

# ABUSING OUR LGBT YOUTH: THE CRIMINALIZATION OF SEXUAL ORIENTATION CHANGE EFFORTS

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The pressures on gay teens can be overwhelming—to keep secrets, tell lies, deny who you are, and try to be who you’re not.

-Alex Sanchez

## ABSTRACT

Recently, both California and New Jersey passed legislation to ban sexual orientation change efforts, and courts in those respective states upheld the bans. By focusing on the enumerated harms provided by the bans, this Comment seeks to look at potential criminal ramifications for those who violate these bans. Ultimately, this Comment will raise the question of how to respond to those who subject minors to these sexual orientation change efforts and suggest that criminal sanctions be used to enforce the bans.

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## I. INTRODUCTION

Sexual orientation change efforts (“SOCE”), also known as reparative or conversion therapies, were practiced “when the medical and psychological communities considered homosexuality an illness.”<sup>1</sup> Efforts to alter an individual’s sexual orientation stem from the notion that not being heterosexual is somehow immoral or wrong, a belief that is not recognized by any major psychological organization.<sup>2</sup> In the past, the view of homosexual conduct as immoral was codified in criminal laws.<sup>3</sup> While the Supreme Court has struck down these laws,<sup>4</sup> the stigma these laws created still affects lesbian, gay, bisexual, and transgender (“LGBT”) members of society.<sup>5</sup>

The perceived immorality and stigma of nonheterosexuality lead to some gruesome methods of “curing” individuals.<sup>6</sup> These SOCE included lobotomies, electroshock therapy, and other torturous methods.<sup>7</sup> While these practices have been largely discredited,<sup>8</sup> new therapeutic techniques still regard homosexuality, bisexuality, and other so-called “deviant”

<sup>1</sup> Pickup v. Brown, 740 F.3d 1208, 1222 (9th Cir. 2013).

<sup>2</sup> *LGBT-Sexual Orientation*, AM. PSYCHOLOGICAL ASS’N, <http://www.psychiatry.org/lgbt-sexual-orientation> (last visited Nov. 27, 2013).

<sup>3</sup> Carlos Maza, *State Sodomy Laws Continue to Target LGBT Americans*, EQUALITY MATTERS (Aug. 8, 2011, 3:26 PM), <http://equalitymatters.org/blog/201108080012>.

<sup>4</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (discussing Texas’s antisodomy law and why the Supreme Court held it to be unconstitutional).

<sup>5</sup> *Id.* at 575.

<sup>6</sup> David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1303–04 (1999).

<sup>7</sup> *Id.* at 1304–06.

<sup>8</sup> *Id.* at 1303–04.

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sexual behaviors as mental disorders that can be cured through psychoanalytic therapy.<sup>9</sup> Despite the shift from the physical harms imposed by the original SOCE, these “talk therapies” still pose potential harms.<sup>10</sup>

These SOCE are even more problematic in the case of LGBT youths whose developing adolescent brains struggle to cope with the conversion efforts.<sup>11</sup> Potential harms are recognized by the only two bans on SOCE to currently exist in the United States.<sup>12</sup> These potential harms include a great risk of depression, anxiety, and self-destructive behavior, including suicide.<sup>13</sup> Courts in California<sup>14</sup> and New Jersey<sup>15</sup> have upheld the laws banning SOCE against First Amendment and other constitutional challenges.

A logical, and arguably, necessary, extension of these bans is that those who subject youths to SOCE should be subject to criminal sanctions. Criminal laws have many goals, but first and foremost they seek to prevent harm to the members of the society they govern.<sup>16</sup> Additionally, in criminalizing conduct, the state<sup>17</sup> sometimes seeks to provide retribution against those who have harmed others,<sup>18</sup> to deter future harm,<sup>19</sup> or in some cases, to rehabilitate those who cause harm.<sup>20</sup> All of these theories of criminalization can be used to justify criminal sanctions against those who subject minors to SOCE.

Further, child abuse and endangerment statutes provide a reason to

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<sup>9</sup> *Id.* at 1307.

<sup>10</sup> *Id.* at 1351–54.

<sup>11</sup> James Eng, *California Weighs Bill to Ban Gay Teen ‘Conversion’ Therapy*, NBC NEWS: U.S. NEWS (May 9, 2012, 4:04 PM), [http://usnews.nbcnews.com/\\_news/2012/05/09/11623231-california-weighs-bill-to-ban-gay-teen-conversion-therapy?lite](http://usnews.nbcnews.com/_news/2012/05/09/11623231-california-weighs-bill-to-ban-gay-teen-conversion-therapy?lite).

<sup>12</sup> California and New Jersey are the two states that have enacted bans on SOCE to date. CAL. BUS. & PROF. CODE § 865.1 (2014); N.J. STAT. ANN. § 45:1-54 (2014).

<sup>13</sup> See Sexual Orientation Change Efforts, § 1(d), 2012 Cal. Legis. Serv. Ch. 835 (SB 1172) (West) (codified in CAL. BUS. & PROF. CODE §§ 865–865.2).

<sup>14</sup> *Pickup v. Brown*, 740 F.3d 1208, 1236 (9th Cir. 2013) (upholding California’s ban on SOCE).

<sup>15</sup> *King v. Christie*, 981 F. Supp. 2d 296, 333 (D.N.J. 2013) (upholding New Jersey’s ban on SOCE).

<sup>16</sup> JOHN S. MILL, ON LIBERTY 13 (Batoche Books 2001) (1859), available at <http://socserv.mcmaster.ca/econ/ugcm/3ll3/mill/liberty.pdf>.

<sup>17</sup> “The state” is used throughout this Comment in reference to both the federal government and individual state governments.

<sup>18</sup> Antony Duff, *Theories of Criminal Law* § 4 (May 14, 2013), available at <http://plato.stanford.edu/entries/criminal-law/> (discussing the reasons for criminalizing certain conduct).

<sup>19</sup> *Id.*

<sup>20</sup> David I. Shapiro, Note, *Sentencing the Reformed Addict: Departure under the Federal Sentencing Guidelines and the Problem of Drug Rehabilitation*, 91 COLUM. L. REV. 2051, 2053 (1991).

criminalize SOCE.<sup>21</sup> Since New Jersey and California have already placed bans on SOCE and recognized their harms, these states provide prime examples and can pioneer criminal punishment for parents, therapists, and others who subject LGBT youths to these practices.<sup>22</sup> Criminalization is necessary to show that the state is serious about protecting at-risk youths from these potential harms.

This Comment proceeds in four parts. Part II explore the history of sexual orientation and the law. In doing so, Part II goes into some detail about the definitions of homosexuality and bisexuality, and the previous legal bans on sodomy. Part III looks at the history of SOCE and why they can be incredibly harmful for LGBT youths. Part IV examines the modern bans in California and New Jersey and the court cases that have upheld these bans. Part V discusses what the next steps for the bans could be, specifically by looking at potential criminal ramifications for engaging in SOCE in violation of the bans. Finally, Part V concludes that an existing avenue to criminalize violations of the ban can be found in child abuse laws. Part VI concludes.

## II. BACKGROUND OF SEXUAL ORIENTATION AND THE LAW

### A. PSYCHOLOGY OF HOMOSEXUALITY

An individual's sexual orientation denotes "the sex of those to whom [that individual] is sexually and romantically attracted."<sup>23</sup> A homosexual orientation, also referred to as gay or lesbian, indicates that an individual is attracted to other persons of the same sex, in contrast to a heterosexual orientation, which indicates an attraction to members of the opposite sex.<sup>24</sup> Individuals attracted to both sexes are considered bisexual.<sup>25</sup> Importantly, sexuality is viewed, under the modern trend, as a continuum on which people can shift over time.<sup>26</sup> There are no known causes of

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<sup>21</sup> See CAL. PEN. CODE § 273a (2014); N.J. STAT. ANN. § 9:6-1 (2014).

<sup>22</sup> In California, providing inappropriate medical treatments is criminal negligence. *Walker v. Superior Court*, 763 P.2d 852, 869 (Cal. 1989). Further, the respective penal codes of California and New Jersey, combined with their bans, provide adequate bases to make an attempt at such prosecution. Compare CAL. PEN. CODE § 273a, and N.J. STAT. ANN. § 45:1-54, with CAL. BUS. & PROF. CODE §§ 865–865.2 (2014), and N.J. STAT. ANN. § 9:6-1 (2014).

<sup>23</sup> *Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation*, AM. PSYCHOLOGICAL ASS'N 1, <http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Jan. 30, 2014).

<sup>24</sup> *LGBT Sexual-Orientation*, *supra* note 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

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heterosexuality, homosexuality, or bisexuality.<sup>27</sup>

Currently, “all major professional mental health organizations have gone on record to affirm that homosexuality is not a mental disorder.”<sup>28</sup> In 1973, the American Psychiatric Association (“APTA”) removed homosexuality from its diagnostic manual, which listed it as a mental disorder.<sup>29</sup> Since 1975, the American Psychological Association (“APA”) has urged psychologists to help remove the stigma placed on homosexuals as a result of homosexuality’s previous classification as a mental disorder.<sup>30</sup> In contrast, the National Association for the Research and Treatment of Homosexuality (“NARTH”) misuses the idea of a continuum of sexuality to assert that sexual orientation can be converted through psychological assistance.<sup>31</sup> As recently as January 25, 2012, NARTH continued to maintain that homosexuality and other “deviant” sexualities ought to be converted to heterosexuality.<sup>32</sup>

#### B. ENACTMENT AND REPEAL OF SODOMY LAWS

Sodomy is defined as “the penetration of the male organ into the mouth or anus of another.”<sup>33</sup> Previously, sodomy, which references the biblical story of Sodom and Gomorrah,<sup>34</sup> was a felony in every state in the United States.<sup>35</sup> Many states decided to take measures to repeal these laws.<sup>36</sup> However, others attempted to uphold them, which made it a felony for same-sex couples to engage in consensual sex.<sup>37</sup> For example, in *Bowers v. Hardwick*, Georgia was able to successfully defend its laws against sodomy in the Supreme Court of the United States.<sup>38</sup> The Supreme Court found that a right to privacy did not protect consenting adults

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Sexual Orientation and Homosexuality*, AM. PSYCHOLOGICAL ASS’N, <http://www.apa.org/helpcenter/sexual-orientation.aspx> (last visited Nov. 27, 2013).

<sup>31</sup> *NARTH Statement on Sexual Orientation Change*, NAT’L ASS’N FOR RESEARCH & THERAPY OF HOMOSEXUALITY, <http://www.narth.com/main-issues#!about1/c1wab> (last visited Nov. 27, 2013) [hereinafter *NARTH Statement*].

<sup>32</sup> *Id.*

<sup>33</sup> MERRIAM-WEBSTER, WEBSTER’S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2165 (Philip Babcock Gove & the Merriam-Webster Editorial Staff, eds., 2002).

<sup>34</sup> *Genesis* 18:20.

<sup>35</sup> Maza, *supra* note 3.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

engaging in homosexual sex from antisodomy laws.<sup>39</sup> The Court also refused to acknowledge any type of fundamental right for same-sex couples to engage in consensual sodomy.<sup>40</sup>

*Bowers* was eventually overturned in the later Supreme Court case *Lawrence v. Texas*.<sup>41</sup> In *Lawrence*, Justice Kennedy declared that the home was a private dwelling where certain intimate conduct is given liberty from government intrusion.<sup>42</sup> The Court recognized that the Constitution protects a right that allows homosexual persons to engage in sodomy as an overt expression of their intimate relationships.<sup>43</sup> Central to the Court's reasoning was its use of the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>44</sup>

Despite the unconstitutionality of antisodomy laws, twelve states still refuse to rewrite their laws in compliance with this decision.<sup>45</sup> There are even some strict constructionist courts that are willing to enforce such laws.<sup>46</sup> And even when the laws are not enforced, they still lead to damaging stigma, public humiliation, and discrimination against homosexuals.<sup>47</sup> Even today, same-sex couples that kiss in a restaurant in a state with a "crime against nature" law can be kicked out of the restaurant.<sup>48</sup> While the local police who responded to such an incident were blamed for being "relatively inexperienced," this incident illustrates how harmful and stigmatizing antisodomy laws are in society.<sup>49</sup>

### III. HISTORY OF SEXUAL ORIENTATION CHANGE EFFORTS

#### A. DEFINING SEXUAL ORIENTATION CHANGE EFFORTS

Reparative therapy, which is synonymous with SOCE, is defined as

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<sup>39</sup> *Id.* at 190–91.

<sup>40</sup> *Id.* at 191.

<sup>41</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>42</sup> *Id.* at 562.

<sup>43</sup> *Id.* at 567.

<sup>44</sup> *Id.* at 575. Certainly, more can be said as to how directly these clauses apply to the right of consenting homosexual adults to engage in sodomy. However, that analysis goes beyond the scope of this Comment and is only relevant to show the trends in protections for homosexuals within the United States.

<sup>45</sup> *Twelve States Still Ban Sodomy a Decade After Court Ruling*, USA TODAY, April 21, 2014, <http://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/>.

<sup>46</sup> Maza, *supra* note 3.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

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“counseling and psychotherapy to attempt to eliminate individuals’ sexual desire for members of their own sex.”<sup>50</sup> These therapies view homosexuality as a mental disease or illness, while the APTA has recognized that homosexuality is not a mental disease or illness since 1979.<sup>51</sup> Because these therapies define same-sex attraction as a mental disorder, they often frame not converting one’s sexual orientation as a failure of the individual on a personal or moral level.<sup>52</sup> This mentality leads to the idea that homosexuality can be “cured.”<sup>53</sup> However, such a concept is largely discredited in modern psychological practice.<sup>54</sup> As a result, many medical and psychological associations have condemned the practice of SOCE, including the American Academy of Pediatrics, the American Counseling Association, and the American Psychiatric Association.<sup>55</sup>

In addition to therapists, religious organizations use a multitude of methods to advertise SOCE, including appeals through the media,<sup>56</sup> and they sometimes directly attempt conversion efforts.<sup>57</sup> These groups are particularly dangerous for homosexual youths because they proclaim that homosexuality is sinful or evil, which can create a sense of guilt, and make the already marginalized youths feel even worse about themselves.<sup>58</sup> Some religious based groups utilize fourteen-step approaches similar to the twelve-step system used by Alcoholics Anonymous.<sup>59</sup>

A major conceptual challenge for conversion efforts stems from a failure to fully understand sexual orientation.<sup>60</sup> Historically, psychologists and other medical professionals considered homosexuality as nothing more than a series of sexual acts, which were considered perverted.<sup>61</sup> This view of homosexuality has evolved into more than sexual acts, but the medical world has largely failed to address the underlying cause of the

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<sup>50</sup> *Just the Facts About Sexual Orientation & Youth: A Primer for Principals, Educators, & School Personnel*, AM. PSYCHOLOGICAL ASS’N 2, <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf> (last visited Mar. 9, 2014) [hereinafter *Just the Facts*].

<sup>51</sup> *Id.* at 5.

<sup>52</sup> *Id.*; see also Cruz, *supra* note 6, at 1300 (illustrating that psychologists, even after homosexuality was removed from the list of mental disorders, still considered homosexuals diseased and contributed to the belief that homosexuality can be cured).

<sup>53</sup> *Just the Facts*, *supra* note 50, at 6.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 6–7.

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *Id.* at 10.

<sup>58</sup> *Id.* at 10.

<sup>59</sup> Cruz, *supra* note 6, at 1309.

<sup>60</sup> See *id.* at 1301.

<sup>61</sup> *Id.* at 1303.

“deviant condition.”<sup>62</sup> Those who practice SOCE have repeatedly attempted to locate and suppress whatever brain development leads a person from heterosexuality to homosexuality.<sup>63</sup> Because the cause of homosexuality has yet to be fully explained, the practice continues today.<sup>64</sup>

Historically, SOCE required rather ghastly techniques.<sup>65</sup> At one point in time, homosexuality was regarded as being so physically intertwined with the body, that medical practitioners used invasive surgery in an attempt to change their subjects’ sexual orientation.<sup>66</sup> Thus, these medical professionals commonly performed lobotomies as a means of sexual orientation conversion.<sup>67</sup> Further, because the medical community viewed homosexuality as a sexual illness in addition to a mental illness, treatments also focused on surgeries that targeted the reproductive organs.<sup>68</sup> With male patients, these kinds of surgeries included implanting testicles from heterosexual men and simple castration.<sup>69</sup> Although men were typically the targets of these treatments, women were also subjected to conversion surgeries that targeted their ovaries, uteruses, and clitorises.<sup>70</sup> Medical professionals favored electrical aversion therapy as a method to eliminate homosexuality in both male and female patients.<sup>71</sup> Drugs and other chemical treatments were administered as another means to attempt to expel homosexual desires from patients.<sup>72</sup> Behavioral approaches were also used, from masturbatory conditioning to male patronization of female prostitutes.<sup>73</sup> While most of these techniques have been discontinued, some argue for a resumption of these practices.<sup>74</sup>

While these described practices mostly focus on physical attributes, SOCE are more psychoanalytic in nature today.<sup>75</sup> The classic approach to sexual orientation conversion via psychoanalysis requires tracing the patient’s emotions and behavior, the therapist offering interpretations of the patient’s revelations, and attempts to enable the patient to accept

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *See id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1304.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1305.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1306.

<sup>73</sup> *Id.* at 1306–07.

<sup>74</sup> *Id.* at 1304.

<sup>75</sup> *Id.* at 1307.



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themselves.<sup>76</sup> Modern SOCE require a highly active therapist who forces their patients to self-accept as a heterosexual through various methods.<sup>77</sup> While these newer practices mark a shift from the outright torture-based methods of the past, they are not so distanced that society can ignore their harms.<sup>78</sup> While these “talk therapies” offered in modern practice appear less invasive into the patient’s physical well-being, these practices are still highly controversial given that both the APA and the APTA no longer regard homosexuality as a mental illness in need of treatment.<sup>79</sup> However, there are groups that continue to maintain that homosexuality is a sexual disorder, including NARTH.<sup>80</sup>

#### B. WHY TARGET LGBT YOUTH?

LGBT youths already find themselves exposed to harassment while at school.<sup>81</sup> However, their educational environment would only be worsened if schools were able to disseminate information about SOCE, as some want them to be.<sup>82</sup> The First Amendment, through the Establishment Clause, offers protection in public schools from an endorsed religious practice, including the ministries that support SOCE.<sup>83</sup> Further, public schools do have the leeway to teach about homosexuality within classes, including sexual education, as long as they do not provide religious materials and do not violate the First Amendment.<sup>84</sup> The Fourteenth Amendment’s equal protection requirements prevent public schools from imposing discriminatory burdens on lesbian, gay, and bisexual students.<sup>85</sup> Importantly, school districts have to devote resources to protect these students from antigay harassment.<sup>86</sup> This is crucial because LGBT youths face rejection from their family, peers, and support systems, making them at least eight times more likely to commit suicide than the average

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<sup>76</sup> *Id.* at 1307–08.

<sup>77</sup> *Id.* at 1308.

<sup>78</sup> *Id.* at 1309–10.

<sup>79</sup> *Id.* at 1311.

<sup>80</sup> *Id.* at 1312.

<sup>81</sup> See *Just the Facts*, *supra* note 50, at 4 (noting that LGBT students were more likely to be harassed than heterosexual students).

<sup>82</sup> *Id.* at 11.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 12.

<sup>85</sup> *Id.* at 12–13.

<sup>86</sup> *Id.* at 13. In 2003, a California school district paid \$1.1 million to six students because a school administrator failed to adequately protect them from harassment. *Id.*

teenager.<sup>87</sup> Further, these youth, when compared to their accepted heterosexual counterparts, are six times more likely to report depression, three times more likely to use illegal drugs, and more than three times more likely to contract HIV or other sexually transmitted diseases.<sup>88</sup>

These notions are explicitly confirmed in the only two bans on SOCE in the United States.<sup>89</sup> The bill passed in California explicitly stated:

The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient. Many patients who have undergone reparative therapy relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction. The possibility that the person might achieve happiness and satisfying interpersonal relationships as a gay man or lesbian is not presented, nor are alternative approaches to dealing with the effects of societal stigmatization discussed.<sup>90</sup>

These harms posed by SOCE impose a critical health risk to lesbian, gay and bisexual youths.<sup>91</sup> The most serious risk is suicide.<sup>92</sup> Both California<sup>93</sup> and New Jersey<sup>94</sup> recognize that being lesbian, gay, or bisexual is not any kind of disorder, firmly siding with the APA and APTA, as opposed to organizations like NARTH.<sup>95</sup> New Jersey's statute recognizes the same types of harms that California does in its bill to ban SOCE.<sup>96</sup> Both bans take a paternalistic approach by protecting minors from the harms that result from these therapies.<sup>97</sup>

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<sup>87</sup> *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy> (last visited August 9, 2014).

<sup>88</sup> *Id.*

<sup>89</sup> Sexual Orientation Change Efforts, § 1(d), 2012 Cal. Legis. Serv. Ch. 835 (SB 1172) (West) (codified in CAL. BUS. & PROF. CODE §§ 865–865.2 (2014)); N.J. STAT. ANN. § 45:1-55 (2014).

<sup>90</sup> Sexual Orientation Change Efforts, § 1(d), 2012 Cal. Legis. Serv. Ch. 835.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* § 1(m).

<sup>93</sup> *Id.* § 1(a).

<sup>94</sup> N.J. STAT. ANN. § 45:1-54 (a) (2014).

<sup>95</sup> *NARTH Statement*, *supra* note 31.

<sup>96</sup> *Compare* N.J. STAT. ANN. § 45:1-54(n), *with* Sexual Orientation Change Efforts, § 1(n), 2012 Cal. Legis. Serv. Ch. 835.

<sup>97</sup> CAL. BUS. & PROF. CODE § 865.1 (2014); N.J. STAT. ANN. § 45:1-55 (a) (2014).

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IV. MODERN PROTECTION FOR LGBT YOUTH: BANNING  
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The bans in California and New Jersey indicate a new trend in the law to ban SOCE, but currently only those two states have made successful attempts to do so.<sup>98</sup> Both of their legislative bans have survived preliminary challenges in the courtroom.<sup>99</sup> The California bill is impressive in that it first and foremost acknowledged that being lesbian, gay, or bisexual is not a disease of any kind, a fact recognized by health professionals and researchers throughout the United States for about forty years.<sup>100</sup> The APA appointed a task force on “Appropriate Therapeutic Responses to Sexual Orientation,” which the California bill cited as a primary reason that a ban was needed to protect youths from SOCE.<sup>101</sup> In doing so, California recognized the potential risks to these youths that may result from such efforts.<sup>102</sup> As previously stated, these risks are incredibly harmful, the most serious harm being suicide brought on by the stress and other related mental issues resulting from SOCE.<sup>103</sup> Gay youths are two to three times more likely to commit suicide than heterosexual youths, and account for about 30 percent of youth suicides annually.<sup>104</sup> The very problem that leads to the prevalence of suicide among homosexual youths is the discrimination and stigmatization they face in society.<sup>105</sup> Part of the stigma comes from the acceptance of practices such as SOCE.<sup>106</sup>

Further, the California ban specifically cited the APTA’s statement that SOCE are direct contributing factors to social prejudice against homosexuality.<sup>107</sup> Additionally, the bill recognized that because it is the

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<sup>98</sup> See CAL. BUS. & PROF. CODE §§ 865–865.2; N.J. STAT. ANN. § 45:1-55.

<sup>99</sup> Pickup v. Brown, 740 F.3d 1208, 1236 (9th Cir. 2013); King v. Christie, 981 F. Supp. 2d 296, 333 (D.N.J. 2013).

<sup>100</sup> Sexual Orientation Change Efforts, § 1(a), 2012 Cal. Legis. Serv. Ch. 835. The history of how the psychiatric profession has handled homosexuality and bisexuality has already been discussed above. Importantly, these “deviant” sexualities were previously viewed as a mental disorder. Cruz, *supra* note 6 at 1300. The California bill contains findings regarding SOCE and sexuality that were not included in the final statute. Compare Sexual Orientation Change Efforts, 2012 Cal. Legis. Serv. Ch. 835 (including findings regarding SOCE and sexuality), with CAL. BUS. & PROF. CODE §§ 865–865.2 (including only the ban on SOCE, a provision for discipline for those violating the ban, and relevant definitions).

<sup>101</sup> Sexual Orientation Change Efforts, § 1(c), 2012 Cal. Legis. Serv. Ch. 835.

<sup>102</sup> *Id.* § 1(n).

<sup>103</sup> *Id.* § 1(b).

<sup>104</sup> Paul Gibson, *Gay Male and Lesbian Suicide*, WEAREFAMILY, [http://www.lambda.org/youth\\_suicide.htm](http://www.lambda.org/youth_suicide.htm) (last visited Nov. 29, 2013).

<sup>105</sup> *Id.*

<sup>106</sup> Sexual Orientation Change Efforts, § 1(d), 2012 Cal. Legis. Serv. Ch. 835.

<sup>107</sup> *Id.*

homosexual youth's own families that send them to these therapies, their health risks are even greater.<sup>108</sup> Lesbian, gay, and bisexual youths who report being rejected by their families are "8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, [and] 3.4 times more likely to use illegal drugs."<sup>109</sup> The suicide risk, which is already higher among LGBT youths than heterosexual ones, is significantly higher when the LGBT youths are rejected by their families.<sup>110</sup> The California bill noted that the state has a compelling interest in protecting the physical and psychological well-being of minors from the serious harms imposed by SOCE.<sup>111</sup> However, the ban in the statute merely prevents mental health providers from administering these treatments to patients under eighteen years of age, with the only consequence being discipline by their licensing entity.<sup>112</sup>

The New Jersey ban utilizes largely similar language and reasoning to the California bill.<sup>113</sup> New Jersey recognizes studies that conclude that SOCE create a sense of guilt and anxiety while having no chance of having a positive effect.<sup>114</sup> Thus, the ban explicitly states that individuals, if they engage in therapy, should focus on determining how to gain acceptance of their sexual orientation and prepare for the societal response to it.<sup>115</sup> The New Jersey law notes that SOCE further stigmatize and internalize societal prejudice against LGBT youths.<sup>116</sup> Additionally, the ban cites studies that show there is no evidence that sexual orientation conversion is even possible through therapy.<sup>117</sup> Finally, New Jersey, like California, recognizes that it has an interest in protecting the physical and psychological well-being of minors who are at risk, which is especially true in the case of LGBT youths who are subject to SOCE.<sup>118</sup> Thus, New Jersey places the same type of ban on SOCE that California has.<sup>119</sup> However, the New Jersey ban, while enumerating how to violate the ban,

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<sup>108</sup> *Id.* § 1(m).

<sup>109</sup> *Id.*

<sup>110</sup> See Gibson, *supra* note 104.

<sup>111</sup> Sexual Orientation Change Efforts, § 1(n), 2012 Cal. Legis. Serv. Ch. 835.

<sup>112</sup> CAL. BUS. & PROF. CODE § 865.2 (2014).

<sup>113</sup> Compare N.J. STAT. ANN. § 45:1-54 (2014), with Sexual Orientation Change Efforts, 2012 Cal. Legis. Serv. Ch. 835.

<sup>114</sup> N.J. STAT. ANN. § 45:1-54(c).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* § 45:1-54(j)(1).

<sup>117</sup> *Id.* § 45:1-54(k).

<sup>118</sup> *Id.* § 45:1-54(n).

<sup>119</sup> *Id.*

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does not offer any recourse against those who engage in SOCE.<sup>120</sup>

Both California's and New Jersey's bans on SOCE have been challenged in court.<sup>121</sup> In California, mental health providers who utilized nonaversive treatments challenged the ban that would subject them to professional discipline.<sup>122</sup> They alleged the ban violated the First Amendment, along with several other constitutional violations.<sup>123</sup> Originally, the plaintiffs moved for preliminary injunctive relief on the ground that the California law violated First Amendment free speech rights.<sup>124</sup>

The procedurally first case, *Welch v. Brown*, held that the law was subject to strict scrutiny because it prohibited the expression of particular viewpoints.<sup>125</sup> In that case, the United States District Court for the Eastern District of California granted preliminary relief because it believed that the state would not be able to satisfy strict scrutiny, and, that in the interim, the plaintiffs would suffer irreparable harm by not being able to practice their beliefs.<sup>126</sup> Another constitutional challenge was not considered until *Pickup v. Brown*, in which First and Fourteenth Amendment claims were heard.<sup>127</sup> In that case, the plaintiffs additionally argued that the ban was unconstitutionally vague.<sup>128</sup> In *Pickup*, the court denied the plaintiffs' motion because the plain text of the bill only bars treatment, not discussions of treatment, meaning the law only regulates conduct, not speech.<sup>129</sup> The court also dismissed the vagueness claim because the ban was of sufficient clarity that practitioners could understand it.<sup>130</sup> Finally, the court ruled that no parents' rights were violated because parents do not have the right to choose "a mental health treatment that the state has reasonably deemed harmful to minors."<sup>131</sup>

The *Pickup* court's decision was appealed and the United States

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<sup>120</sup> N.J. STAT. ANN. § 45:1-55 (2014). This statute contrasts with California's ban, which explicitly subjects those who violate the law to their licensing agency. *Compare* § 45:1-54 (2014), *with* CAL. BUS. & PROF. CODE § 865.2 (2014).

<sup>121</sup> *Pickup v. Brown*, 740 F.3d 1208, 1221 (9th Cir. 2013); *King v. Christie*, 981 F. Supp. 2d 296, 302 (D.N.J. 2013).

<sup>122</sup> *Pickup v. Brown*, 740 F.3d at 1223.

<sup>123</sup> *Id.* at 1225.

<sup>124</sup> *Id.* at 1222.

<sup>125</sup> *Welch v. Brown*, 907 F. Supp. 2d 1102, 1112 (E.D. Cal. 2012).

<sup>126</sup> *Id.* at 1121.

<sup>127</sup> *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at \*1 (E.D. Cal. Dec. 4, 2012).

<sup>128</sup> *Id.* at \*7.

<sup>129</sup> *Id.* at \*9.

<sup>130</sup> *Id.* at \*16.

<sup>131</sup> *Id.* at \*16–26.

Court of Appeals for the Ninth Circuit reviewed the decision of both *Welch* and *Pickup* together.<sup>132</sup> The appellate court pointed out several important components that are not contained in the California law.<sup>133</sup> These include that mental health providers can still freely communicate with the public about SOCE, and advocate for their use.<sup>134</sup> The mental health providers are still free to express their views about homosexuality and they can even recommend SOCE, so long as they do not themselves engage in them.<sup>135</sup> Additionally, individuals who are eighteen years of age or older can still subject themselves to SOCE, minors can still be subjected to them in other states, and nonlicensed counselors, like religious leaders, can still administer them in California.<sup>136</sup> The court explicitly held that the ban only forces “licensed mental health providers in California who wish to engage in ‘practices . . . that seek to change a [minor’s] sexual orientation’ either to wait until the minor turns [eighteen] or be subject to professional discipline.”<sup>137</sup> The court recognized that the legislature’s purpose was to protect minors, both physically and psychologically.<sup>138</sup> Additionally, the court noted its concerns, both with the efficacy of SOCE and with the anecdotal reports of harm.<sup>139</sup>

The appellate court separated its discussion into multiple sections, the first of which addressed any potential free speech violations.<sup>140</sup> First, the court determined that heightened scrutiny was not required.<sup>141</sup> Relying on precedent,<sup>142</sup> the court determined that the ban is a regulation of conduct, not speech.<sup>143</sup> Following this precedent, the court announced that while the speech communicated during a psychoanalytical session was entitled to constitutional protection, it was not exempt from regulation.<sup>144</sup> However, at that time no court had decided how much protection the communication within therapy is entitled to.<sup>145</sup> Importantly, the principle that

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<sup>132</sup> *Pickup v. Brown*, 740 F.3d at 1223.

<sup>133</sup> *Id.* at 1229.

<sup>134</sup> *Id.* at 1227.

<sup>135</sup> *Id.* at 1229.

<sup>136</sup> *Id.* at 1223. Because these other states do not have bans, there is absolutely no protection in these cases, which poses a problem if the states with bans are serious about preventing harm to these at risk youths. *Id.*

<sup>137</sup> *Id.* (quoting CAL. BUS. & PROF. CODE § 865 (2014)).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1225.

<sup>141</sup> *Id.*

<sup>142</sup> *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000); *Conant v. Walters*, 309 F.3d 629, 638 (9th Cir. 2002).

<sup>143</sup> *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013).

<sup>144</sup> *Id.* at 1230.

<sup>145</sup> *Id.*

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psychotherapists do not gain special First Amendment protection merely because their type of treatment requires the spoken word had already been established,<sup>146</sup> but these principles distilled from precedent were insufficient for the court to determine in the present case if there was a First Amendment violation.<sup>147</sup>

Instead, the court determined that First Amendment protection should be viewed as a continuum, where the highest level of protection is afforded to professionals engaging in a public dialogue.<sup>148</sup> Thus, harmful, banned, or otherwise unpopular medical procedures or treatments may be written or spoken about in the public sphere.<sup>149</sup> The midpoint of the continuum, the professional relationship, limits speech protection to medical professionals by only protecting truthful—but not misleading—speech to their patients.<sup>150</sup> This is consistent with public policy that doctors are liable for giving negligent medical advice without being able to hide behind the First Amendment.<sup>151</sup> At the lowest end of this continuum is the regulation of professional conduct, in which the state has the highest interest in limiting the abilities of professionals.<sup>152</sup> In those situations the state has the right to ban certain treatments; most regularly the state engages in this practice by banning or limiting the use of certain drugs.<sup>153</sup> These bans regulate the conduct of doctors, but there is no violation of those doctors' free speech rights.<sup>154</sup> The ban on SOCE are no different, and the court found that the ban belonged on the lowest end of the continuum where the state's power is strongest, meaning there was no First Amendment violation.<sup>155</sup>

Next, the appellate court considered if the ban was unconstitutionally vague.<sup>156</sup> Basic due process requires that any enacted legislation be voided if what the legislation prohibits is not clearly defined.<sup>157</sup> Vagueness does not exist if "a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question."<sup>158</sup> Further, the

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<sup>146</sup> *Id.* at 1231.

<sup>147</sup> *Id.* at 1231–32.

<sup>148</sup> *Id.* at 1227.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 1228 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992)).

<sup>151</sup> *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2013).

<sup>152</sup> *Id.* at 1229.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1233.

<sup>158</sup> *Id.* (quoting *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1994)).

standard is lowered when the law targets a select group of persons and the meaning is plain enough for members of the targeted class.<sup>159</sup> In this case, there is clearly a selected group, licensed mental health providers who engage in SOCE, lowering the standard.<sup>160</sup> The court concluded that a reasonable person would be able to discern a plain meaning from the law, which is that mental health treatment that aims to alter a minor patient's sexual orientation is prohibited.<sup>161</sup> Therefore, the meaning of the law was found to be clear.<sup>162</sup>

Another key challenge brought to the appellate court was the notion that parents' rights to make medical decisions for their children were violated by the ban.<sup>163</sup> The state argued that parents do not have the right to engage in unsafe practices and that SOCE are harmful, therefore parents do not have the right to make the decision to force their children into SOCE.<sup>164</sup> The appellate court, following considerable precedent, recognized that there is no fundamental right to choose a health professional or course of treatment that has been reasonably prohibited by the state.<sup>165</sup> Because the majority of precedent clearly states that adults themselves do not have a right to engage in prohibited health services, the court found it bizarre that parents would have the right to subject their children to prohibited medical treatments.<sup>166</sup> Further, the Supreme Court has recognized that the state has greater regulatory power over children than adults.<sup>167</sup>

The plaintiffs additionally contended that they have rights over their children when it comes to sexual education.<sup>168</sup> The court recognized that parents do have the right to choose when and how to inform their children about sex, but they do not have the right to compel the state to follow their own views as to what mental health practices are safe for their children.<sup>169</sup> Thus, the appellate court held that the law did not violate any fundamental rights<sup>7</sup> of the parents.<sup>170</sup> Therefore, the preliminary injunction granted in *Welch* was reversed and the order denying relief in *Pickup* was

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<sup>159</sup> *Id.* at 1233–34.

<sup>160</sup> *Id.* at 1234.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1235.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1235–36; *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993).

<sup>166</sup> *Pickup*, 740 F.3d at 1236.

<sup>167</sup> *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

<sup>168</sup> *Id.* at 1236.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*



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affirmed.<sup>171</sup>

The New Jersey ban on SOCE has also been challenged.<sup>172</sup> In *King v. Christie*, the plaintiffs alleged violations of their First Amendment rights, including free speech and the free exercise of religion.<sup>173</sup> Additionally, the challenge also claimed violations of minors' right to self-determination and their parents' fundamental right to direct their upbringing.<sup>174</sup> The United States District Court for the District of New Jersey concluded the ban does not regulate speech.<sup>175</sup> In reviewing the plain language of the law, the court found there are no references to speech, but instead that the law can be generally associated with conduct.<sup>176</sup> Moreover, the court cited the Ninth Circuit's *Pickup* decision that reached the same conclusion.<sup>177</sup> Additionally, the court declared there was no free speech violation, as anyone can speak about SOCE, but that licensed medical professionals may not engage in them.<sup>178</sup> Citing *Pickup*, the New Jersey court held that talk therapy, by only being able to be communicated through speech, is not entitled to any special constitutional protection.<sup>179</sup> Despite the fact that the Ninth Circuit's decision in *Pickup* is not binding on New Jersey, the court found the reasoning so persuasive that it chose to adopt it.<sup>180</sup> Additionally, the New Jersey court held that while the communication utilized during SOCE is entitled to constitutional protection, it is not immune from regulation.<sup>181</sup>

If therapy was entitled to special First Amendment protection, then any regulation of professional therapy would be subject to the heightened scrutiny argued for by the plaintiffs.<sup>182</sup> However, the court believed that rational basis review was appropriate.<sup>183</sup> Passing rational basis review requires that only a legitimate state interest be at issue, and that the

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<sup>171</sup> *Id.*

<sup>172</sup> *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013). The court in this case spends considerable time discussing the ability of a third party to intervene in these proceedings. *Id.* at 306–11. As the nature and ability of the third party, Garden State, to intervene is beyond the scope of this Comment, a discussion of this debate is purposefully omitted.

<sup>173</sup> *Id.* at 305.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 314.

<sup>176</sup> *Id.* at 316.

<sup>177</sup> *Id.* at 313–14.

<sup>178</sup> *Id.* at 314.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 318.

<sup>181</sup> *Id.* at 319.

<sup>182</sup> *Id.* Medicinal practice has a longstanding history of being regulated by the state. *See Watson v. Maryland*, 218 U.S. 173, 176 (1910) (noting that the medical profession requires regulation).

<sup>183</sup> *King*, 981 F. Supp. 2d at 324.

legislature act rationally.<sup>184</sup> The court cited the reasons enumerated by the New Jersey legislature as its legitimate interest in passing the law.<sup>185</sup>

Additionally, the New Jersey court, like the Ninth Circuit, held that the ban on SOCE was not vague.<sup>186</sup> Using the same reasoning as the California court, the New Jersey court stated that a lower standard for vagueness is appropriate given that the statute targets a specific group of persons with specialized knowledge.<sup>187</sup> SOCE is not a vague term because the statute explicitly mentions it, and it is clearly defined within a reasonable reading of the statute.<sup>188</sup> Further, the plaintiffs also contended that the term “sexual orientation” was vague, but the court was unconvinced given that the plaintiffs demonstrated that they understood what it meant in their own declarations.<sup>189</sup>

## V.    EXTENDING THE BAN—CRIMINALIZING SEXUAL ORIENTATION CHANGE EFFORTS

### A.    JUSTIFICATION OF CRIMINALIZATION

While banning SOCE is a substantial step in advocating for rights of LGBT youths, the bans currently in place do not go far enough to protect them. SOCE must be prohibited in all forms in order to prevent the harms clearly defined by the statutes, and the greatest protection society can offer is the criminalization of SOCE.

Before discussing why SOCE ought to be criminalized, it is important to understand why conduct in general can be criminalized. Crimes only regulate *conduct*, as opposed to constitutionally protected areas like speech.<sup>190</sup> Banning SOCE appears well-established in some federal courts,<sup>191</sup> but there is a distinction in American criminal law between crimes that are punishable and those that are mere violations.<sup>192</sup> As the bans stand, engaging in SOCE is a violation of law, subject to

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 325–26 (citing N.J. STAT. ANN. § 45:1-54 (2014)).

<sup>186</sup> *Id.* at 326.

<sup>187</sup> *Id.* at 327.

<sup>188</sup> *Id.* at 327–28.

<sup>189</sup> *Id.* at 328–29.

<sup>190</sup> Duff, *supra* note 17, § 2.

<sup>191</sup> See *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013); *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013). Both cases reaching this issue clearly define engaging in SOCE as conduct open to regulation, and not speech or some other protected right. *Pickup*, 740 F.3d at 1229; *King*, 981 F. Supp. 2d at 296.

<sup>192</sup> Duff, *supra* note 18, § 2.

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discipline by a licensing agency.<sup>193</sup> In contrast to mere discipline by a professional board, criminalization of an act allows the state to condemn the defendant with a guilty verdict.<sup>194</sup> The general purpose for condemning criminals is to forbid their acts and prevent further unjustifiable and inexcusably substantial harm to others or the public interest.<sup>195</sup> When individual well-being is at stake, the state has a stake in protecting its citizens from serious harm.<sup>196</sup>

Harm itself is a compelling reason to condemn conduct as criminal because, “the only purpose for which power can rightfully be exercised over any member of a civilized community, against [the member’s] will, is to prevent harm to others.”<sup>197</sup> Despite criticisms, the harm principle is a clear explanation for why many acts are criminalized.<sup>198</sup> For example, consent is not a defense to certain criminal conduct, such as murder.<sup>199</sup> However, the explanation of criminalizing consensual conduct, like consensual murder, must rest on the fact that the state has a paternalistic interest in protecting citizens from themselves and others.<sup>200</sup> Paternalism, the protection of people against themselves, is commonplace in American law.<sup>201</sup> This principle allows society to criminalize conduct that is harmful to others, even when they passively or actively assist in the harm.<sup>202</sup>

The criminal law communicates between the state and its citizens by declaring that criminal wrongs ought not to be committed.<sup>203</sup> In doing so, the state seeks to dissuade citizens from committing such wrongs.<sup>204</sup> This theory of criminal law, known as deterrence, seeks to reduce the incidence of the harms that the criminal law seeks to prevent.<sup>205</sup> An alternative, but equally plausible, view of the criminal law is that it seeks to provide retributive punishment for those who are harmed.<sup>206</sup> In doing so, society

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<sup>193</sup> CAL. BUS. & PROF. CODE § 865.2 (2014).

<sup>194</sup> Duff, *supra* note 18, § 4.

<sup>195</sup> *Id.* Additionally, the Model Penal Code notes that the criminal law is concerned with conduct that “unjustifiably and inexcusably inflicts or threatens substantial harm.” *Id.* (quoting MODEL PENAL CODE § 1.01(1)(a) (1962)).

<sup>196</sup> *Id.*

<sup>197</sup> MILL, *supra* note 16, at 13.

<sup>198</sup> See H.L.A. HART, LAW, LIBERTY, AND MORALITY 4 (1963).

<sup>199</sup> *Id.* at 30–31.

<sup>200</sup> *Id.* at 31.

<sup>201</sup> *Id.* at 31–32. For example, drug laws commonly protect individuals from themselves, as not every drug user will harm another. *Id.*

<sup>202</sup> *Id.* at 33.

<sup>203</sup> Duff, *supra* note 18, §§ 2, 5.

<sup>204</sup> *Id.* § 5.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* § 4.

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provides an appropriate response to a reasonable agent's responsible acts.<sup>207</sup>

The criminal law's method of delivering messages toward citizens comes from punishment.<sup>208</sup> From a retributive viewpoint, the criminal law is focused on the past conduct of offenders,<sup>209</sup> and it becomes a means of setting right those who have offended.<sup>210</sup> Society is held together by the morality it imposes upon itself, and the violation of this morality requires punishment.<sup>211</sup> However, retribution must not contradict the law's own end of preventing harm by punishing too severely.<sup>212</sup>

The Supreme Court has recognized that punishment must be justified by one of three theories.<sup>213</sup> In addition to the two already mentioned, the Supreme Court allows for a theory of rehabilitation,<sup>214</sup> which can be defined as "[t]he process of seeking to *improve* a criminal's character and outlook so that he or she can function in society without committing other crimes."<sup>215</sup> However, rehabilitation is not to be considered when determining whether a crime requires imprisonment, or the length of a sentence.<sup>216</sup>

Applying these principles, it would be perfectly reasonable to criminalize SOCE and punish those who subject minors to them. The statutes that ban SOCE clearly define the practice as harmful,<sup>217</sup> and the courts have recognized and agree that the harms they create are substantial enough to give the state a legitimate interest in banning them.<sup>218</sup> If the state is truly interested in preventing harm to its citizens, then SOCE,

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<sup>207</sup> *Id.* § 5.

<sup>208</sup> *Id.* § 2.

<sup>209</sup> *Id.* § 3.

<sup>210</sup> *Id.* § 4.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* A healthy philosophical debate exists between deterrence theorists and retributive theorists. However, which of these two theories of justice is more appropriate to justify a criminal system of justice is beyond the scope of this Comment. As a result, this Comment will seek to justify punishing parents and therapists who force SOCE upon minors under both theories within the current American criminal justice system.

<sup>213</sup> *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

<sup>214</sup> *Id.*

<sup>215</sup> *United States v. Hawkins*, 380 F. Supp. 2d 143, 160 (E.D.N.Y. 2005) (quoting BLACK'S LAW DICTIONARY 1311 (8th ed. 1999)).

<sup>216</sup> *Tapia v. United States*, 131 S.Ct. 2382, 2390 (2011) (suggesting that the goal of prison may not be rehabilitation and that imprisonment may better serve either deterrence or retribution).

<sup>217</sup> Sexual Orientation Change Efforts, § 1(n), 2012 Cal. Legis. Serv. Ch. 835 (SB 1172) (West) (codified in CAL. BUS. & PROF. CODE §§ 865–865.2 (2014)); N.J. STAT. ANN. § 45:1-54(n) (2014).

<sup>218</sup> *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2013); *King v. Christie*, 981 F. Supp. 2d 296, 325 (D.N.J. 2013).

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which is recognized as harmful by both statutes and case law, ought to require the imposition of criminal sanctions against adults that force minor children into them. The current consequence in California, discipline by a licensing agency,<sup>219</sup> does not treat the potential harm, the death of a minor,<sup>220</sup> seriously enough.

Given the goals of the criminal justice system, serious criminal sanctions need to be imposed on all those who subject minors to SOCE, not just therapists. Due to the paternalistic nature of the state and the criminal law, society ought to be able to punish those who allow SOCE to occur as well, namely the parents who send their children to them. These parents contribute to, and even encourage, much of the harm that is inflicted upon these LGBT youths by sending them to SOCE. The state has a compelling interest in prosecuting these parents to protect their children because of the increased suicide rates cited amongst the youths who are forced into these therapies.<sup>221</sup>

Parents who send their children to SOCE should clearly be punished by the state according to the theories of punishment recognized by the Supreme Court.<sup>222</sup> Under a theory of deterrence, the goal would be to deter parents who want to impose these harms upon their children. If these parents fear that criminal sanctions, including imprisonment, may be at stake, then they are less likely to force their children into these situations. Alternatively, under a theory of retribution, these parents deserve to be punished for inflicting psychological harm upon their children, which itself can make some children suicidal.<sup>223</sup> The state may impose a punishment that reflects such a serious harm.<sup>224</sup> Rehabilitation concerns do exist as well because the state has an interest in ensuring that these parents do not harm their children, or any future children, through SOCE again.

Certainly, there is a valid concern that criminalizing parents may subject them to periods of incarceration, and research suggests that children are harmed when their parents are incarcerated.<sup>225</sup> If all available caretakers are incarcerated, there is an increased chance that children will

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<sup>219</sup> CAL. BUS. & PROF. CODE § 865.2.

<sup>220</sup> Sexual Orientation Change Efforts, § 1(b), 2012 Cal. Legis. Serv. Ch. 835.

<sup>221</sup> *Id.*; N.J. STAT. ANN. § 45:1-54(b).

<sup>222</sup> See *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.”).

<sup>223</sup> Sexual Orientation Change Efforts, § 1(m), 2012 Cal. Legis. Serv. Ch. 835.

<sup>224</sup> There is some concern that the level of punishment be appropriate. See *Kennedy*, 554 U.S. at 420 (noting that a theory of retribution can violate a “commitment to decency and restraint,” especially through the death penalty).

<sup>225</sup> Deseriee A. Kennedy, *Children, Parents & The State: The Construction Of A New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 89 (2011).

be placed in foster care.<sup>226</sup> However, whether children are harmed when their parents are incarcerated is difficult to determine.<sup>227</sup> In almost any case in which parents are incarcerated, their children are subject to many other at-risk factors, making it difficult to determine which factor causes the harm.<sup>228</sup> In the case of SOCE, which are already recognized as causing harm to minors, determining what additional harms there would be if the minor's parents were incarcerated is impossible. Regardless, because the harms of SOCE include suicide, no other harm minors could experience, including the incarceration of their parents, could possibly be worse.

Therapists who engage in the practice of SOCE ought to be subjected to similar criminal sanctions. While the parents would be punished for indirectly causing harm, the therapists who practice SOCE directly cause harm to minors.<sup>229</sup> To be clear, merely speaking about the therapies, or recommending them through nothing more than speech, is covered by the First Amendment and is protected from criminal sanctions.<sup>230</sup> However, the actual practice causes harm and ought to be subject to an appropriate punishment. The statutes currently only allow the licensing agency to discipline the therapists, but even if they lose their license, they could still illegally engage in these harmful practices, thus not protecting minors. To seriously protect minors, we need to impose serious criminal sanctions to deter the therapists, provide minors the retribution they deserve, and, in some cases, potentially rehabilitate therapists who engage in these efforts.

There may be some minors who wish for their parents to send them to these SOCE. However, given the paternalistic nature of the state, it is imperative that we protect these minors from the potential harm they would inflict upon themselves.<sup>231</sup>

#### B. CHILD ABUSE AND ENDANGERMENT: AN EXISTING AVENUE TO PROSECUTE THOSE WHO ENGAGE IN SOCE

While theoretical reasons to criminalize SOCE have been explored, practical methods to enforce criminal sanctions against both parents and

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<sup>226</sup> *Id.* at 90.

<sup>227</sup> *Id.* at 92.

<sup>228</sup> *Id.*

<sup>229</sup> Sexual Orientation Change Efforts, *supra* note 217; N.J. STAT. ANN. § 45:1-54(b) (2014).

<sup>230</sup> *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2013); *King v. Christie*, 982 F. Supp. 2d 296, 314 (D.N.J. 2013).

<sup>231</sup> Joel Anderson & Rutger Classen, *Sailing Alone: Teenage Autonomy and Regimes of Childhood*, 31 LAW & PHIL. 495, 496 (2012), available at <http://link.springer.com/article/10.1007%2Fs10982-012-9130-9>. Children ought to be treated differently from adults when undertaking dangerous or risky activities. *Id.*

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therapists who subject children to SOCE also exist. Particularly, inappropriate medical treatment that results in the death of a child can be considered felony child endangerment.<sup>232</sup> While it is important to recognize that each state determines the limits of their own criminal law, this Comment focuses on California and New Jersey because those are the two states that already have bans on SOCE.<sup>233</sup>

First, it is important to examine the child endangerment laws in those states to properly draw conclusions about how to prosecute under them. California Penal Code Section 273a provides that:

Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.<sup>234</sup>

While this provision broadly allows for harms, it does contain certain key provisions that are relevant. Causing unjustifiable mental suffering for a child in a parent's care is sufficient to violate the statute.<sup>235</sup> Additionally, placing a child in a situation that has a substantial risk of harm also violates the law.<sup>236</sup> Finally, the California law provides a provision that a child abuser shall be rehabilitated through counseling so they can provide appropriate care for their children.<sup>237</sup>

New Jersey also outlaws cruelty toward a child. The state definition of child cruelty includes "inflicting upon a child unnecessary suffering or pain, either mental or physical."<sup>238</sup> Additionally, New Jersey considers "continued inappropriate placement of a child in an institution . . . with the knowledge that the placement has resulted and may continue to result in

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<sup>232</sup> Walker v. Superior Court, 763 P.2d 852, 873 (Cal. 1989).

<sup>233</sup> Certainly, the existence of a ban on SOCE is unnecessary to recognize that SOCE cause harms and therefore should be criminalized. However, it certainly bolsters the argument when the state has already recognized the harms present in these efforts. For these reasons, the focus ought to be on California and New Jersey for pioneering criminal sanctions against those who violate their bans.

<sup>234</sup> CAL. PEN. CODE § 273a(a) (2014).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* § 273a(c)(3)(A). This rehabilitation helps resolve issues between children and parents, which justifies punishing the parents.

<sup>238</sup> N.J. STAT. ANN. § 9:6-8.21 (2014).

harm to the child's mental or physical well-being" to be child neglect.<sup>239</sup> Institutions, under this statutory definition, include both public and private SOCE facilities.<sup>240</sup> Also, the knowledge requirement in the New Jersey law may be met by the mere existence of the ban,<sup>241</sup> which explicitly states that placement into a SOCE facility would be harmful.<sup>242</sup> Given that ignorance of the law is typically not a defense,<sup>243</sup> a parent's lack of knowledge of the existence of the ban could arguably be barred as a defense to this knowledge requirement.

Despite the fact that neither California nor New Jersey has yet to prosecute anyone under their respective penal codes for engaging in SOCE with a minor, it is not a significant stretch to imagine how a court could find parents or therapists guilty of child neglect. Existing California case law has punished inappropriate medical treatments under a theory of child neglect.<sup>244</sup> While the current jurisprudence only deals with physical ailments, not mental ailments introduced by SOCE, criminal liability exists when a parent recklessly endangers their child by choosing an inappropriate medical treatment.<sup>245</sup>

Further, even if these SOCE are asserted under a First Amendment freedom of religion claim, criminal liability can still exist.<sup>246</sup> The standard for determining liability in such a situation is balancing the gravity of the state's interest against the severity of the religious imposition.<sup>247</sup> Endangering the welfare of a child is considered of great significance, especially when the child's life is at stake.<sup>248</sup> The California Supreme Court has held that "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of the children before they have reached the age of full legal discretion when they can make that choice for themselves."<sup>249</sup> In the context of SOCE, legal adults may freely opt into SOCE and any subsequent harm they may choose for themselves, but the state has a

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> See N.J. STAT. ANN. § 45:1-54 (2014).

<sup>242</sup> *Id.* at § 45:1-54(n).

<sup>243</sup> *United States v. Mahoney*, 298 F. App'x 555, 557 (9th Cir. 2008).

<sup>244</sup> *Walker v. Superior Court*, 763 P.2d 852, 873 (Cal. 1989). In this case, a mother was found criminally negligent for allowing her child to die of meningitis and only offering prayer instead of appropriate medical attention. *Id.*

<sup>245</sup> *Id.* at 869.

<sup>246</sup> *Id.* at 871.

<sup>247</sup> *Id.* at 869.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 870 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).



compelling interest in protecting minors from being placed at risk of physical and psychological harm that overrides any preference of their parents or their religious affiliations.

There are several cases that explore how parental neglect can support a finding of manslaughter or felony child neglect.<sup>250</sup> In *State v. Norman*, the defendant contended that refusal to provide medical care for his son was protected under the right to religious freedom guaranteed in the Washington Constitution.<sup>251</sup> The son, age 10, was only offered prayer as a method for curing his physical illness, despite the fact that his symptoms pointed to diabetes.<sup>252</sup> The members of his religious community believed he was being punished for his sin of masturbation, for which he was spanked with a paddle.<sup>253</sup> The court held that there was a common law duty to provide medical care for children in the case of serious illness,<sup>254</sup> and that these religious practices were insufficient to protect the child.<sup>255</sup> Further, there is a natural or sacred duty for parents to adequately provide medical care for their children.<sup>256</sup> The defendant was ultimately convicted of manslaughter for failure to provide medical care to his child.<sup>257</sup> While the sacred duty does not explicitly extend in this case to psychological care, certainly parents have a duty to not harm their children.<sup>258</sup>

Of course, the conduct in *Norman* is different from SOCE, because in *Norman* the absence of treatment led to death, while in the case of SOCE, the absence of treatment is beneficial.<sup>259</sup> However, providing ineffective religious treatment for disease, which gave rise to liability in *Norman*, is fairly comparable to SOCE, which can be religious treatment that causes harm. Depending on how serious society is about protecting youths from these harmful practices, finding liability for SOCE is not a far stretch.

Criminal neglect also occurs when a parent has knowledge that an unfit party would care for his or her child.<sup>260</sup> In *State v. Evans*, the

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<sup>250</sup> *Id.* at 873; *State v. Norman*, 808 P.2d 1159, 1163 (Wash. Ct. App. 1991); *State v. Evans*, 492 N.W.2d 141, 146–47 (Wis. 1992).

<sup>251</sup> *Norman*, 808 P.2d at 1160. *See generally* WASH. CONST. art. I, § 11 (“Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual . . .”).

<sup>252</sup> *Id.* at 1160–61.

<sup>253</sup> *Id.* at 1161.

<sup>254</sup> *Id.* at 1163.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 1162.

<sup>257</sup> *Id.* at 1166.

<sup>258</sup> *Id.* at 1162.

<sup>259</sup> *Id.*

<sup>260</sup> *State v. Evans*, 492 N.W.2d 141, 147 (Wis. 1992).

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defendant entrusted his children to someone he knew would not provide adequate care.<sup>261</sup> Such knowledge, or even that a reasonable person would have such knowledge, is sufficient to find criminal neglect.<sup>262</sup> Again, this case relied on an inability to provide appropriate medical care for a physical ailment,<sup>263</sup> and the court found liability when a parent placed his children in an environment that lead to physical harm or death.<sup>264</sup> Therefore, a child's parents should be held criminally liable when they create an environment that leads to the suicide of their child.

Moreover, a parent can commit negligent homicide<sup>265</sup> if he or she ignores or disregards a risk that he or she should be aware of, leading to his or her child's death.<sup>266</sup> In *State v. Bier*, a husband left a loaded gun out for his intoxicated wife, who then used the gun to allegedly commit suicide.<sup>267</sup> The husband claimed he told his wife to use the gun against him,<sup>268</sup> and these facts were sufficient to find criminal negligence.<sup>269</sup> While in the case of SOCE, parents are not literally placing a gun in the hands of their children, they are greatly increasing the risk their children will commit suicide.<sup>270</sup>

Another key issue in finding criminal liability is disregarding notice of an impending harm.<sup>271</sup> Certainly, in the case of SOCE, notice of impending harm is satisfied with the presence of the existing bans, particularly because they acknowledge the potential harms. While notice of impending harm or death has been at issue in extending existing case law,<sup>272</sup> it ought not be at issue here given that parents have already been placed on notice by the bans in California and New Jersey. A major extension would only need to be applied in the cases of parents who send their children into states where SOCE are not banned. While the treatment providers in those states are outside the jurisdiction of the states that have banned SOCE, the parents ought to still be subject to criminal sanctions because they have sufficient notice in the form of the ban and it would still

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<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 143.

<sup>264</sup> *Id.* at 147.

<sup>265</sup> *State v. Bier*, 591 P.2d 1115, 1120 (Mont. 1979).

<sup>266</sup> *Id.* at 1118.

<sup>267</sup> *Id.* at 1116–17.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 1120.

<sup>270</sup> Sexual Orientation Change Efforts, *supra* note 217 at § 1(m).

<sup>271</sup> *Bier*, 591 P.2d at 1118.

<sup>272</sup> *Hermanson v. State*, 604 So.2d 775, 776 (Fla. 1992).

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fit under the child abuse and neglect laws.<sup>273</sup> Thus, in order to protect the children from out-of-state SOCE, the state needs to punish the parents since it cannot reach the treatment providers.

## VI. CONCLUSION

The law, psychology, and homosexuality have a long, dark history. Having been previously labeled a mental illness,<sup>274</sup> same-sex attraction has long been a taboo in the United States stemming from the criminalization of sodomy.<sup>275</sup> To remedy this, religion and psychology came together to create SOCE, an attempt to change the sexual orientation of those who engaged in same-sex practices to the “normal” heterosexual lifestyle.<sup>276</sup>

SOCE took a morbid approach to “curing” same-sex attraction, including practices like lobotomies and electroshock therapy.<sup>277</sup> While these types of therapies are now largely outdated, the new “talk therapies” are still extremely harmful to the individuals subjected to them.<sup>278</sup> These harms have been recognized by two states, California<sup>279</sup> and New Jersey.<sup>280</sup> As a result, both states have banned the practice of SOCE directed toward minors,<sup>281</sup> and California subjects therapists who engage in these practices to discipline by their appropriate licensing agencies.<sup>282</sup> These bans acknowledge that youths are particularly at risk of suffering serious harms from these practices,<sup>283</sup> and courts in those states have recognized that they need to be protected by these constitutional bans.<sup>284</sup>

However, these bans do not go far enough to seriously protect these youths. The states need to criminally punish SOCE therapists and the parents who send their children to them. The state has a right to impose criminal sanctions against those who seriously harm others.<sup>285</sup> Criminal

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<sup>273</sup> California and New Jersey’s child abuse laws do not indicate that the conduct constituting child abuse has to occur within those respective states, so theoretically the state could assert jurisdiction over their residents when they return after committing child abuse elsewhere. *See* Cal. Pen. Code § 273a (2014); N.J. STAT. ANN. § 9:6-1 (2014).

<sup>274</sup> *LGBT-Sexual Orientation*, *supra* note 2.

<sup>275</sup> Maza, *supra* note 3.

<sup>276</sup> *Just the Facts*, *supra* note 50.

<sup>277</sup> Cruz, *supra* note 6, at 1304–06.

<sup>278</sup> *Id.* at 1351–54.

<sup>279</sup> CAL. BUS. & PROF. CODE §§ 865–865.2 (2014).

<sup>280</sup> *See* N.J. STAT. ANN. § 45:1-54 (2014).

<sup>281</sup> CAL. BUS. & PROF. CODE § 865.1; N.J. STAT. ANN. § 45:1-54.

<sup>282</sup> *See* CAL. BUS. & PROF. CODE § 865.2.

<sup>283</sup> Sexual Orientation Change Efforts, § 1(n), 2012 Cal. Legis. Serv. Ch. 835 (SB 1172) (West) (codified in Cal. Bus. & Prof. Code §§ 865–865.2 (2014)); N.J. STAT. ANN. § 45:1-54(n).

<sup>284</sup> *Pickup v. Brown*, 740 F.3d at 1236; *see also King v. Christie*, 981 F. Supp. 2d at 333.

<sup>285</sup> MILL, *supra* note 16 at 13.

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sanctions communicate to the public that these actions are impermissible and hopefully deter future harm, rehabilitate those who would cause harm, and provide retribution for those harms.<sup>286</sup>

Further, a means of criminalizing parents and therapists who engage in SOCE practices already exists. Parents and therapists could be criminally prosecuted under child abuse and endangerment statutes.<sup>287</sup> Looking at how the bans in California and New Jersey might interact with their respective child abuse and endangerment laws reveals that this is plausible.<sup>288</sup> To show that the state is serious about protecting LGBT youth from the harms of SOCE, the state must begin the practice of criminally punishing the parents and therapists that are subjecting these youths to harm.

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<sup>286</sup> *Kennedy v. Louisiana*, 554 U.S. at 420.

<sup>287</sup> CAL. PEN. CODE § 273a (2014); N.J. STAT. ANN. § 9:6-1 (2014).

<sup>288</sup> Compare CAL. PEN. CODE § 273a, and N.J. STAT. ANN. § 45:1-54, with CAL. BUS. & PROF. CODE §§ 865–865.2, and N.J. STAT. ANN. § 9:6-1.