion Therapy,"* STAR-LEDGER (Mar. 21, 2013), http://www.nj.com/politics/index.ssf/2013/03/christie_undecided_on_ban_of_c.html. Christie's comments, made in a year in which he sought re-election to the governor's office, focused on parental rights:

I'm of two minds just on this stuff in general . . . Number one, I think there should be lots of deference given to parents on raising their children. I don't—this is a general philosophy, not to his bill—generally philosophically, on bills that restrict parents [sic] ability to make decisions on how to care for their children, I'm generally a skeptic of those bills. Now, there can always be exceptions to those rules and this bill may be one of them.

Id.

135. Jenna Portnoy, *Gov. Christie Says He Does Not Believe in Gay Conversion Therapy,* STAR-LEDGER (Mar. 22, 2013), http://www.nj.com/politics/index.ssf/2013/03/gov_christie_says_he_does_not.html. Christie's Democratic opponent in the 2013 gubernatorial election, Barbara Buono, said his comments revealed a "stunning level of ignorance." *Id.* "Gay children don't need to be cured," Buono said, calling SOCE "nothing short of child abuse . . . [and] a cruel and damaging practice of trying to shame children into being something they're not." *Id.* Buono's daughter is openly LGBT. Brent Johnson, *Buono's Daughter Says She's Gay, Calls out Christie on Same-Sex Marriage,* STAR-LEDGER (June 27, 2013), http://www.nj.com/politics/index.ssf/2013/06/buonos_daughter_announced_shes_gay_calls_out_christie_on_same-sex_marriage.html. The Democratic Governors Association labeled Christie's remarks as "extremist" and "reactionary" in an e-mail sent to its supporters. *See* Portnoy, *supra*.

136. Portnoy, *supra* note 135.

137. *Gov. Christie Set to Sign Ban on Gay-to-Straight Conversion Therapy,* ASSOCIATED PRESS (Aug. 19, 2013), http://www.nj.com/politics/index.ssf/2013/08/gov_christie_set_to_sign_ban_on_gay-to-straight_conversion_therapy.html.

138. Letter from Dr. Joseph Nicolosi, Nat'l Ass'n for Research & Therapy of Homosexuality, to Josephine Minardo, President, N.J. Psychological Ass'n (on file with RUTGERS U. L. REV.) (emphasis added).

139. This organization has been described as a fringe group. *See Junk Science, supra* note 82.

140. Letter from Dr. Michelle Cretella, Vice President, Am. Coll. of Pediatricians, to N.J. Assembly Women & Children Comm. (on file with RUTGERS U. L. REV.).

that governmental regulation about “what *healthcare procedures* are appropriate for a child” violates parental rights.¹⁴¹ The clinical director of a SOCE practice in California beseeched a legislative committee not to restrict “the freedom to pursue *healing*.”¹⁴² The New Jersey Family Policy Council slammed the legislation as “ban[ning] minors from receiving *counseling*” and as a usurpation of “*professional discretion*” of mental health providers.¹⁴³ A representative of the International Healing Foundation urged legislators not to “deny the right of children to receive *therapy*.”¹⁴⁴ Conceding that “[n]o one should ever be coerced or shamed in to *treatment* for unwanted” same-sex attractions, representatives of Jews Offering New Alternatives to Homosexuality declared that “the *treatment* is effective only when the individual commits to the process . . . like any other *therapy*.”¹⁴⁵ And, in a blistering document purporting to fact-check SB-1172, NARTH itself described SOCE as “psychological *care*,” saying the bill would be harmful by reducing “the availability of any *psychological services*” to California’s LGBT youths.¹⁴⁶ This terminology is telling in that it is the language of conduct, not the language of expression or speech. While the terminology of SOCE proponents is not dispositive on the speech/conduct distinction, these comments tellingly reveal that SOCE’s leading practitioners and advocates have characterized SOCE as conduct, not speech. These revealing comments undermine the notion that the California and New Jersey statutes violate the First Amendment free speech protections.

141. *Id.* (emphasis added).

142. Charles Peters, Clinical Director, Sexual Orientation Change Inst., Testimony at the N.J. Assembly Women & Children Comm. Hearing (June 13, 2013) (on file with RUTGERS U. L. REV.) (emphasis added). Specifically, this individual decried the restriction of the ability to pursue healing from sexual abuse “by the likes of [p]edophile Jerry Sandusky.” *Id.* For context surrounding this inflammatory reference, see *supra* note 133.

143. Gregory Quinlan, Dir. of Governmental Affairs, N.J. Family First, Testimony at the N.J. Senate Health, Human Servs., & Senior Citizens Comm. Hearing (Mar. 18, 2013) (on file with RUTGERS U. L. REV.) (emphasis added).

144. Christopher Doyle, Dir., Int’l Healing Found., Testimony at the N.J. Assembly Women & Children Comm. Hearing (June 13, 2013) (on file with RUTGERS U. L. REV.) (emphasis added).

145. Jews Offering New Alternatives to Homosexuality, Statement at the N.J. Senate Health, Human Servs., & Senior Citizens Comm. Hearing (Mar. 18, 2013) (on file with RUTGERS U. L. REV.) (emphasis added). The group also refers to SOCE practices as “programs” and “the process.” *Id.*

146. Nat’l Ass’n for Research & Therapy of Homosexuality, Statement submitted to the N.J. Assembly Women & Children Comm. Hearing (June 13, 2013) (on file with RUTGERS U. L. REV.) (emphasis added).

V. THE CALIFORNIA AND NEW JERSEY STATUTES ARE CONSTITUTIONAL
UNDER THE FIRST AMENDMENT BECAUSE THEY ARE PERMISSIBLE
APPLICATIONS OF THE STATE'S LICENSING POWER TO REGULATE
CONDUCT

Proponents of SOCE challenged both the California¹⁴⁷ and New Jersey¹⁴⁸ statutes, SB-1172 and A-3371. A primary thrust of these challenges was that the statutes unduly and impermissibly restricted the First Amendment right to free speech.¹⁴⁹ After two different cases in the Eastern District of California reached diametrically-opposed results on First Amendment speech and SOCE, the Ninth Circuit considered the case.¹⁵⁰ On January 29, 2014, the Ninth Circuit held that SB-1172 is “a regulation of professional conduct” and hence “does not violate the free speech rights of SOCE practitioners or minor patients”¹⁵¹ in an amended opinion that denied rehearing en banc.¹⁵² On November 8, 2013, the District of New Jersey held that “A-3371 restricts neither speech nor religious expression,” applied rational basis review, and held that “A-3371 passes constitutional muster under that standard.”¹⁵³ SOCE proponents have sought to appeal these judicial defeats, filing certiorari and appealing to the Third Circuit, respectively.¹⁵⁴

A. *The Plaintiffs' Arguments*

Proponents of SOCE made similar First Amendment speech arguments in both legal challenges.¹⁵⁵ This subsection seeks to

147. See, e.g., *Pickup v. Brown*, No. 2:12-cv-02497-KJM-EFB, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012); *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012).

148. See, e.g., *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013).

149. See, e.g., *King*, 981 F. Supp. 2d at 303; *Welch*, 907 F. Supp. 2d at 1102.

150. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).

151. *Id.* at 1222.

152. *Id.* at 1214.

153. *King*, 981 F. Supp. 2d at 303.

154. *Pickup*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014); *King*, 981 F. Supp. 2d 296, *appeal docketed*, No. 13-4429 (3d Cir. 2013).

155. Indeed, the lead counsel, Matt Staver, of Liberty Counsel, is the same on both the California and New Jersey briefs. Plaintiffs-Appellants' Reply Brief at 1, *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (Nos. 12-17681, 13-15023) [hereinafter “Appellants' 9th Cir. Brief”]; Appellants' Reply Brief at 1, *King v. Christie*, No 13-4429, 2014 WL 1160883, at *1 (3d Cir. Mar. 13, 2014) [hereinafter “Appellants' 3d Cir. Brief”].

summarize the legal arguments of SOCE supporters from their legal filings.¹⁵⁶

Central to each argument made by proponents of SOCE was the fundamental argument that SOCE is speech. The proponents of SOCE argued that “undisputed evidence shows that SOCE counseling . . . consists solely of speech.”¹⁵⁷ Supporting this proposition is the fact that mental health counseling and psychotherapy consists of “talk therapy,” including “discussions with the client concerning the nature and cause” of same-sex attractions, “assistance in understanding traditional, gender-appropriate behaviors and characteristics,” and “assistance in fostering and developing those gender-appropriate behaviors and characteristics.”¹⁵⁸ Indeed, they argued, SOCE consists “entirely of talking to clients.”¹⁵⁹ Further supporting this argument, they declared that SOCE practitioners “engage in talking, the only tool available . . . under the modern discipline of psychotherapy” in order to deliver “the message that unwanted same[-]sex attractions can be reduced or eliminated.”¹⁶⁰ Thus, under their argument, there is no distinction between the act of providing professional mental health services and constitutionally-protected speech.

Having argued that SOCE is speech, SOCE proponents next argued that SB-1172 and A-3371 failed every standard of judicial scrutiny and therefore must be struck down. As content-based restrictions of speech, they argued, the statutes were subject to strict scrutiny,¹⁶¹ requiring each State to achieve that interest in a way that was narrowly tailored.¹⁶² Because there was no conclusive evidence that SOCE was harmful to minors, they argued, government could have no compelling interest in banning SOCE.¹⁶³ In addition, SOCE proponents specifically rejected the notion that there was scientific and medical consensus among leading professional organizations.¹⁶⁴ Because less restrictive means existed—

156. In this subsection, I rely more on the opening briefs of SOCE proponents from the Third Circuit case, as the arguments are largely the same, and these are the most recent filings.

157. Appellants’ 3d Cir. Brief, *supra* note 155, at 4–6.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 12.

162. *Id.* For a more thorough recitation of the scrutiny standards, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 552–54 (4th ed. 2011).

163. Appellants’ 3d Cir. Brief, *supra* note 155, at 14.

164. Appellants’ 9th Cir. Brief, *supra* note 155, at 12. *But see* Brief of Amicus Curae Jack Drescher, M.D. in Support of Defendants-Appellees and Urging Affirmance, *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (Nos. 12-17681, 13-15023). Drescher’s brief argues that the idea that SOCE is harmful “is consistent with a large body of knowledge” in the

such as state-mandated informed consent prior to minors undergoing SOCE—the statutes were not narrowly tailored. Hence, the statutes failed strict scrutiny and were unconstitutional.

Alternatively, SOCE proponents argued that even if the statutes were content-neutral, the statutes were invalid under heightened scrutiny.¹⁶⁵ Heightened scrutiny applies, they argued, when statutes regulating expressive conduct incidentally affect speech.¹⁶⁶ This test requires an important government interest and that the government “not burden substantially more speech than necessary to further those interests.”¹⁶⁷ Similar to their strict scrutiny argument, SOCE proponents argued that each State’s interest in preventing unproven harms were speculative and thus did not constitute an important government interest.¹⁶⁸ Once again, SOCE proponents argued that the states could have used less restrictive means, concluding that the statutes failed heightened scrutiny and were unconstitutional.¹⁶⁹

Advocates for SOCE also argued that the statutes failed rational basis review.¹⁷⁰ Under rational basis review, state action need only be “rationally related” to a “legitimate” state interest—hardly an exacting test.¹⁷¹ Yet, SOCE proponents argued the statutes failed even this standard. By now, the reasoning should be familiar.¹⁷² Because the harm sought to be prevented was merely theoretical, they argued, there was no legitimate state interest at stake.¹⁷³ Thus, it was not possible that the statutes could survive rational basis review, as there was no “evil that need[ed] to be corrected.”¹⁷⁴ Hence, they argued, the statutes failed to pass constitutional muster under even the most accommodating standard of scrutiny.

professional mental health community “tending to show that SOCE [is] dangerous to youth” and further argues that “if SOCE proponents want to claim ethical and scientific legitimacy for their methods, they bear the burden of refuting this body of knowledge.” *Id.* at 9–10.

165. Appellants’ 3d Cir. Brief, *supra* note 155, at 14.

166. *Id.*

167. *Id.* (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

168. *Id.* at 14–15.

169. *Id.* at 14.

170. *Id.* at 15.

171. Appellants’ 9th Cir. Brief, *supra* note 155, at 42 (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)).

172. It appears as though SOCE proponents simply used variations on the same theme in making arguments about the different standards of scrutiny.

173. Appellants’ 3d Cir. Brief, *supra* note 155, at 16.

174. *Id.* (citing *Romer*, 517 U.S. at 645).

B. The Courts' Decisions

The Ninth Circuit and the District of New Jersey largely rejected the arguments of SOCE proponents. In their holdings, the courts emphasized a critical analytical distinction—holding that the practice of SOCE is conduct, not speech. Indeed, the conduct/speech analysis was not merely a component of the decision's analytical framework; for practical purposes, it *was* the decision.

California's SB-1172 faced two challenges in 2012: *Welch v. Brown*¹⁷⁵ and *Pickup v. Brown*.¹⁷⁶ At the district court level, *Welch* and *Pickup* had opposite outcomes—outcomes that underscore the importance of the conduct/speech analysis in the ultimate determination of the law's constitutionality.¹⁷⁷

In *Welch*, two of the plaintiffs were licensed mental health professionals who practiced SOCE as defined by the statute, and a third plaintiff was an aspiring therapist who sought to make SOCE his primary area of practice.¹⁷⁸ The plaintiffs sued under 42 U.S.C. § 1983, seeking declaratory relief, as well as preliminary and permanent injunctions against the enforcement of SB-1172.¹⁷⁹

The *Welch* court held that SB-1172 restricted the content and viewpoint of the speech of mental health providers and was therefore subject to strict scrutiny review.¹⁸⁰ In doing so, the court concluded that even if SB-1172 regulated professional conduct and not speech, it was not exempt from strict scrutiny analysis for two reasons. First, the court noted that “at least some forms of SOCE, such as ‘talk therapy,’ involve speech”¹⁸¹ in the context of the Ninth Circuit's observation that “communication . . . during psychoanalysis is entitled to First Amendment protection.”¹⁸² Because the statute's prohibitions thus targeted “speech’ and ‘nonspeech’ elements . . . in the same course of conduct,”¹⁸³ analyzing the statute's First Amendment constitutionality required a heightened level of scrutiny under *United States v. O'Brien*.¹⁸⁴

175. 907 F. Supp. 2d 1102 (E.D. Cal. 2012).

176. No. 2:12-cv-02497-KJM-EFB, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012).

177. See *id.* at *1; *Welch*, 907 F. Supp. 2d at 1105.

178. *Welch*, 907 F. Supp. 2d at 1106–07.

179. *Id.* at 1105.

180. *Id.* at 1117.

181. *Id.* at 1112 (quoting *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002)).

182. *Id.*

183. *Id.* at 1113 n.7 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)).

184. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The *O'Brien* Court explained that when the same set of acts implicates both speech and non-speech elements, “a sufficiently important governmental interest in regulating the non-speech element can

Second, because “SB[-]1172 ban[ned] a mental health provider from expressing his or her viewpoints about homosexuality as part of SOCE treatment,”¹⁸⁵ the court would have been “hard-pressed to conclude that SB-1172 [was] content- and viewpoint-neutral.”¹⁸⁶ This analysis led the *Welch* court to conclude the statute “must ultimately be assessed under strict scrutiny.”¹⁸⁷ Deeming the statute likely to fail this exacting test, the court held plaintiffs’ First Amendment claims were likely to succeed.¹⁸⁸ After considering the remaining elements of the injunction standard, the court enjoined enforcement of SB-1172.¹⁸⁹

In *Pickup*, the Eastern District of California considered the same question, reaching the opposite conclusion. Rigorously examining the text of SB-1172, the court concluded the statute merely prohibited SOCE treatment itself, not any discussions about treatment.¹⁹⁰ As such, the *Pickup* court concluded that the California statute regulated conduct and not speech.¹⁹¹ Thus, reasoning that SB-1172 was merely subject to rational basis review, Judge Mueller concluded the plaintiffs’ claims were unlikely to succeed.¹⁹² As a result, the court denied an injunction.¹⁹³

The Ninth Circuit consolidated both district court cases on appeal.¹⁹⁴ The Ninth Circuit’s analysis proceeded from its prior decisions in *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* (“*NAAP*”)¹⁹⁵ and *Conant v. Walters*.¹⁹⁶ In reviewing *NAAP*¹⁹⁷ and *Conant*,¹⁹⁸ the court articulated an analytical framework:

justify incidental limitations” on the speech elements. *Id.* Such a governmental intrusion is justified where “[1] it is within the constitutional power of the [g]overnment; [2] if it furthers an important or substantial government interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction is . . . no greater than is essential in furtherance of that interest.” *Id.* at 377.

185. *Welch*, 907 F. Supp. 2d at 1117.

186. *Id.*

187. *Id.*

188. *Id.* at 1117–21.

189. *Id.* at 1121–23.

190. *Pickup v. Brown*, No. 2:12-cv-02497-KJM-EFB, 2012 WL 6021465, at *9 (E.D. Cal. Dec. 4, 2012).

191. *Id.*

192. *Id.* at *12.

193. *Id.* at *26.

194. *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014).

195. *Nat’l Ass’n for the Advancement of Psychoanalysis v. Ca. Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000) [hereinafter “*NAAP*”].

196. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) [hereinafter *Conant*].

197. In *NAAP*, unlicensed psychoanalysts challenged California’s regulatory framework of psychoanalysis on First Amendment grounds. 228 F.3d at 1046. The plaintiffs unsuccessfully argued that because the required state licensure examination only covered certain methods and topics, it was not viewpoint neutral and infringed on free speech rights. *Id.* at 1055. The Ninth Circuit rejected this argument by noting that the licensing

(1) doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive *some* constitutional protection, but is not immune from regulation.¹⁹⁹

In *Pickup*, the Ninth Circuit noted that “the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship”²⁰⁰ that would be unconstitutional absent such a relationship.²⁰¹ Why might the professional-client relationship be considered crucial in this way? Because, the Ninth Circuit answered, the overriding priority of the freedom of speech is to protect the public discourse and the marketplace of ideas.²⁰² In contrast, professionals who utilize a “state-issued license”²⁰³ to practice clinical psychotherapy or psychology seek to provide treatment “to advance the welfare of [patients], rather than to contribute to public debate.”²⁰⁴

The Ninth Circuit ultimately concluded that SOCE is professional conduct, not speech.²⁰⁵ As SOCE is an act of psychotherapy and mental health treatment, it is conduct despite the fact that these professional

scheme did not run afoul of the First Amendment in large part because “the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech.” *Id.* at 1054 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

198. In *Conant*, the Ninth Circuit affirmed a permanent injunction preventing the federal government from sanctioning doctors who recommended medical marijuana to their patients on First Amendment grounds. 309 F.3d at 631. Distinguishing between prescribing marijuana to patients and merely discussing marijuana’s potential medical benefits, the court held that restricting doctors’ ability to discuss the potential benefits of a treatment failed First Amendment scrutiny. *Id.* at 637–39. Thus, the act of treatment (i.e., a doctor “prescribing or distributing marijuana”) was different from a doctor merely sharing his opinion on the efficacy of the treatment. *Pickup*, 740 F.3d at 1226. Because the former was conduct, the Ninth Circuit agreed the government could constitutionally restrict it, while the latter was an impermissible speech restriction. *Id.* The direct parallels of this analysis to SOCE are discussed next.

199. *Pickup*, 740 F.3d at 1227.

200. *Id.* at 1228.

201. *Id.*

202. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see also *CHEMERINKSY*, *supra* note 162, at 955–57.

203. *Pickup*, 740 F.3d at 1227.

204. *Id.*

205. *Id.* at 1229.

services are delivered via spoken language.²⁰⁶ Moreover, the Ninth Circuit persuasively noted that SB-1172 did not “prevent licensed therapists from discussing the pros and cons of SOCE with their patients,”²⁰⁷ leaving therapists “free to discuss and recommend, or recommend against, SOCE.”²⁰⁸ Because mental health professionals remained free to share their opinions about SOCE to their patients, their freedom of speech was not infringed.²⁰⁹ As a regulation of medical and professional conduct, SB-1172’s effects on speech, the court concluded, were incidental.²¹⁰ From this conclusion, the Ninth Circuit proceeded to apply rational basis review, which SB-1172 easily passed.²¹¹

Similarly, the District Court of New Jersey rejected a challenge to A-3371, holding that the statute regulated professional conduct and not speech.²¹² Examining the statute’s plain language, the court noted that “even a cursory review reveals that the statute nowhere references speech or communications; instead, the statute contains words and phrases that are generally associated with conduct.”²¹³ Like the court in *Pickup*, the court in *King* focused on the relationship between state licensing and the regulation of professional conduct.²¹⁴ While A-3371 prohibited licensed professionals from engaging in SOCE, the court observed, it “d[id] not prohibit non-licensed counselors or therapists, including non-licensed religious counselors, from practicing SOCE.”²¹⁵ Nor did the statute, the court emphasized, prohibit licensed professionals from discussing the pros and cons of SOCE in any context—whether with patients, in academic writings, or at professional conferences.²¹⁶

206. *Id.*

207. *Id.*; see also SB-1172, Ch. 835 Stat. 2012. The Ninth Circuit also noted that SB-1172 did not “prevent mental health providers from referring minors to unlicensed counselors, such as religious leaders” or “prevent unlicensed providers, such as religious leaders, from administering SOCE.” *Pickup*, 740 F.3d at 1223.

208. *Pickup*, 740 F.3d at 1231.

209. *Id.*

210. *Id.*

211. *Id.* at 1231–32. SOCE proponents appealed the Ninth Circuit’s ruling to the Supreme Court, which denied certiorari. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014).

212. *King v. Christie*, 981 F. Supp. 2d 296, 318–19 (D.N.J. 2013). The court initially considered the issue in the context of a motion for preliminary injunction. However, the parties agreed to convert the motion into a motion for summary judgment. *Id.* at 305.

213. *Id.* at 313. In particular, the court highlighted the statutory text’s phrases, such as “shall not *engage* in sexual orientation change *efforts*,” and defining SOCE as “*the practice* of seeking to change a person’s sexual orientation.” *Id.*

214. *Id.* at 312–13.

215. *Id.* at 304 n.6.

216. *Id.* at 314, 317–18, 321–23.

Perhaps most damning to the plaintiffs' challenge in *King* was plaintiffs' own admission that SOCE counseling was "no different than any other form of mental health counseling"²¹⁷ because counseling has long been considered conduct and not speech. The District Court of New Jersey emphasized the Supreme Court's key point in *Giboney*, that "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."²¹⁸ Noting the textual similarities between SB-1172 and A-3371²¹⁹ and favorably citing the Ninth Circuit's reasoning in *Pickup*,²²⁰ the District Court of New Jersey concluded the statute did not restrict speech.²²¹ As a result, rational basis review applied, and the statute passed.²²²

The Third Circuit affirmed the District of New Jersey's judgment, albeit through a different line of reasoning.²²³ Disagreeing with the lower court, the Third Circuit noted that the "verbal communication that occurs during SOCE counseling . . . enjoys some degree of protection under the First Amendment."²²⁴ Still, the Third Circuit noted the critical role that licensed, highly-educated professionals play in our society and the deference and trust many clients "have no choice but to place" in such professionals in a variety of settings.²²⁵ As such, the court held that such communications do not receive full First Amendment protections.²²⁶ Applying intermediate scrutiny, the Third Circuit held that A-3371 passed this heightened level of review because the statute was based on "substantial evidence" that it would prevent harm to minors.²²⁷ Notably,

217. *Id.* at 317.

218. *Id.* at 315 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

219. Judge Wolfson noted that California's SB-1172 "is virtually identical to A-3371." *King*, 981 F. Supp. 2d at 312.

220. *Id.* at 313–14.

221. *Id.*

222. *Id.*

223. *King v. Christie*, No. 13-4429, 2014 WL 4455009, at *1 (3d Cir. Sept. 11, 2014).

224. *Id.* at *4.

225. *Id.* at *11.

226. *Id.* at *8.

227. *Id.* at *17. The Third Circuit elaborated on its reasoning for concluding A-3371 passed intermediate scrutiny:

The legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its potential to inflict harm. Among others, the American Psychological Association, the American Psychiatric Association, and the Pan American Health Organization have warned

the Third Circuit explicitly rejected the notion of SOCE as impermissible content-based discrimination, noting that the Legislature targeted SOCE “because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients.”²²⁸ Thus, although it did not agree on the lower court’s conduct/speech analysis, the Third Circuit found A-3371 would survive challenges even at more rigorous levels of First Amendment scrutiny.

C. Which Approach is Correct?

Prior to commenting critically, it is important to note that, in the grand scheme of First Amendment jurisprudence, there are few decisions that speak directly to the circumstances of SOCE. Our society’s understanding of sexuality and sexual orientation, and the legal issues intertwined with these understandings, are complex and quickly advancing. Still, useful comparisons to more familiar paradigms may be drawn. In drawing such analogies, both case law and commentary support the argument that SOCE is conduct and not speech.

Foremost among the principles of free speech in America is Justice Holmes’s famous declaration that the First Amendment should protect “the power of the thought to get itself accepted in the competition of the market.”²²⁹ The core of the First Amendment’s freedom of speech shields those who “bi[d] for the minds of men in the market place of ideas” from undue government interference.²³⁰ Without a doubt, this includes most speech in the political arena, while activities traditionally understood as

of the “great” or “serious” health risks accompanying SOCE counseling, including depression, anxiety, self-destructive behavior, and suicidality. N.J. Stat. Ann. § 45:1–54 (collecting additional position statements and articles from the American Academy of Pediatrics, the American Psychoanalytic Association, and the American Academy of Child and Adolescent Psychiatry warning of the health risks posed by SOCE counseling). Many such organizations have also concluded that there is no credible evidence that SOCE counseling is effective. *See id.*

We conclude that this evidence is substantial. Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject.

Id.

228. *King*, 2014 WL 4455009, at *15.

229. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

230. *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring).

conduct are less protected. With respect to conduct, however, the Supreme Court has recognized protection of expressive conduct—that is, symbolic actions that communicate a message.²³¹ In protecting such conduct, the Court has stressed the expressive nature of the act, requiring “an intent to convey a particularized message” and “the likelihood . . . that the message would be understood by those who viewed it” under the circumstances.²³²

On the other hand, the Supreme Court has cautioned against going too far down the expressive conduct rabbit hole. The Court summarized this idea in *City of Dallas v. Stanglin*, noting it was theoretically possible to “find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall.”²³³ Such activities, however, are not protected free speech, as “such a kernel is not sufficient to bring the activity within the protection of the First Amendment.”²³⁴

In *United States v. O’Brien*, the Court provided a test to determine when the First Amendment protects conduct.²³⁵ *O’Brien* involved the archetypal speech/conduct dilemma: individuals opposed to the Vietnam War burned their draft cards in a display of protest against the war—an act that violated federal law.²³⁶ Clearly, burning a draft card is conduct; indeed, it is difficult to imagine how setting something on fire should be considered speech in the platonic ideal of the word. Still, and equally clearly, burning a draft card is not purely conduct when it is done as a demonstration of political opposition to the war effort. So how do we resolve the analysis? Chief Justice Warren delineated a test, writing:

[G]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest.²³⁷

231. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that the First Amendment protected the ability of individuals to wear armbands protesting the Vietnam War).

232. *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

233. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

234. *Id.*

235. *United States v. O’Brien*, 391 U.S. 367 (1968).

236. *Id.* at 370.

237. *Id.* at 377.

Applying the test to the facts of the case, the *O'Brien* Court held that the federal law was justified.²³⁸

In the context of SOCE, however, it is critical to note that the practice of SOCE does not involve expressive conduct, as “talking therapies do not take place in the marketplace of ideas.”²³⁹ The practice of psychotherapy is strictly a “medical intervention for which any speech that may be involved is only incidental to the purpose of treatment.”²⁴⁰ This Note has previously discussed that proponents of SOCE insist their care is accomplished solely through conversation and talking therapies.²⁴¹ Yet, even though psychotherapy and talking therapies “may consist entirely of speech[,]” these conversations “do[] not receive special First Amendment protection” because “the purpose of psychotherapy is not speech—it is relieving emotional suffering.”²⁴²

Indeed, the statutes are permissible as regulations of professional conduct. Even when professional acts are accomplished via spoken words, they may still be regulated as professional conduct. This principle finds root in the well-established fact that the State may, under its police power, “ban treatments, whether for physical or mental conditions, that are ineffective or harmful.”²⁴³ Chemerinsky explains:

238. *Id.* at 382. Chemerinsky succinctly summarizes the Court’s reasoning: The Court identified several justifications, unrelated to the suppression of speech, for the prohibition of draft card destruction or mutilation. The Court said, for example, that requiring the presence of draft cards facilitates emergency military mobilization, aids communication with a person’s draft board because the address is listed on the card, and reminds individuals to notify their draft board of any change in address or changes related to draft status.

CHEMERINSKY, *supra* note 162, at 1099.

239. Shawn L. Fultz, Comment, *If It Quacks Like a Duck: Reviewing Health Care Providers’ Speech Restrictions Under the First Prong of Central Hudson*, 65 AM. U.L. REV. 567, 596 (2013).

240. *Id.*

241. *See supra* Part V.A.

242. Fultz, *supra* note 239, at 596.

243. Erwin Chemerinsky, “Gay Conversion” Therapy Is Not Protected Free Speech, THE ATLANTIC (Dec. 10, 2012), <http://www.theatlantic.com/national/archive/2012/12/gay-conversion-therapy-is-not-protected-free-speech/266102/>. Chemerinsky continues:

The Food and Drug Administration, for example, has done this since 1906 for drugs and medical devices. Courts have repeatedly rejected the claim that individuals have a constitutional right to use treatments that are banned as harmful or ineffective. Above all, the government always has the power to safeguard children from physical or mental abuse.

Id.

The fact that conversion therapy is done primarily through words does not mean that it is automatically protected as speech under the First Amendment. Never have the courts treated the First Amendment as an absolute protection for speech, and indeed they have upheld many laws that restrict speech by professionals [D]octors may be sanctioned for their speech during treatment, such as when they express an incompetent or false medical opinion to a patient, or fail to provide adequate instructions or ask necessary questions.²⁴⁴

As the Ninth Circuit and District of New Jersey compellingly explain in *Pickup* and *King*, the fact that professional conduct and medical treatment are merely executed through communication does not extend the First Amendment's protection to such conduct.²⁴⁵

Legal scholars and practicing attorneys alike should be familiar with this principle, as it was applied to attorneys in *Ohralik v. Ohio State Bar Association*.²⁴⁶ In *Ohralik*, an attorney sought to appeal discipline he received for advertising his services to an automobile accident victim in person in the hospital.²⁴⁷ The Ohio Supreme Court found these acts violated the Ohio Code of Professional Responsibility.²⁴⁸ In its opinion, the Supreme Court held that "in-person solicitation by a lawyer of remunerative employment is a business transaction."²⁴⁹ In the act of solicitation of services, the Court further held, "speech is an essential but subordinate component."²⁵⁰ The Court noted the critical state interest in "maintaining standards among members of the licensed professions."²⁵¹ Rejecting the lawyer's argument that this rule on professional conduct ran afoul of the First Amendment, the Court explained that accepting such an argument would render "in-person solicitation . . . virtually immune to effective oversight and regulation by the State or by the legal profession."²⁵² The analogy to SOCE is directly parallel, as speech is an "essential but subordinate component" of both the act of soliciting services and the act of providing mental health services.²⁵³ Equally important, like the lawyer's argument in *Ohralik*, the argument that

244. *Id.*

245. *See supra* Part V.B.

246. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978).

247. *Id.* at 452–53.

248. *Id.*

249. *Id.* at 457.

250. *Id.*

251. *Id.* at 460.

252. *Ohralik*, 436 U.S. at 466–67.

253. *Id.* at 457.

SOCE receives the highest protections of First Amendment speech would eviscerate the states' ability to effectively regulate their mental health professionals.²⁵⁴

Furthermore, the cases that extend First Amendment protection to professional conduct are distinguishable—as they largely involve issues of advertising (itself a kind of marketplace of ideas). In *Sorrell v. IMS Health, Incorporated*, the Supreme Court struck down a Vermont law that prohibited using data miners and pharmaceutical manufacturers from using doctors' prescribing histories for marketing without the doctors' consent.²⁵⁵ Because the statute “impose[d] a burden based on the content of speech and the identity of the speaker” in the arena of advertising and marketing, First Amendment protections were implicated.²⁵⁶ While the State argued that this kind of marketing conflicted with the public interests of public safety and medical confidentiality, Justice Kennedy's opinion dismissed this argument, accusing the State of restricting speech it simply “found too persuasive” and striking down the law.²⁵⁷

However, *Sorrell's* holding²⁵⁸ is distinguishable as applied to SOCE. Unlike *Sorrell*, where a state impermissibly banned access to what was essentially already extant marketing data, SB-1172 and A-3371 do not restrict pro-SOCE marketing or advertising in any way. SB-1172 and A-3371 do not prevent licensed mental health professionals from discussing the pros and cons of SOCE with patients.²⁵⁹ Nor do SB-1172 or A-3371 prevent any licensed mental health professionals from engaging in academic research or publications about SOCE, delivering speeches about SOCE to practitioners or the general public, or teaching aspiring practitioners the techniques of SOCE. In short, SB-1172 and A-3371 do not affect expressive conduct as that concept pertains to SOCE. Instead, the statutes merely affect only the act of the medical treatment itself: thus, they regulate conduct and not speech.

Moreover, language used *by the lawsuits' named plaintiffs themselves* suggests that SOCE is conduct and not speech. Both David Pickup and Dr. Tara King describe SOCE in the language of conduct and medical

254. Cf. *Ohralik*, 436 U.S. at 466–67.

255. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2659 (2011).

256. *Id.* at 2665.

257. *Id.* at 2672.

258. For a more detailed discussion of First Amendment speech issues in *Sorrell*, see Martha Swartz, *Physician-Patient Communication and the First Amendment After Sorrell*, 17 MICH. ST. J. MED & L. 101 (2012).

259. See *supra* Part V.B.

treatment, using phrases like: “this type of counseling;”²⁶⁰ “I have counseled clients;”²⁶¹ “the opportunity to address unresolved issues and to get . . . help;”²⁶² “[w]e do competent therapy, therapy that truly works;”²⁶³ “[w]hen those wounds get healed;”²⁶⁴ and “helped save my life;”²⁶⁵ and calling SB-1172 “the height of . . . therapeutic irresponsibility.”²⁶⁶ In prominent public descriptions of SOCE by the named plaintiffs in the lawsuits, the idea of SOCE as speech seems, at best, an afterthought.

The primary problem with accepting the notion that SOCE represents protected constitutional speech—as opposed to conduct—is that such an argument lacks any meaningful limiting principle. SOCE proponents are quick to note that the kind of SOCE prohibited by SB-1172 and A-3371 involves mere “talk therapy,” as opposed to the more draconian efforts of the past. But does this idea—that because SOCE is accomplished through spoken words it is therefore protected speech under the First Amendment—make legal sense?

In order to answer this question, it is useful to consider it in more familiar analogous settings. Let us, for a moment, accept the arguments of SOCE proponents on this point as true. If we do so, a myriad of additional questions come immediately to mind. Consider the lawyer who fails to keep his legal education up to date and as a result, advises his client to take actions that constitute fraud. Should the fact that this advice was transmitted via a phone conversation or an email mean that the lawyer is shielded from malpractice liability for engaging in “speech” protected under the First Amendment?²⁶⁷

Consider the engineer working to renovate a bridge, who miscommunicates a critical fact to the construction team she supervises. If the bridge later collapses while motorists are driving across, would the First Amendment shield her communication from civil or criminal liability? Consider the public school history teacher who boycotts teaching students about President Ronald Reagan because he disagrees with Reagan’s ideology. Would the teacher’s argument that the First Amendment prohibits the school from compelling him to speak against

260. Statement of Dr. Tara King submitted to the N.J. Senate Health, Human Servs., & Senior Citizens Comm. Hearing (Mar. 18, 2013) (on file with RUTGERS U. L. REV.).

261. *Id.*

262. *Id.*

263. Levs, *supra* note 123, at 34.

264. *Id.*

265. *Id.*

266. *Id.*

267. In *Pickup*, the Ninth Circuit noted that “a lawyer may be disciplined for divulging the confidences of his client, even though such disclosure is pure speech.” 740 F.3d 1208, 1228 (9th Cir. 2014).

his political convictions prevent the school from terminating his employment for violating the curriculum? Consider the doctor whose patient presents with severe chest pains and a squeezing sensation in her chest. If the doctor recommends nothing more than herbal tea, should the First Amendment protect the doctor from liability when the patient later dies of a heart attack?²⁶⁸

The answer to each of these questions must be no.²⁶⁹ The reason why not only makes intuitive sense to the layperson but legal sense as well: even though they are delivered through spoken language, the lawyer's advice, the engineer's directive, the teacher's lessons, and the doctor's prescription are all courses of conduct, not speech.²⁷⁰ It is certainly true that each involves a communicative or expressive element. But, in each circumstance, the communication is incidental to the act of a professional providing professional services to a client. Just as in these hypothetical scenarios, the act of providing medical treatment "does not receive special First Amendment protection merely because it is administered through speech."²⁷¹

Nor should it. In the context of talking therapies, words are merely the tools used to deliver the medical treatment. Like the physician's blood pressure cuff and the pediatrician's stethoscope, the therapist's words seek to detect and identify a patient's ills. Like the doctor's prescription pad and the surgeon's scalpel, the therapist's words seek to provide a medical remedy to those ills. While First Amendment protection shields

268. Indeed, the Ninth Circuit spoke to this point as well in *Pickup*, holding this principle to be well established. Doctors, the court observed, "are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care." *Id.* at 1220. This discussion developed upon a point made thirteen years earlier in *Conant*, that "a doctor 'may not counsel a patient to rely on quack medicine. The First Amendment would not prohibit the doctor's loss of license for doing so.'" *Id.* (quoting *Conant v. McCaffrey*, No. C 97-00139 WHA., 2000 WL 1281174, at *13 (N.D. Cal. Sept. 7, 2000) *aff'd sub nom.*, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002)).

269. While these hypothetical defendants may have defenses, First Amendment speech protections would not be among them. With respect to the teacher example, an Ohio teacher sought to review his termination on First Amendment grounds. *Freshwater v. Mt. Vernon Sch. Dist.*, 1 N.E. 335, 338 (Ohio 2013). In violation of the public school curriculum, the teacher regularly presented his religious beliefs (specifically, creationism and intelligent design) to his eighth grade science students, resulting in his termination. *Id.* The Ohio Supreme Court upheld the termination. *Id.* In his petition to the Supreme Court, the teacher argued that his firing was an impermissible attack on his free speech. Petition for Writ of Certiorari, *Freshwater v. Mt. Vernon Sch. Dist.*, No 13-1311 2014, WL 1691052, at *1, *12-17 (U.S. Apr. 22, 2014). The Supreme Court declined to hear the case. *Freshwater v. Mt. Vernon Sch. Dist.*, No 13-1311, 2014 WL 1695151 (U.S. Oct. 6, 2014).

270. See also *Pickup*, 740 F.3d at 1227.

271. *Id.* at 1231.

the ability of a practitioner to give his or her opinion about SOCE's effectiveness to a patient, to advocate for SOCE-friendly public policy, or to publish academic papers or give conference presentations about SOCE, each of these instances is distinguishable.²⁷² These instances are classic examples of protectable speech. What is unprotected conduct, however, is the practice of SOCE itself—the act of a practitioner providing medical treatment to a patient via psychotherapeutic or psychological techniques.

Moreover, proponents of SOCE are quick to note that SOCE talk therapy is consonant with and indistinguishable from many other types of legitimate psychotherapy and mental health therapies.²⁷³ If this is the case, it follows logically that any practice of spoken psychotherapy or mental health service is necessarily speech for constitutional purposes. This overbroad conflation of speech and conduct has serious implications, which the district court noted in *King*:

Plaintiffs' argument . . . taken to its logical end . . . would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible. Such a result runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services.²⁷⁴

Once again, Chemerinsky powerfully crystallizes the practical implications of this point:

[S]tate licensing boards and courts already enforce a plethora of speech-based restrictions . . . including barring false, deceptive, or harmful statements. There is no First Amendment barrier to such regulations, and there is none to SB-1172. Just as a therapist cannot lawfully endanger a person with anorexia by telling her "you are too fat," or treat a condition such as "female hysteria" that has long ceased to be recognized by modern medical authorities as a psychiatric disorder, so therapists . . . cannot subject minors to dangerous practices based on scientifically false and discredited views about sexual orientation.²⁷⁵

272. See also *supra* Part V.B; *supra* notes 250–51 and accompanying text.

273. *King v. Christie*, 981 F. Supp. 2d 296, 317 (D.N.J. 2013).

274. *Id.* at 319.

275. Chemerinsky, *supra* note 243.

Yet, under the arguments advanced by SOCE's proponents, a psychiatrist who tells an anorexic girl she is too heavy, thereby endangering her emotional health and possibly her life, would receive full First Amendment speech protections for this spoken treatment.

This example, as well as those previously mentioned, is not a caricature that unduly dismisses the First Amendment arguments of SOCE advocates. Rather, it simply follows those arguments to their logical extensions. The fact that absurd sounding and potentially dangerous outcomes inevitably result shows, in a compelling way, that the practice of SOCE must be considered conduct, not speech. Furthermore, these examples reveal that the SOCE-as-speech arguments necessarily lack any meaningful or discernible limiting principle.

If we are to accept the notion that SOCE represents speech and not conduct, the slippery slope becomes very slippery indeed—and very quickly. One wonders if social conservatives who advocate for SOCE as free speech²⁷⁶ have fully considered the implications of their arguments. In theory, variants of the SOCE-as-speech argument could be used to unwind a considerable portion of the socially-conservative political agenda. Parental notification requirements for minors to obtain abortions might be struck down as impermissibly compelling those minors to speak in violation of their rights. Requirements that doctors provide certain information to women seeking abortions prior to the procedure might similarly be overturned. Public schools that teach that proper marriage is only between a man and a woman or that provide only a cursory curriculum with respect to evolution might find that these curricula unacceptably violate the First Amendment rights of their teachers. And so on.

More significantly, any regulation of any sort on psychotherapy could immediately be challenged and subjected to heightened levels of scrutiny. Such a view would intolerably undermine the traditional conception of the states' general police power;²⁷⁷ the states' interest in prescribing guidelines for the medical profession;²⁷⁸ the states' ability to set and maintain standards of conduct in licensed professions;²⁷⁹ and the states' ability to safeguard the integrity of the medical profession.²⁸⁰ Thus, the argument that SOCE represents speech requires one to upend fundamental and thoroughly settled legal infrastructure about the police

276. See *supra* Part III.

277. See *Watson v. Maryland*, 218 U.S. 173, 176 (1910).

278. See *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

279. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978).

280. See *Lange-Kessler v. Dep't of Educ. of New York*, 109 F.3d 137 (2d Cir. 1997).

powers of the State, with uncertain and potentially dangerous consequences. Put another way, accepting the argument that SOCE is speech for constitutional purposes does not merely crack open Pandora's Box; it pries the lid entirely off, leaving only a whirlwind of questions in its aftermath. Surely, our First Amendment jurisprudence demands a different answer.

VI. CONCLUSION

This Note has sought to show why states statutes banning licensed mental health professionals from practicing SOCE on minors are constitutional under First Amendment speech principles. But seeking the answer to this narrow legal question should not preclude us from asking what may seem to be difficult questions about sexual orientation, gender identity, and the future of our society. Truly, the question of whether SOCE is proper or legitimate in today's society inevitably brings a sharp and polarizing debate, inviting cable news sound bites, bright lights, heated rhetoric, and media frenzy over legislative hearings. I suspect the controversy and ugly battles over these issues will not be protracted. Perhaps our discourse will be moved by a more compelling argument. Perhaps our society will come to a better understanding, best distilled by the simple eloquence of a high school student from Parsippany, New Jersey—a young man who was not broken, a young man who did not need to be fixed.²⁸¹

281. See Livio, *supra* note 1.