A PROPOSED CURE: MORE EXPANSIVE CONVERSION THERAPY LEGISLATION AND THE LIMITS OF PARENTAL RIGHTS

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TABLE OF CONTENTS

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INTRODUCTION

Presently, only eighteen states and the District of Columbia have laws that bar state-licensed mental healthcare providers from engaging in sexual orientation change efforts ("SOCE"), commonly known as conversion or reparative therapy, with minors.[1] Several other states—such as Florida, Michigan, and Pennsylvania—have cities and counties in which this practice has been barred, but these states still lack state-wide SOCE legislation.[2]

Legislation prohibiting state-licensed mental healthcare providers from engaging in SOCE with minors is relatively new; California led the pack in passing SOCE legislation in 2012, and the majority of the other states with SOCE legislation did not follow suit until 2017 and 2018.[3] Predictably, there is limited litigation on the constitutionality of these laws. However, the Ninth Circuit weighed in on the issue in *Pickup v. Brown*[4] and *Welch v. Brown*,[5] as

1. *Conversion Therapy Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/conversion_therapy [https://perma.cc/U5BY-RKQ6].

2. *Id.*

3. MOVEMENT ADVANCEMENT PROJECT, CONVERSION THERAPY LAWS (2019), http://www.lgbtmap.org/img/maps/citations-conversion-therapy.pdf [https://perma.cc/8SYG-LZHZ] (listing the states that have passed SOCE laws with links to the respective state legislation).

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

5. Welch v. Brown, 834 F.3d 1041 (9th Cir. 2016).

did the Third Circuit in *King v. Governor of New Jersey*[6] and *Doe ex rel. Doe v. Governor of New Jersey*.[7] Both circuits have upheld the constitutionality of the respective California and New Jersey laws that bar state-licensed mental healthcare providers from engaging in SOCE with minors.[8] The Supreme Court has consistently refused to hear the issue, denying certiorari in each of these cases.[9] Thus, these circuit rulings that the respective laws are constitutional stand.

Although the states have not put forth a unified front regarding state-licensed mental healthcare providers engaging in SOCE with minors,[10] the states that have SOCE legislation cohere in the rationale behind their laws: protecting minors from a practice that is known to be both harmful and ineffective. Still, the Ninth Circuit noted a critical loophole in California's SOCE legislation: the legislation "does *not* . . . [p]revent unlicensed providers, such as religious leaders, from administering SOCE to children or adults."[11] Consequently, given the nearly identical phrasing of each state's legislation in only barring *state-licensed* mental healthcare providers from engaging in SOCE with minors, minors in states with and without SOCE legislation alike are left unprotected from SOCE at the hands of *unlicensed* providers who administer the bulk of SOCE on minors.[12]

The empirical data demonstrating the harmfulness and ineffectiveness of SOCE, however, does not draw this distinction between state-licensed and unlicensed providers; rather, the data demonstrates that SOCE at the hands of state-licensed *and* unlicensed providers brings about the same deleterious effects on minors. This then begs the question: if the empirical data demonstrates that SOCE are harmful and ineffective when performed by both state-licensed *and* unlicensed providers, and if this data was sufficient to support states in barring the practice by state-licensed providers, why then is this data not also sufficient to prohibit the practice on minors altogether, regardless of the source?

6. King v. Governor of New Jersey, 767 F.3d 216 (3d Cir. 2014).

7. Doe *ex rel.* Doe v. Governor of New Jersey, 783 F.3d 150 (3d Cir. 2015).

8. *Welch*, 834 F.3d at 1044–47; *Doe*, 783 F.3d at 156; *King*, 767 F.3d at 246–47; *Pickup*, 740 F.3d at 1236.

9. Welch v. Brown, 137 S. Ct. 2093 (2017); Doe v. Christie, 136 S. Ct. 1155 (2016); King v. Christie, 135 S. Ct. 2048 (2015); Pickup v. Brown, 573 U.S. 945 (2014).

10. *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 3.

11. Pickup v. Brown, 740 F.3d 1208, 1223 (9th Cir. 2014).

12. *See* CHRISTY MALLORY ET AL., CONVERSION THERAPY AND LGBT YOUTH 4 (2018) (finding that, while only 20,000 lesbian, gay, bisexual, and transgender ("LGBT") youth will receive conversion therapy from a state-licensed healthcare provider in the states that do not currently have laws prohibiting the practice, 57,000 LGBT youth will receive conversion treatment from unlicensed advisors before they reach the age of eighteen across all states).

This Note will propose and examine the constitutional bounds of more expansive legislation that targets not just SOCE at the hands of state-licensed mental healthcare providers, but also at the hands of unlicensed providers—specifically religious leaders. Though more expansive legislation would likely trigger constitutional objections under the First Amendment, particularly with respect to free speech and free exercise rights, this Note will examine the constitutionality of this proposed legislation through the lens of parental rights under the Fourteenth Amendment.[13]

This Note will proceed in the following order: Part I will examine the history and nature of SOCE, detail the current position of mainstream mental health professional associations regarding SOCE, and analyze current SOCE legislation and its deficiencies. Part II will propose more expansive SOCE legislation and establish that such legislation would not unconstitutionally infringe upon parental rights under the Fourteenth Amendment. Part III will analyze the limits that the Supreme Court has hitherto placed on parental rights, taking the defined limits of these rights in light of claims of religious freedom into special consideration. Parts IV and V will respond to anticipated critiques of the proposed legislation, focusing on the potential ease with which the legislation may be evaded and the ramifications that the legislation may have with respect to parental rights. Finally, Part VI will provide several policy justifications for the proposed legislation.

This Note will ultimately conclude that, as a matter of both doctrine and policy, states not only can, but should amend or enact legislation to eradicate the practice of SOCE on minors altogether, without limitations based on whether the SOCE provider is state-licensed. This Note will conclude that such legislation does not unconstitutionally infringe upon parental rights guaranteed by the Fourteenth Amendment.

13. The First Amendment implications of current SOCE legislation have been examined at length. *See generally* Elizabeth Bookwalter, Note, *Getting It Straight: A First Amendment Analysis of California's Ban on Sexual Orientation Change Efforts and Its Potential Effects on Abortion Regulations*, 22 AM. U. J. GENDER SOC. POL'Y & L. 451 (2014) (discussing the Ninth Circuit's analysis of the free speech and free exercise issues that California's SOCE legislation poses); Megan E. McCormick, Note, *The Freedom to Be "Converted"?: An Analysis of The First Amendment Implications of Laws Banning Sexual Orientation Change Efforts*, 48 SUFFOLK U. L. REV. 171 (2015) (examining the free speech implications of SOCE legislation); Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532 (2014) (considering the First Amendment concerns raised by California's SOCE legislation).

I. THE RISE OF SEXUAL ORIENTATION CHANGE EFFORTS AND ITS RECEPTION BY PROFESSIONALS AND LEGISLATURES

A. SEXUAL ORIENTATION CHANGE EFFORTS

Sexual orientation change efforts ("SOCE") are defined as "efforts to alter sexual orientation through psychoanalytic and behavior therapy," and, in the religious context, through "religiously based self-help groups for distressed individuals" who seek "'healing' or change" and to become "ex-gay."[14] This practice developed in the nineteenth century, a time when people who were homosexual or gender non-conforming were stigmatized, discriminated against, and criminalized.[15] In a 2018 study, the Williams Institute estimated that, in the United States, 350,000 lesbian, gay, bisexual, or transgender ("LGBT") adolescents had received conversion therapy treatment; 20,000 LGBT youth will receive conversion therapy from a state-licensed healthcare provider in the states that do not currently have laws prohibiting the practice; 6,000 LGBT youth in states with laws that ban licensed healthcare providers from practicing conversion therapy on minors would have been subject to the treatment if their states did not have such laws; and 57,000 LGBT youth will receive conversion therapy treatment from religious or spiritual advisors before they reach the age of eighteen.[16]

Methods of SOCE include aversion treatments, such as "inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual bec[omes] aroused to same-sex erotic images or thoughts," in addition to "covert sensitization, shame aversion, systematic desensitization, orgasmic reconditioning, and satiation therapy."[17] Castration has also been used as a method of aversion therapy.[18] Non-aversive treatments have focused on "dating skills, assertiveness, and affection training."[19] Cognitive approaches have centered around "reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation."[20] For adolescents, there are also involuntary or coerced in-

14. JUDITH M. GLASSGOLD ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 22, 25 (2009) [hereinafter TASK FORCE REPORT] (citation omitted).

15. *Id.* at 21.

16. MALLORY ET AL., *supra* note 12, at 1.

17. TASK FORCE REPORT, *supra* note 14, at 22.

18. *Born Perfect: The Facts About Conversion Therapy*, NAT'L CTR. FOR LESBIAN RTS., http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/#q2 [https://perma.cc/8MGD-TZUP].

19. TASK FORCE REPORT, *supra* note 14, at 22.

20. *Id.*

patient or residential treatment options.[21]

Other treatment options include religious-based programs. One of the better-known programs was called Love in Action's Refuge, which was closed in 2007 and is no longer advertised, though it still sponsors adult conversion therapy programs;[22] another was an umbrella organization known as Exodus International, which was shut down in 2013.[23] Still, religious-based programs remain active. According to patient anecdotes, they "allegedly use[] fear and even threats about negative spiritual, health, and life consequences" as part of their curriculum.[24] One such program allegedly had its participants keep a "moral inventory" journal, "in which they detail[ed] their struggle with same-sex temptation over the years, which they read at emotionally raw group meetings."[25] Another program made use of "[a]version therapy, shock therapy, harassment and occasional physical abuse" with the goal of getting its participants to "hate [themselves] for being [lesbian, gay, bisexual, transgender, or queer]."[26] The program allegedly "removed . . . everything that made [its participants] unique," and then remade them into ostensibly devout and heterosexual human beings.[27] Another program rendered a minor stricken with fear that, even if the minor did "come out [of the program] straight," he or she would be "so mentally unstable and depressed it [would not] matter."[28] Love in Action is reported to have staged a mock funeral for one of its participants who no longer wished to be enrolled in the program, having the participant lay still on a table while others lamented his inability to "stick with God" and his resulting premature death.[29]

21. *Id.* at 74.

22. *Id.* at 75 n.63.

23. Julie Rodgers, Opinion, *What I Learned from Gay Conversion Therapy*, N.Y. TIMES (May 5, 2018), https://www.nytimes.com/2018/05/05/opinion/gay-conversion-therapy.html [https://perma.cc/KB9P-VVFU].

24. TASK FORCE REPORT, *supra* note 14, at 75.

25. Alex Williams, *Gay Teenager Stirs a Storm*, N.Y. TIMES (July 17, 2005), https://www.nytimes.com/2005/07/17/fashion/sundaystyles/gay-teenager-stirs-a-storm.html [https://perma.cc/DAF5-JYB2].

26. James Michael Nichols, *A Survivor of Gay Conversion Therapy Shares His Chilling Story*, HUFFPOST (Nov. 17, 2016, 11:05 AM), https://www.huffingtonpost.com/entry/realities of conversion therapy_us_582b6cf2e4b01d8a014aea66 [https://perma.cc/JAH7-JTTS].

27. *Id.* (citation omitted).

28. Williams, *supra* note 25 (citation omitted).

29. Michelle Goldberg, *Ex-Gay Leader John Smid's About-Face*, DAILY BEAST (July 13, 2017 10:09 PM) (citation omitted), https://www.thedailybeast.com/ex-gay-leader-john-smids-about-face [https://perma.cc/NT8H-RB2U].

B. THE AMERICAN PSYCHOLOGICAL ASSOCIATION'S FINDINGS AND RECOMMENDATIONS REGARDING SOCE

Existing state legislation protecting minors from SOCE at the hands of state-licensed mental healthcare providers is well-supported, as the reported effects of SOCE are, by and large, grim. In 2000, the American Psychiatric Association ("APA") released a position statement on sexual orientation change therapies, asserting that "[p]sychotherapeutic modalities to convert or repair homosexuality are based on developmental theories whose scientific validity is questionable."[30] The APA also stated that reports of "cures" of homosexuality through sexual orientation change therapies were met with reports of the psychological harm that such practices caused.[31] Accordingly, in light of medical providers' obligation to "[f]irst, do no harm," the APA recommended that healthcare providers refrain from engaging in efforts to change another's sexual orientation.[32]

Then, in 2009, the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation ("the Task Force") published a report detailing the damaging effects of SOCE and the unlikely success of this practice.[33] With respect to reported success rates of SOCE, the Task Force found that older studies of dubious validity reported some short-term decrease in same-sex sexual attraction in a minority of study participants, while more recent studies "provide no sound scientific basis for determining the impact of SOCE on decreasing same-sex sexual attraction."[34] Furthermore, while there was some decrease in same-sex sexual behavior in a minority of study participants, the Task Force found that the success of these programs in actually increasing other-sex sexual attraction and behavior had little support.[35]

30. AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON THERAPIES FOCUSED ON ATTEMPTS TO CHANGE SEXUAL ORIENTATION (REPARATIVE OR CONVERSION THERAPIES) (2000) (internal quotation marks omitted) (on file with author). This position statement came approximately twenty-seven years after the APA decided in 1973 that homosexuality was no longer a mental illness. *See generally The A.P.A. Ruling on Homosexuality*, N.Y. TIMES (Dec. 23, 1973), https://www.nytimes.com/1973/12/23/archives/the-issue-is-subtle-the-debate-still-on-the-apa-ruling-on.html [https://perma.cc/HW2C-FCD2] (reporting the APA's decision and providing a transcription of discussion between two prominent psychiatrists regarding the decision); Ira Glass & Alex Spiegel, *81 Words*, THIS AM. LIFE (Jan. 18, 2002), https://www.thisamericanlife.org/204/81-words [https://perma.cc/FX8R-79BX] (detailing the APA's ideological changes that preceded this decision).

31. AM. PSYCHIATRIC ASS'N, *supra* note 30.

32. *Id.*

33. TASK FORCE REPORT, *supra* note 14, at 3.

34. *Id.* at 38.

35. *Id.* at 39–41. A similar conclusion was ultimately reached by Dr. Robert L. Spitzer. Benedict Carey, *Psychiatry Giant Sorry for Backing Gay 'Cure,'* N.Y. TIMES, May 19, 2012, at A1. In 2001, Dr. Spitzer, who had been instrumental in the removal of homosexuality from the psychiatric field's

With respect to the reported harms of SOCE, the studies that the Task Force examined indicated that some of those who have been subjected to SOCE self-reported feelings of "anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, and sexual dysfunction."[36] The Task Force found the well-being of minors to be particularly at risk in these settings because of their "lack of legal rights and cognitive and emotional maturity and emotional and physical dependence on parents, guardians, and [licensed mental healthcare providers]."[37] Looking ahead to appropriate psychiatric treatment of minors, the Task Force recommended a framework of "acceptance and support, . . . active coping, social support, and identity exploration and development," family interventions to reduce rejection and increase support, and a concerted focus on the child's "total health and well-being," rather than on efforts to change the child's sexual orientation.[38]

On August 5, 2009, the American Psychological Association adopted the findings of the Task Force, concluding in part that "there is insufficient evidence to support the use of psychological interventions to change sexual orientation."[39] The American Psychological Association also recommended the avoidance of psychotherapy that portrays homosexuality as a mental illness and the promotion of psychotherapy that provides "accurate

diagnostic manual in 1973, published a study in which he interviewed 200 men and women undergoing conversion therapy and found that "[t]he majority of participants gave reports of change from a predominantly or exclusively homosexual orientation before therapy to a predominantly or exclusively heterosexual orientation in the past year." *Id.* However, in 2012, Dr. Spitzer issued a public apology in which he conceded that his study was critically limited to a finding of how people participating in conversion therapy described changed in sexual orientation and thus did not speak to whether such therapy was actually effective. *Id.*

36. TASK FORCE REPORT, *supra* note 14, at 42; *see also* Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346, 349–50 (2009) (finding that lesbian, gay, and 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 report illegal drug use, 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"); Gabriel Arana, *My So-Called Ex-Gay Life*, AM. PROSPECT (Apr. 11, 2012), https://prospect.org/article/my-so-called-ex-gay-life [https://perma.cc/65QD-J5V4] (describing the author's personal experiences with depression, anxiety, and suicidal ideation as a result of his exposure to conversion therapy).

37. TASK FORCE REPORT, *supra* note 14, at 76.

38. *Id.* at 5, 7.

39. Barry S. Anton, *Proceedings of the American Psychological Association for the Legislative Year 2009*, 65 AM. PSYCHOLOGIST 385, 385–475 (2010), *reprinted in* AM. PSYCHOLOGICAL ASS'N, APA POLICY STATEMENTS ON LESBIAN, GAY, BISEXUAL, & TRANSGENDER CONCERNS 31 (2011), https://www.apa.org/about/policy/booklet.pdf [https://perma.cc/5USY-8D2Q].

information about sexual orientation and sexuality, [which] increase[s] family and school support, and reduce[s] rejection of sexual minority youth."[40]

C. CALIFORNIA'S LAW AGAINST SOCE AND RELATED LITIGATION

In 2012, California enacted Senate Bill 1172 ("SB 1172"), which bars state-licensed mental healthcare providers from performing SOCE on minors.[41] The legislation renders such conduct "unprofessional" and subject to "discipline by the licensing entity for that mental health provider."[42] Several examples of those who qualify as "mental health providers" within the meaning of the legislation are listed (for example, licensed marriage and family therapists, licensed clinical social workers, and psychologists), with the ultimate conclusion that the law applies to "any . . . person designated as a mental health professional under California law or regulation."[43] The legislation defines "[s]exual orientation change efforts" as "any practices by mental health providers that seek to change an individual's sexual orientation," with special mention of efforts to change gender behaviors and expressions and to change attractions toward the same sex.[44] Finally, the legislation excludes from professional discipline conduct that provides positive support to clients or that does not seek to change sexual orientation.[45]

In support of the bill, the California legislature underscored the Task Force's findings regarding SOCE, essentially using these findings as the bill's backbone.[46] The legislature also cited the American Academy of Pediatrics,[47] the American Psychoanalytic Association,[48] and other mainstream mental health professional associations for support, drawing

40. *Id.*

41. S.B. 1172, 2011-2012 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE §§ 865(a), 865.1 (West 2019)).

42. CAL. BUS. & PROF. CODE § 865.2 (West 2019).

43. *Id.* § 865(a).

44. *Id.* § 865(b)(1).

45. *Id.* § 865(b)(2).

46. *See* Cal. S.B. 1172 §§ 1–2.

47. Comm. on Adolescence, *Homosexuality and Adolescence*, 92 PEDIATRICS 631, 633 (1993) ("Therapy 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.").

48. *2012 – Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression*, AM. PSYCHOANALYTIC ASS'N, http://www.apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender [https://perma.cc/MV5P-FRQQ] ("[E]fforts [to change sexual orientation, gender identity, or expression] are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes.").

specific attention to the demonstrably harmful effects of SOCE on minors.[49] Asserting that California has a compelling state interest in shielding minors from the potential harms associated with SOCE, the bill eradicates the practice of SOCE on minors by state-licensed mental healthcare providers.[50]

In *Pickup v. Brown*, the Ninth Circuit reviewed the Eastern District of California's holding that SB 1172 stood constitutional muster, incorporating its prior holding in *Welch v. Brown* on the same issue.[51] Between the two cases, the plaintiffs were SOCE practitioners, aspiring SOCE practitioners, organizations that promote SOCE, children undergoing SOCE, and their parents.[52] The Ninth Circuit ultimately affirmed *Welch*, holding that SB 1172 does not violate the free speech or free association rights of SOCE practitioners or patients,[53] is not void for vagueness or overbreadth, and does not impinge on parents' rights to direct the care and upbringing of their children.[54] The Supreme Court denied certiorari of both *Pickup* and *Welch*, letting the Ninth Circuit's holdings in each case stand.[55]

This Note will focus on the part of the Ninth Circuit's holding in *Pickup* that stated SB 1172 did not unconstitutionally infringe upon parents' fundamental right under the Fourteenth Amendment to direct the upbringing of their children. The Ninth Circuit justified its holding first in reasoning that, because parents, as adults, do not have a fundamental right to choose a particular treatment or provider for themselves,[56] it would be counterintuitive for parents to have the right to choose a particular treatment or provider for their children, particularly a treatment or provider that the state has reasonably deemed harmful.[57] Accordingly, the court found that parents' fundamental rights were not violated in prohibiting parents from subjecting their children to SOCE administered by a state-licensed mental healthcare provider, particularly because the state has deemed SOCE at the

49. Cal. S.B. 1172 § 1(b).

50. *Id.* § 2.

51. Pickup v. Brown, 740 F.3d 1208, 1221–22 (9th Cir. 2014).

52. *Id.* at 1224.

53. In *Pickup*, the Ninth Circuit declined to address the free exercise of religion claim asserted by the plaintiffs in *Welch* because the plaintiffs in *Welch* failed to sufficiently argue the claim, the district court in *Welch* did not rule on the claim, and the plaintiffs in *Pickup* did not raise such a claim. *Id.* at 1224 n.3.

54. *Id.* at 1222.

55. Welch v. Brown, 137 S. Ct. 2093 (2017); Pickup v. Brown, 573 U.S. 945 (2014).

56. *Pickup*, 740 F.3d at 1235–36 ("[S]ubstantive due process rights do not extend to the choice of type of treatment or of a particular health care provider." (quoting Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1050 (9th Cir. 2000))).

57. *Id*. This is a curious argument for the Ninth Circuit to have made considering that, under current legislation, parents as adults can choose to subject themselves to SOCE at the hands of a state-licensed mental healthcare provider.

hands of state-licensed mental healthcare providers harmful to children.[58] Second, the Ninth Circuit held that, just as parents in *Fields v. Palmdale School District* were not permitted to "compel public schools to follow their own idiosyncratic views as to what information the schools may dispense,"[59] in the case of SOCE, "to recognize the right [the plaintiffs asserted] would be to compel the California legislature, in shaping its regulation of mental health providers, to accept [the] [p]laintiffs' personal views of what therapy is safe and effective for minors."[60] Thus, the court found that SB 1172 does not violate parents' Fourteenth Amendment rights.[61]

D. NEW JERSEY'S LAW AGAINST SOCE AND RELATED LITIGATION

In 2013, New Jersey enacted its own statute that prohibits state-licensed professional counselors (for example, licensed marriage and family therapists, licensed clinical social workers, and licensed practicing psychologists) from engaging in SOCE with minors.[62] Like its sister California statute, the New Jersey statute also permits counseling that provides "acceptance, support, and understanding" to a minor, and counseling that does not seek to change sexual orientation.[63] The New Jersey legislature's justification for passing the statute is essentially identical to that of California and is likewise substantiated by the findings and recommendations of the same mainstream mental health professional associations.[64]

In *King v. Governor of New Jersey*, the Third Circuit held that New Jersey's statute does not violate First Amendment free speech rights, is not unconstitutionally vague or overbroad, and does not violate practitioners' rights to free exercise of religion.[65] In its free speech analysis, the Third Circuit underscored the magnitude of the state's interest in this legislation, which the court called "unquestionably substantial" in light of how "especially vulnerable" minors were to harmful professional practices.[66] The Third Circuit found that the harms that SOCE counseling presents are "real, not merely conjectural," as substantiated by the findings to that effect by the mainstream mental health professional associations cited in the legislative

58. *Id.*
59. *Id.* at 1236 (discussing Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005)).
60. *Id.*
61. *Id.*
62. N.J. STAT. ANN. § 45:1-55(a) (West 2019).
63. *Id.* § 45:1-55(b)(1–2).
64. Assemb. B. 3371, 2012-2013, Reg. Sess. (N.J. 2013).
65. King v. Governor of New Jersey, 767 F.3d 216, 223, 240–42 (3d Cir. 2014).
66. *Id.* at 237–38.

record.[67] From those records, the Third Circuit extrapolated, "[i]t is not too far a leap in logic to conclude that a minor client might suffer psychological harm if repeatedly told by an authority figure that her sexual orientation—a fundamental aspect of her identity—is an undesirable condition."[68] The Third Circuit further noted that "if SOCE counseling is ineffective—which . . . is supported by substantial evidence—it would not be unreasonable for a legislative body to conclude that a minor would blame [him- or] herself if [his or] her counselor's efforts failed."[69] Thus, the court found that the legislation "directly advances" a state interest in protecting minors from harmful professional practices.[70]

Then, in *Doe ex rel. Doe v. Governor of New Jersey*, the Third Circuit again upheld the constitutionality of the statute, finding that the statute did not infringe upon the First Amendment right to receive information, the First Amendment right to the free exercise of religion, or the parents' fundamental rights under the Fourteenth Amendment.[71] The Third Circuit agreed with the Ninth Circuit's reasoning in *Pickup* that SOCE legislation does not infringe upon parents' fundamental rights under the Fourteenth Amendment because such rights do not provide for the right of parents to choose, for themselves or for their children, a particular provider or treatment "that the state has reasonably deemed harmful."[72]

E. A DANGEROUS LOOPHOLE

Still, while California and New Jersey's statutes and the like are an important step forward in protecting minors from the harmful effects of SOCE, they afford children insufficient protection. Specifically, by their own terms, the statutes leave children fully within the grasp of unlicensed providers administering SOCE. As the Ninth Circuit noted in *Pickup*, California's statute—and thus, by extension, New Jersey's statute and any similar statutes from other states—does not, in most relevant part, "[p]revent unlicensed providers, such as religious leaders, from administering SOCE to children or adults."[73]

What appears to be a small concession relative to the significant protection that these SOCE statutes provide is actually an explicitly

67. *Id.* at 238 (citation omitted).
68. *Id.* at 239.
69. *Id.*
70. *Id.*
71. Doe *ex rel.* Doe v. Governor of New Jersey, 783 F.3d 150, 154–56 (3d Cir. 2015).
72. *Id.* at 156 (citing Pickup v. Brown, 740 F.3d 1208, 1235–36 (9th Cir. 2014)).
73. *Pickup*, 740 F.3d at 1223.

permitted minefield. Critically, the Task Force found that "[t]here are a large number of unlicensed and unregulated programs marketed to parents struggling to find behavioral or mental health programs for their adolescent children."[74] These programs are able to escape regulation by "not identifying themselves as mental health programs, [although] they do advertise mental health, behavioral, and/or educational goals, especially for those youth perceived as troubled by their parents."[75] These programs are also known to be involuntary and coercive, using "seclusion or isolation and escort services to transport unwilling youth to program locations."[76] Religious-based conversion therapy programs fall under this unregulated category.[77]

This loophole allows all of the same deleterious treatment and effects on minors as those enumerated as justification for the statutes' bar of state-licensed conduct. Moreover, the findings of the mainstream mental health professional associations were not limited to SOCE administered by state-licensed mental healthcare providers; they apply to SOCE administered by any provider, whether state-licensed or not, and particularly by religious leaders.[78] However, in the hands of these non-licensed individuals who administer SOCE and escape state regulation, children are without legal protection.

II. A POSSIBLE SOLUTION

To better protect children from the harms of SOCE, existing legislation should be amended to be more sweeping in its restrictions, and future legislation must do the same. Drawing from the phrasing of the current SOCE laws in California and New Jersey, truly protective legislation would read something like the following:[79]

a. Under no circumstances shall any person provide, consent to, or facilitate the administration of sexual orientation change efforts

74. TASK FORCE REPORT, *supra* note 14, at 75.

75. *Id.*

76. *Id.*

77. *See id* at 75–76.

78. At the beginning of its report, the Task Force stipulated that it "use[d] the term *sexual orientation change efforts* (SOCE) to describe methods . . . that aim to change a person's same-sex sexual orientation to other-sex, regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders . . .) are involved." TASK FORCE REPORT, *supra* note 14, at 2 n.**. Thus, as the Task Force discussed the harms associated with SOCE, these harms do not solely stem from SOCE at the hands of mental health professionals alone; the Task Force's findings of harm stem from SOCE at the hands of religious leaders as well.

79. It is acknowledged that this legislation is merely a proposal intended to further discussion about more extensive SOCE legislation. The proposed statute may give rise to constitutional objections that are beyond the scope of this Note.

on a person under eighteen years of age.

b. As used in this section, "sexual orientation change efforts" means individualized or group counseling, in the form of either psychotherapy administered by a state-licensed mental healthcare provider or a formal program, with the primary goal of changing, repressing, or eliminating a person's sexual orientation, gender identity, or gender expression.[80]

(1) As used in this section, "counseling" means the giving of treatment, guidance, or instruction, through spoken word or through physical acts, to bring about the resolution of a problem. More specifically, "counseling" here includes, but is not limited to, counseling to change same-sex-oriented desires or behaviors to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender.

(2) As used in this section, "formal program" means an organized method through which counseling is administered in which individuals formally enroll or regularly engage in as part of a systematic effort to change one's sexual orientation.

(3) As used in this section, the "primary goal" of the counseling is a question of fact that is to be determined based on the totality of the circumstances and independently of what a given mental healthcare provider's or other program's stated or publicized purpose is. The counseling's "primary goal" is to be evaluated from the perspective of the counselor.

c. "Sexual orientation change efforts" shall not include counseling for a person seeking to transition from one gender to another, or counseling that:

(1) provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including

80. Sexual preferences or practices that can be characterized as bestiality or pedophilia are not understood as a sexual orientation, gender identity, or gender expression generally or within the meaning of this statute. Accordingly, counseling that targets bestiality or pedophilia is not prohibited by this statute.

> sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and
>
> (2) does not seek to change sexual orientation.[81]

This proposed legislation offers more complete protection for children from SOCE in part because parents are thereby barred from consenting to such treatment for their children, whether at the hands of state-licensed healthcare providers, religious leaders, or other sources. This legislation also specifically targets not just SOCE at the hands of state-licensed mental healthcare providers (which is what current SOCE legislation is limited to targeting), but also SOCE at the hands of religious-based SOCE programs.

Still, it is important to take note of what this legislation does *not* prohibit. This proposed legislation prohibits neither church attendance nor prayer in church, even if the sermon at church or the prayer is about homosexuality, as neither action falls within the legislation's definition of counseling or can be considered a form of psychotherapy or formal program within the meaning of the statute. Most importantly, because of the "counseling" and "psychotherapy" or "formal program" requirements, this legislation does not reach into the confines of the home to govern parent-child interactions therein; parents do not violate this legislation by expressing contempt over their child's sexuality to their child or any such derivative behavior.

However, the relatively far-reaching nature of this proposed legislation gives rise to concern of an abuse of state police power. Within this concern rests an objection to the proposed legislation grounded in the Fourteenth Amendment: any state enacting such expansive legislation unconstitutionally infringes upon parental rights. The remainder of this Note will address the constitutionality of this proposed legislation in light of a claim anchored in Fourteenth Amendment parental rights.

III. A DOCTRINAL ARGUMENT IN SUPPORT OF THE PROPOSED LEGISLATION

A. THE PROPOSED LEGISLATION FALLS WITHIN A STATE'S POLICE POWER

Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to

81. This statute is intended to be civil, not criminal, in nature. A penalty for a violation of this statute would be a fine of some amount deemed appropriate by the state.

the States respectively, or to the people."[82] The Tenth Amendment is the source of state police power.[83]

In order for legislation to fall within a state's police power, the legislation must meet two requirements: first, the legislation must address the general public interest, not just the interest of a particular class,[84] and second, the legislation must be tailored to what is "reasonably necessary" to service the asserted public interest such that it does not "unduly oppress[]" individuals.[85] Specifically, a state's police power is hemmed in by the Constitution: a state cannot pass a law that contravenes the Constitution or any right provided by the Constitution.[86] The key for this Note is that a state's police power embraces the power to enact legislation aimed at the protection of public health and safety.[87]

There is a significant public health and safety interest in protecting children from the harms of SOCE. It is well established that the state and the public at-large have a legitimate interest in protecting children from harm.[88] SOCE are one such harm. While it could be argued that the state may not reach so far as to prohibit a form of psychotherapy that is inconclusive with respect to success and harm rates with minors, the Third Circuit addressed this concern in explaining that "a state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its

82. U.S. CONST. amend. X.

83. *See* Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1905) ("[T]he police power [is] a power which the State[s] did not surrender when becoming . . . member[s] of the Union under the Constitution.").

84. Lawton v. Steele, 152 U.S. 133, 137 (1894); *see also* Stuart J. Baskin, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1387 (1974) (noting that the state may intervene when conduct interferes with the state's "social, political, and economic institutions; or its moral quality").

85. *Lawton*, 152 U.S. at 137.

86. *See Jacobson*, 197 U.S. at 25.

87. *Id.*; *see also* R.R. v. Husen, 95 U.S. 465, 470–71 (1878) ("[The police power of the state] is generally said to extend to making regulations promotive of domestic order, morals, health, and safety."); Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878) ("[T]here seems to be no doubt that [state police power] does extend to the protection of the leves [sic], health, and property of the citizens, and to the preservation of good order and the public morals."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) ("No direct general power over [inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and other component parts of the mass of legislation that States retain power over] is granted to Congress; and, consequently, they remain subject to state legislation."); Thorpe v. Rutland & Burlington R.R., 27 Vt. 140, 149 (1854) ("The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.").

88. As the Supreme Court noted in *Prince v. Massachusetts*, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens with all that implies." Prince v. Massachusetts, 321 U.S. 158, 169 (1944).

citizens from serious threats of harm."[89] Indeed, while the state need not present "a 10,000-page record" in order to address a "real problem," the state "must present more than anecdote and supposition."[90]

There is more than anecdote and supposition here. According to the Task Force, minors subjected to SOCE are rendered depressed, suicidal, and riddled with guilt, anxiety, self-hatred, and sexual dysfunction after being subjected to a psychotherapeutic modality with a success rate that is questionable at best.[91] These findings were not limited to SOCE administered by state-licensed mental healthcare providers. The Task Force generally noted that its findings of harm stemmed from religious-based SOCE as well, specifically noting that unlicensed, religious-based groups are known for their involuntary and coercive nature, that such programs use seclusion and isolation as part of their curriculum, and that such programs use forced transportation for minors unwilling to attend.[92] Both California and New Jersey extensively cited to the Task Force's findings as well as to several other mainstream mental health professional associations in the legislative histories accompanying their SOCE legislation. All cited associations were unified with respect to the harmfulness and ineffectiveness of the performance of SOCE on minors. Additionally, the Third Circuit volunteered its own commentary on the harm that SOCE poses to children when administered by an "authority figure"—not just by a state-licensed mental healthcare provider—in asserting that children might suffer "psychological harm" as a result of treatment that targets a "fundamental aspect of [their] identity," in addition to feelings of blame if the treatment was unsuccessful.[93] Thus, SOCE, whether at the hands of a state-licensed mental healthcare professional or an unlicensed individual, threatens real harm to children, and the proposed legislation addresses this harm in endeavoring to protect children in a way that is more comprehensive than current legislation.

Additionally, though more stringent and more sweeping in its reach than current SOCE laws, the proposed legislation is tailored to what is "reasonably necessary" to protect children from this health and safety risk. In drafting legislation rooted in a state's police power, "large discretion is necessarily vested in the legislature" to determine both what public interests

89. King v. Governor of New Jersey, 767 F.3d 216, 239 (3d Cir. 2014) (citing United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 822 (2000)).

90. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 822 (2000).

91. TASK FORCE REPORT, *supra* note 14, at 37, 42.

92. *Id.* at 2 n.**, 37, 42.

93. *King*, 767 F.3d at 239.

are at stake and what legislation is necessary to address and protect these interests.[94] The proposed legislation certainly extends further than current SOCE legislation, but necessarily so. The findings of the mainstream mental health professional associations regarding the harms suffered as a result of SOCE are not limited to harms experienced at the hands of state-licensed mental healthcare providers; the findings specifically encompass harms stemming from SOCE administered by religious-based programs as well.[95] But religious-based SOCE programs are not prohibited by current legislation, as the Ninth Circuit in *Pickup* explicitly disclaimed that current SOCE legislation "does *not* . . . [p]revent unlicensed providers, such as religious leaders, from administering SOCE to children or adults."[96]

Thus, given that a state's objective in SOCE legislation is to protect children from harm brought on by exposure to SOCE in general, legislation should extend further than merely prohibiting SOCE at the hands of state-licensed mental healthcare providers in order to achieve this end. Indeed, legislation should prohibit all SOCE—at the hands of state-licensed providers *and* non-state-licensed providers—in order to serve this purpose.

However, the proposed legislation encounters an obstacle when faced with the constitutional hurdle to state police power: whether the legislation conflicts with parental rights secured by the Fourteenth Amendment.

B. THE FOURTEENTH AMENDMENT DOES NOT BAR THE PROPOSED LEGISLATION

The proposed legislation targets and restricts parental conduct: parents cannot facilitate the performance of SOCE on their children from any source, such as from a state-licensed mental healthcare provider, religious leader, or otherwise. Accordingly, this more expansive legislation would likely trigger an objection by parents that such legislation unconstitutionally permits the state to intrude upon their right to direct the upbringing of their children, as guaranteed by the Fourteenth Amendment.[97]

94. Lawton v. Steele, 152 U.S. 133, 136–37 (1894).

95. TASK FORCE REPORT, *supra* note 14, at 75; *see also* Williams, *supra* note 25 (quoting an adolescent expecting to attend such a program wrote on his blog who explained that "If [he] do[es] come out straight, [he]'ll be so mentally unstable and depressed it won't matter").

96. Pickup v. Brown, 740 F.3d 1208, 1223 (9th Cir. 2014).

97. Although the rights of parents may also find a basis in privacy rights, the Supreme Court has demonstrated a preference of analyzing the rights of parents in terms of parental rights guaranteed by the Fourteenth Amendment. JOHN P. WILSON, THE RIGHTS OF ADOLESCENTS IN THE MENTAL HEALTH SYSTEM 196 (1978). Accordingly, this Note will couch its analyses and arguments in terms of parental rights under the Fourteenth Amendment rather than in terms of privacy rights.

1. The Limits of Parental Rights Under the Fourteenth Amendment

The seminal case in recognizing parental rights under the Fourteenth Amendment's Due Process clause is *Meyer v. Nebraska*, in which the Supreme Court held, over ninety years ago, that parents' fundamental liberty interests included the right to "establish a home and bring up children" and the power to "control the education of their own."[98] The Supreme Court reaffirmed these rights shortly thereafter in *Pierce v. Society of Sisters*, in which the Court unanimously recognized that "[t]he child is not the mere creature of the State; those who nurture [the child] and direct his [or her] destiny have the right, coupled with the high duty, to recognize and prepare him [or her] for additional obligations."[99] Decades later, the Supreme Court again recognized the domain of parental rights in *Prince v. Massachusetts*, explaining that "[i]t is cardinal . . . that the . . . nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[100] Finally, as summarized most recently by the Supreme Court in *Troxel v. Granville*, "it cannot . . . be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children."[101]

However, though parental rights are solidified in our jurisprudence, establishing a parental domain into which the state presumptively may not intrude,[102] parental rights are not without limitation and are not absolutely beyond the reach of state intervention. Critically, parental rights wane and state power takes precedence when the parents' decisions regarding their children expose their children to harm.[103]

98. Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).

99. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

100. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

101. Troxel v. Granville, 530 U.S. 57, 66 (2000).

102. *See* Cleveland Bd. of Educ. v. LaFluer, 414 U.S. 632, 639–40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *see also* SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS 1 (4th ed. 2009) ("Under American law, the rearing of children generally takes place in families and is principally the responsibility of parents, who are given broad legal authority and discretion to make decisions involved in carrying out this role.").

103. *See* Baskin, *supra* note 84, at 1386–87 (noting that state intervention to "save" a child is overzealous when the child has not actually been harmed and that an "outsider's" intrusion on the parental sphere is only necessary when parental conduct "produces serious damage to [the child's] welfare").

Supreme Court precedent explicitly authorizes state intrusion when parental decisions subject children to physical harm[104] or deprivations of liberty.[105] The Supreme Court has not explicitly addressed whether the state may intrude when parental decisions subject children to psychological harm. However, the Court's reasoning in the cases that provide for state intrusion in the face of physical harm to children or deprivations of their liberty can be applied to the psychological harm that children suffer as a result of SOCE. Accordingly, with this broader scope of what is regarded as harmful to children, Supreme Court precedent authorizes state intrusion into the parental sphere; in subjecting their children to the harmful practice of SOCE at the hands of any provider, parents lose their ascendance over state power, allowing the state to constitutionally intervene.

2. Parental Rights Bar State Intrusion When Children Are Not Harmed

Parental choices that do not harm or threaten harm to children fall within the bounds of parental rights and are thereby constitutionally insulated from state intrusion.[106] For example, in *Meyer*, the Supreme Court held that a Nebraska statute prohibiting any individual or teacher—in any private, religious, or public education space—to teach a child who had not passed the eighth grade a language other than English was an unconstitutional infringement upon parents' Fourteenth Amendment right to direct the upbringing and education of their children.[107] The Court explained that, although the state has the power to enact laws designed to protect and improve the wellbeing of its citizenry, "[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly *harmful* as to justify its inhibition with the consequent infringement of rights long freely enjoyed."[108] Thus, the statute was "arbitrary," without any "reasonable relation" to a legitimate end of the state, given that "[m]ere knowledge of the German language cannot reasonabl[y] be regarded as harmful."[109]

The proposition that parental rights preclude state intrusion when parental choices do not harm children was reaffirmed in *Society of Sisters*.[110] There, the Supreme Court unanimously held that an Oregon law requiring

104. *See Prince*, 321 U.S. at 164, 169–70.

105. *See* Parham v. J.R., 442 U.S. 584, 616–17, 620 (1979).

106. *See* Meyer v. Nebraska, 262 U.S. 390, 400, 403 (1923); *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

107. Meyer, 262 U.S. at 396–97, 399–403.

108. *Id*. at 401, 403 (emphasis added).

109. *Id*. at 400, 403.

110. *See Soc'y of Sisters*, 268 U.S. at 534–36.

every parent of a child between the ages of eight and sixteen to enroll the child in public education unreasonably interfered with the right of parents to direct the education and upbringing of their children.[111] The Court explained that the private education institutions that challenged the constitutionality of the statute "engaged in a kind of undertaking not inherently *harmful*, but long regarded as useful and meritorious."[112] Because the state legislation did not protect children from harm, the state had traversed too far into the domain of parental rights.[113]

3. Parental Rights Are Limited When Demonstrated to Be Harmful to Children

Parental rights necessarily cede to protective state power when parental decisions harm or threaten harm to children.[114] For example, in *Prince*, the aunt and custodian of a nine-year-old girl permitted the child to join her near a traffic intersection in selling copies of Jehovah's Witnesses gospel magazines, thereby violating a state child labor statute.[115] The aunt challenged the constitutionality of the statute, claiming in pertinent part that it violated her parental rights under the Fourteenth Amendment.[116] The Court held that the statute was constitutional.[117] The Court explained that the statute targeted a harm in the form of the "evils" of "the crippling effects of child employment"—especially child employment that takes place in public places, in light of all of the possible harms that can be encountered on the street—and the unique harms associated with propagandizing, such as "emotional excitement and psychological or physical injury."[118] The Court acknowledged the supremacy of parental rights in directing the upbringing of children but held that the State "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[119] Thus, the Court held that the state, acting to "guard the general interest in [the child's] well being," may restrict "the parent's claim to control of the

111. *Id.*

112. *Id.* at 534 (emphasis added).

113. *See id.* at 535 ("[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.").

114. *See* Prince v. Massachusetts, 321 U.S. 158, 164, 168–70 (1944); *see also* Parham v. J.R., 442 U.S. 584, 616–17, 620 (1979).

115. *Prince*, 321 U.S. at 161–63.

116. *Id.* at 164.

117. *Id.* at 169–71. As summarized in *Wisconsin v. Yoder*, the holding of *Prince* is that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972).

118. *Prince*, 321 U.S. at 168–70.

119. *Id.* at 166–67.

child."[120] Moreover, drawing a bright line between what parents may choose for themselves as adults and what parents may choose for their children, the Court clarified that "[p]arents may be free to become martyrs themselves . . . [,] [b]ut it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[121]

The notion that parental rights reach their limit when parental decisions harm or threaten harm to children was reaffirmed in *J.R.*.[122] There, in evaluating the constitutionality of a voluntary commitment statute in Georgia, the Supreme Court held that children, like adults, have a substantial liberty interest in not being unnecessarily committed to an institution and in avoiding the social stigma associated with having received psychiatric care.[123] The Court stood firm that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."[124] Accordingly, the Court found that because the "risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great[,] . . . some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied."[125] The Court prescribed a framework that satisfied this requirement of a neutral review[126] and found that the Georgia statute satisfied its requirements.[127] Thus, because the challenged statute protected children from the harm of liberty deprivation due to unnecessary involuntary commitment and the harm of social stigma

120. *Id.* at 166, 168–71.

121. *Id.* at 169–71. However, just as the Court placed a clear limit on parental power, it also placed a clear limit on its holding, confining it to the facts of the case, thereby barring its application to every "state intervention in the indoctrination and participation of children in religion" and declining to issue a "warrant for every limitation on [children's] religious training and activities." *Id.* at 171 (internal quotation marks omitted).

122. Parham v. J.R., 442 U.S. 584, 600–01 (1979).

123. *Id.*

124. *Id.* at 603.

125. *Id.* at 606 (citation omitted).

126. The Court described this framework as follows:

> [The] inquiry must carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decisionmaker have the authority to refuse to admit any child who does not satisfy the medical standards for admission. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure.

Id. at 606–07.

127. *Id.* at 616–17, 620.

stemming from having been committed, the statute was constitutional.[128]

4. Parental Rights Are Necessarily and Constitutionally Limited in the Context of SOCE

The cases referenced above can be placed on a spectrum. On one end rest *Meyer* and *Society of Sisters*, in which parental rights rendered state intervention unconstitutional because the respective pieces of legislation failed to target a real harm posed to children. On the other end of the spectrum rest *Prince* and *J.R.*, in which state intrusion into the sphere of parental rights was constitutional because the state addressed a real harm posed to children.

And so the question arises: is the proposed legislation, which bars parents from subjecting their children to SOCE, more like legislation that bars the instruction of children in a language other than English (*Meyer*) or that requires public school attendance (*Society of Sisters*); or is the proposed legislation more like legislation that protects children from the harms of child labor and propagandizing (*Prince*), of being denied their liberty interest, and of being subjected to social stigma as a result of psychiatric commitment (*J.R.*)?

The answer is quite clear: the proposed legislation, which concededly represents an intrusion of the state into the domain of parental rights, falls closer to the *Prince* and *J.R.* end of the spectrum because it targets a real harm. Like the legislation in *Prince* and *J.R.*, which was constitutional in spite of its intrusion into the domain of parental rights because it targeted a harm that parental choices posed to their children; the proposed legislation is constitutional because it, too, targets a harm that parental choices pose to children.

Unlike instruction in a language other than English (*Meyer*) or a private education (*Society of Sisters*), which the Supreme Court asserted could not "reasonabl[y] be regarded as harmful,"[129] and deemed "useful and meritorious,"[130] respectively, SOCE can reasonably be regarded as harmful and could hardly be labeled as "useful and meritorious" in light of its dubious success rate and reported harm rate. The depression, anxiety, suicidal ideation, self-hatred, and other repercussions that the Task Force and other mental health professional associations found to result from SOCE were especially acute in children subjected to such treatment, given their

128. *See id.*
129. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
130. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925).

vulnerability. Indeed, the effects of SOCE on children are much more similar to the "evil[]," "crippling effects" of child employment that the Massachusetts legislature constitutionally sought to eradicate in *Prince*. While parents, as adults, may still choose to subject themselves to SOCE under the proposed legislation, as the Supreme Court explained in *Prince*, parents' freedom to make martyrs of themselves does not encompass a right to make martyrs of their children. Moreover, children's liberty interests against being confined to a treatment facility and encountering social stigma associated with such confinement, as set out in *J.R.*, are triggered when parents subject their children to SOCE, particularly in the context of religious-based and coercive SOCE facilities. Just as parental rights were constitutionally curtailed by child labor and voluntary commitment laws due to the harms of child employment, liberty deprivation, and social stigma, parental rights should similarly not extend so far as to permit parents to subject their children to the harm, deprivation of liberty, and social stigma associated with SOCE.

As the Supreme Court noted in *Prince*, "[a] democratic society rests, for its continuance, on the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[131] Given the detrimental effects that SOCE—whether at the hands of a state-licensed professional or unlicensed individual—has on children's health and well-being, the existence of harm is evident, and the state is well within its police power to act to quell this harm. Parental rights pose no insurmountable barrier to this proposed legislation: because parental decisions to subject children to SOCE are harmful to children, and because parental rights yield to state intervention when parental decisions are harmful to children, parental rights should yield to protective state intervention.

5. Bolstering a Claim of Parental Rights with a Free Exercise Claim Still Does Not Bar State Intervention When Children Are Harmed

Given the strong religious undercurrent associated with SOCE,[132] parents seeking to subject their children to SOCE may attempt to add further constitutional justification to their conduct by bolstering their parental rights claim with a claim of free exercise. However, parental rights under the Fourteenth Amendment, even when linked with a free exercise claim under the First Amendment, are not beyond the reach of the state if parental

131. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

132. *See* TASK FORCE REPORT, *supra* note 14, at 17–20, 25 (discussing the religious roots of sexual orientation change efforts and the current focus of SOCE on individuals with strong religious beliefs).

decisions in light of those two rights are harmful to children.[133]

In *Wisconsin v. Yoder*, parents, who were members of the Old Order Amish religion and the Conservative Amish Mennonite Church, violated a Wisconsin compulsory school-attendance law, which required children to attend school until the age of sixteen, when they refused to send their children to school once they completed the eighth grade and were between the ages of fourteen and fifteen.[134] The parents believed that sending their children to school beyond the eighth grade posed a serious risk to their children's ability to integrate into the Amish community, not only because they would be physically and emotionally removed from the community, its dynamics, and its responsibilities during some of the most formative adolescent years, but also because high school imparts values to students that directly contradict the Amish religion.[135] This belief was legitimized by expert testimony from scholars on religion and education, who revealed that salvation within the Amish religion hinges on remaining "aloof from the world and its values," and that the religion objects to high school education because it is viewed as an "impermissible exposure of their children to a 'worldly' influence."[136] Moreover, one expert testified that compulsory high school education could result in "great psychological *harm* to Amish children" due to the conflicts it would produce between what they were learning and experiencing at school and in their community.[137]

The Supreme Court acknowledged that "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[138] Key in the Court's analysis of this case were its several, explicit acknowledgements that accommodating the Amish parents' religious preferences did not harm the children. The Court specifically noted that "[t]his case . . . is not one in

133. *See* Wisconsin v. Yoder, 406 U.S. 205, 232–34 (1972); *see also* Prince v. Massachusetts, 321 U.S. 158, 169–70 (1944).

134. *Yoder*, 406 U.S. at 207.

135. *Id.* at 207, 209–11. One expert on Amish society testified that modern high schools, with respect to their culture and curriculum, are not equipped to promote and instruct on Amish values. *Id.* at 212. The conflict in values between secondary education and the Amish religion are evident when juxtaposed: secondary education emphasizes "intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students," while the Amish religion focuses on "informal learning-through-doing; a life of 'goodness,' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society." *Id.* at 210–11.

136. *Id.*

137. *Id.* at 212 (emphasis added).

138. *Id.* at 233–34.

which any *harm* to the physical or mental health of the child . . . has been demonstrated or may be properly inferred. The record is to the contrary, and any reliance on that theory would find no support in the evidence."[139] The record indicated that forgoing one to two years of compulsory education in light of the religious beliefs of the Amish community "will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship."[140] The Court also noted that even if the Amish children chose to leave the Amish community, there was no evidence that they would be ill-equipped to function in life without a formal education beyond the eighth grade, given the "practical agricultural training and habits of industry and self-reliance" that they will have learned through their religious community.[141]

Thus, the Court held that the state was not permitted to "save" the children from the religious practices of the Amish community when the children suffered no harm and thus were not in need of saving.[142] Accordingly, Wisconsin's compulsory education statute violated the parents' free exercise rights and unconstitutionally infringed upon their right to direct the upbringing of their children.[143]

The guardian in *Prince* also brought suit under the First Amendment, arguing that Massachusetts' child labor law unconstitutionally infringed upon her freedom of religion in addition to her Fourteenth Amendment parental rights.[144] There, the Court made clear that the state's primary objective was the wellbeing of children, and it accordingly is well within the state's power to intrude on parental freedom when a child's welfare is at risk, even if the parent "grounds his claim to control the child's course of conduct on religion or conscience."[145] Thus, the Court found that the Massachusetts child labor statute that barred a parent or guardian from permitting her child to engage in street preaching in the name of religion was neither an unconstitutional infringement upon religious freedom nor an unconstitutional infringement upon parental rights because of the risk of harm to children created by child employment and the possible "emotional excitement and psychological or physical injury" that street preaching entails.[146]

139. *Id.* at 230 (emphasis added) (footnote omitted).
140. *Id.* at 234.
141. *Id.* at 224.
142. *Id.* at 232, 234.
143. *Id.* at 234.
144. Prince v. Massachusetts, 321 U.S. 158, 159, 164 (1944).
145. *Id.* at 166–67.
146. *Id.* at 169–71.

6. A Claim of Religious Freedom Does Not Insulate Parental Rights from State Intrusion in the Context of SOCE

Once more, the cases examined can be placed on a spectrum: on one end rests *Yoder*, in which a free exercise claim successfully bolstered a parental rights claim when parental choices did not harm or threaten harm to children, rendering state intrusion into the parental domain unconstitutional; at the other end rests *Prince*, in which a parental rights claim coupled with a free exercise claim was unsuccessful when parental choices harmed or threatened harm to children, rendering protective state intrusion into the parental domain constitutional.

Parents seeking to justify their decision to subject their children to SOCE by bolstering their claim of parental rights under the Fourteenth Amendment with a claim of free exercise under the First Amendment align much more closely with the guardian in *Prince* than with the parents in *Yoder*. Just as in *Prince*, in which parental choices that created a risk of harm to children in the form of the "evils" of child employment and the emotional, psychological, and physical injuries stemming from propagandizing, could not be constitutionally justified by a double-headed claim of parental rights and free exercise; parental choices in subjecting children to SOCE create a risk of harm to children in the form of increased depression, anxiety, suicidal ideation, and other lasting psychological, emotional, and potentially physical harms and thus cannot be constitutionally justified on grounds of parental rights even with the added force of a free exercise claim. Additionally, in contrast to the unanimous evidence in *Yoder* from Amish parents and religious and educational scholars that showed that allowing Amish parents to remove their children from school after finishing the eighth grade in the name of religion was *not* harmful to the children, there is a consensus among the mainstream mental health professional associations that allowing children to be exposed to SOCE *is* harmful. Thus, while it was *state* intrusion in requiring that Amish children attend school—not parental choices—that threatened "great psychological harm" to children in *Yoder*, thus rendering state conduct unconstitutional in the name of parental rights and free exercise; in the case of SOCE, it is *parental* conduct that threatens great harm to children, thus rendering state protection constitutional in spite of parental rights and free exercise rights.

Parents seeking to bolster a parental rights claim to subject their children to SOCE with a free exercise claim should, in contrast to the parents in *Yoder*, be unsuccessful precisely because the parental choice advocated for here is harmful to children. Accordingly, just as the guardian in *Prince* could not subject her child to the dangerous activity of religious

propagandizing on the street, even though such conduct was performed in the name of religion, parents should not be permitted to subject their children to the harmful effects of SOCE, even if religiously motivated.

IV. "THICK" VERSUS "THIN" PARENTAL RIGHTS

The preceding analysis in Part III is not unanimously supported. In an article asserting that the federal courts in *Welch*, *Pickup*, *King*, and *Doe* conducted a "feeble judicial analysis of parental rights," Lynn D. Wardle argued that the rulings that California and New Jersey SOCE legislation do not unconstitutionally infringe upon parental rights provide for a "thin" version of parental rights that is in conflict with the "thick" parental rights that the Supreme Court prescribes.[147] Wardle relies primarily on *J.R.* to support his argument in favor of "protecting parental discretion in making child-rearing decisions."[148] Comparing the medical treatment issues present in both *J.R.* and current SOCE legislation, Wardle emphasized the Court's statements in *J.R.* about the "broad . . . authority" that parents have in directing the upbringing of their children to bolster his conclusion that even current SOCE legislation infringes upon parental rights.[149]

Given that Wardle found parental rights under current SOCE legislation to be too thin, it is virtually certain that he would also find parental rights under the proposed SOCE legislation to be much too weak. However, both current SOCE legislation and the proposed SOCE legislation leave the heart of childrearing—the power to direct the moral upbringing of children—still squarely within the parents' domain. By their own terms, both strains of SOCE legislation leave the occurrences within the home between parents and children untouched, and parents can still express contempt over their children's sexuality and take them to church. Under both current SOCE legislation and the proposed SOCE legislation, moral guidance is still left to the parents, and parental rights remain thick even under the proposed legislation.

V. A POTENTIALLY FRUITLESS ENDEAVOR?

The proposed legislation presents a critical loophole of its own: religious-based and other SOCE programs could simply redefine themselves to fall outside the bounds of the protective SOCE legislation. For example, instead of advertising themselves as religious programs intended to change

147. Lynn D. Wardle, *Controversial Medical Treatments for Children: The Roles of Parents and of the State*, 49 FAM. L.Q. 509, 526–27, 531 (2015).

148. *Id.* at 530–31.

149. *Id.* at 530 (quoting Parham v. J.R., 442 U.S. 584, 602–03 (1979)).

the sexual orientation of its participants, programs could define themselves as a regular meeting place where individuals pray over others who experienced same-sex attractions or where individuals study the passages in the Bible that are believed to condemn homosexuality.

Although this proposed statute allows room for this tactic, the statute's utility is not vitiated. First and foremost, the statute's own terms limit the reach of this loophole. The statute requires that the "primary goal" is determined through a finding of fact based on the totality of the circumstances. Thus, to draw on the hypotheticals posed above, even if religious programs shifted their marketed goal away from explicit conversion therapy and instead marketed themselves as a study of the Bible's allegedly anti-homosexual passages, it is still possible for such programs to violate the proposed legislation, as an analysis of the totality of the circumstances could lead to a finding that the program's primary goal remains changing sexual orientation.

Second, the fact that some programs and individuals could find a way to evade this legislation does not render the legislation useless. The proposed statute still targets considerably more SOCE treatment than current legislation and thus offers minors more protection than they have now. Moreover, just because people will find ways to engage in activities prohibited by law does not mean that there should not be laws at all.

VI. A POLICY ARGUMENT IN SUPPORT OF THE PROPOSED LEGISLATION

In addition to the doctrinal argument set out above as to why the state *can* constitutionally enter the parental domain in wholly prohibiting parents from subjecting their children to SOCE, there is also a policy justification for why the state *should* do so. In arguing for greater limitation of parental rights from an ethics perspective, Samantha Godwin asserted that "[g]ranting parents rights that are enforceable against their children according to the parent's separate interests has the effect of displacing and diminishing consideration for children's separate interests and rights. This displacement and diminution of children's rights and interests amounts to denying children equal protection and consideration."[150] Allowing parents to unilaterally consent to SOCE for their children is not only harmful to children with respect to the potential physical, psychological, and emotional repercussions that such treatment can have, but is also harmful from an individual liberty

150. Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 5 (2015) (footnote omitted).

perspective: it denies children the ability to make their own choices regarding their sexuality.

As the Supreme Court noted in *Prince*, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens with all that implies."[151] Stuart J. Baskin expanded this notion in observing that "[a]n important goal of childrearing in a democratic society" is "encouraging individual self-determination."[152] Allowing parents to consent to SOCE for their children does just the opposite of fostering individual self-determination in their children, not only at the moment of giving consent for SOCE without regard to their children's preferences, but also for the potentially lifelong repercussions that their children could experience as a result of this treatment. The proposed legislation provides for a greater opportunity for children to decide how to address their sexuality for themselves.

Moreover, in considering a liberal conception of equality, Ronald Dworkin explained the following:

> I presume that we all accept the following postulates of political morality. Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the grounds that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's. These postulates, taken together, state what might be called the liberal conception of equality; but it is a conception of equality, not of liberty as license, that they state.[153]

Allowing parental rights to extend so far as to give parents license to subject their children to SOCE at the hands of any type of provider can result in immediate and lasting harm. This does not comport with the notion that children are entitled to rights of their own. Although a more detailed consideration of children's rights falls beyond the scope of this Note, it can be stipulated that children have—and ought to have—some rights independent of those belonging to their parents. Children are independently capable of "suffering and frustration" and of "forming and acting on

151. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).
152. Baskin, *supra* note 84, at 1399 n.77.
153. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 326–27 (Bloomsbury Acad. 2013) (1977).

intelligent conceptions of how their lives should be lived." Accordingly, children deserve the right to define their own "good life" and to address their own sexuality how and when they see fit, or, at a minimum, should not be expected to abide by their parents' conception of the "good life" when it comes to their own sexuality.

Finally, an examination of Isaiah Berlin's concepts of negative and positive liberty offers further support for vesting a right in children to decide for themselves how to respond to their sexual orientation. According to Berlin's concept of negative liberty, which can be understood as liberty that is free of coercion, "[t]he wider the area of non-interference the wider my freedom."[154] While Berlin did not advocate for a limitless freedom among individuals, he asserted the following:

> [T]here ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred.[155]

The ability for children to make their own decisions regarding their sexuality should be within the "minimum area of personal freedom" that Berlin discussed. Without the freedom of sexual autonomy, children's personal development is hindered, which can in turn negatively impact their adult lives with respect to how they adjust to, function in, and contribute to society. The damaging effects of SOCE on children can last a lifetime, and children should be freed from this interference.

Berlin's concept of positive liberty, which can be understood as the "freedom which consists in being one's own master,"[156] provides another perspective on why children should have the freedom to direct their sexual lives. As Berlin explained:

> I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer—deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realising them. . . . I wish, above all, to be

154. ISAIAH BERLIN, LIBERTY 166, 170 (Henry Hardy ed. 2002).
155. *Id.* at 171.
156. *Id.* at 178.

> conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes.[157]

Under this concept of positive liberty, children should be "instruments of [their] own," treated as conscious, thinking, active subjects instead of as objects subject to the sexual orientation preferences of their parents. Decisions related to one's sexuality—defining it, responding to it, acting on it—should rest with that individual, whether or not that individual has reached the age of majority. Accordingly, the decision as to whether to engage in SOCE should rest squarely with the child in question.

CONCLUSION

Sexual orientation change efforts ("SOCE") have been unanimously renounced as harmful and ineffective by the leading mental health professional associations. This renunciation is not limited to SOCE performed on adults or to SOCE at the hands of state-licensed mental healthcare providers. SOCE have been renounced as harmful to everyone, as administered by anyone. Yet, not even half of the United States have laws that prohibit the practice. And even the states that have laws against the practice do not completely protect children from the harmful effects of SOCE, as current laws are limited to prohibiting state-licensed mental healthcare professionals from engaging in SOCE with children, leaving children wholly unprotected from SOCE at the hands of religious leaders and other unlicensed providers.

The legislation proposed in this Note endeavors to offer children more complete protection from the harms of SOCE in part by barring parents from subjecting their children to SOCE at the hands of any provider—state-licensed, religiously-guided, or otherwise. Through an examination of Supreme Court precedent as to the limits of parental rights, whether raised alone under the Fourteenth Amendment or in conjunction with a free exercise claim under the First Amendment, this Note has established doctrinal support for more expansive legislation. Under Supreme Court precedent, the presumptively impervious domain of parental rights, whether rooted in sacred or secular justifications, is rendered permeable to protective state power when children are harmed. Because SOCE are harmful to children no matter the source, the state is within its means to bar parents from consenting to such treatment for their children. Moreover, this Note offers a policy justification for this expansive legislation grounded in the necessity

157. *Id.*

of preserving and promoting the individual liberty of children in society.

Thus, in light of the foregoing doctrinal and policy justifications, states not only can but should do more to protect their children from the harms of SOCE, and the legislation proposed in this Note provides a viable avenue to that end.