THE RIGHT TO STAY GAY: SB 1172 AND SOCE

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INTRODUCTION

Gay rights in the United States have experienced something of a renaissane over the past two decades. Less than thirty years ago, the Supreme Court held that it was constitutional to criminalize homosexuality and scoffed at the idea that there was any “connection between, family, marriage, or procreation on the one hand and homosexual activity on the other.”\(^1\) Today, in the wake of *United States v. Windsor*,\(^2\) it seems increasingly inevitable that homosexual individuals will soon be allowed to marry in every state of the Union and enjoy the full panoply of rights enjoyed by heterosexuals.

Nevertheless, not all are on board with this project of equal rights for homosexuals. Several states have been in the news in recent months for their innovative legislative attempts to limit gay rights. In particular, Kansas and Arizona have been under immense national scrutiny for their failed efforts to pass bills that would have allowed business owners to deny service to homosexuals on religious grounds.\(^3\) Other states have proposed more targeted measures covering, for instance, businesses that provide services for wedding ceremonies.\(^4\) All of this has prompted many commentators to lament that “[w]e still have a

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2. 133 S. Ct. 2675 (2013).
4. *Id.*
long way to go for gay rights.” Yet, in all of this angst over a potential “anti-gay backlash” leading to innovative state legislation to limit gay rights, several innovative measures seeking to expand gay rights have flown under the radar.

California Senate Bill (SB) 1172 is one of the more notable examples of this phenomenon. Signed by Governor Jerry Brown in September 2012, SB 1172 prohibits mental health providers and therapists from engaging in sexual orientation change efforts (SOCE) with minors under eighteen years of age.

This Note will discuss both SB 1172 and the resulting litigation that has bounced around federal courts since its passage. Part I will provide some background on SOCE and the controversy surrounding their use. Part II will unpack the particulars of SB 1172 and its legislative history. Part III will discuss the litigation over the constitutionality of SB 1172. And Part IV will explore some of the potential implications of SB 1172.

I. SOCE

The term SOCE, colloquially known as “gay conversion therapy,” is an umbrella term that comprises a number of techniques and practices that aim to “help” clients with “unwanted same-sex attraction.” Many of these techniques and practices were conceived in tandem with the “pathologizing psychiatric and psychological conception of homosexuality during the 1960s and the early 1970s.” Generally, SOCE are divided into two categories: “aversion treatments” and “nonaversive treatments.” The former category includes 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 becomes aroused to same-sex erotic images or thoughts.” The latter category resonates more with our contemporary conception of therapy. It includes treatments such as cognitive therapy to “change gay men’s and lesbi-

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11. Id.; see also Pickup v. Brown, 740 F.3d 1208, 1222 (9th Cir. 2014).

12. AM. PSYCHOLOGICAL ASS’N, supra note 10, at 22.
ans’ thought patterns by reframing desires, redirecting thoughts, or using hypnosis.”

As the psychiatric and psychological community, and society at large, have increasingly accepted homosexuality, SOCE have become less mainstream and today are rejected by most mental health professional associations. Most in the medical community deem aversive therapies, in particular, to be “inappropriate, unethical, and inhumane.” SOCE, however, have retained limited popularity among one segment of the population: “those holding conservative religious and political beliefs.” Some in this community believe that can be used to “repair” or “convert” homosexuals and absolve them of the sin of their same-sex attractions.

The efficacy of SOCE has been the subject of continued debate. A controversial 2003 study by Robert Spitzer collected 200 examples of gay men and women who had experienced some change in their sexual orientation as a result of SOCE. Other so-called “ex-gays” have also gone public with their stories and formed online support communities. Many major mental health professional organizations, however, have concluded that there is “little basis for concluding whether SOCE has any effect on sexual orientation,” largely rejecting studies such as those performed by Spitzer as systematically flawed. Many have also gone further, suggesting that SOCE have harmful side effects, including depression, anxiety, self-destructive behavior, substance abuse, suicidal thoughts, and increased hostility towards others.

13. Id.
14. Id. at 23-24.
15. Id. at 25.
16. Id. at 24-25.

18. See, e.g., Erik Eckholm, ‘Ex-Gay’ Men Fight Back Against the View That Homosexuality Can’t Be Changed, N.Y. TIMES (Oct. 31, 2012), http://www.nytimes.com/2012/11/01/us/ex-gay-men-fight-view-that-homosexuality-cant-be-changed.html; PARENTS & FRIENDS OF EX-GAYS & GAYS, http://pfox.org. Much as Spitzer later disavowed his controversial study, a number of “ex-gays” have later admitted that SOCE did not change their sexual orientation. See, e.g., Ex-Gay Scandals and Defection, TRUTH WINS OUT, https://www.truthwinsout.org/scandals-defections (last updated Mar. 7, 2014) (collecting examples of ex-gays who “later recanted or were found to not be living their lives as they had advertised”).


II. SB 1172 AND SOCE IN CALIFORNIA

SB 1172 is refreshingly clear about both what motivated the legislation and what the law does and does not do. The bill only has two sections: Section 1 contains a long list of findings and Section 2 lays out the substantive provisions. The findings in Section 1 largely consist of statements drawn from mental health professional organizations.\(^{21}\) Their statements echo the concerns delineated above about the efficacy of SOCE and the potential side effects. Several also discuss the “especially serious health risks” involved in using SOCE on minors, who are more vulnerable to the potential side effects of self-stigmatization, depression, and low self-esteem.\(^{22}\)

Section 2 adds three new sections to the California Business and Professions Code. The first new section, Section 865, contains several key definitions. Section 865(a) defines “mental health provider” to include any psychiatrist, psychologist, school psychologist, therapist, clinical social worker, or clinical counselor.\(^{23}\) Section 865(b)(1) defines “[s]exual orientation change efforts” to encompass “any practices by mental health providers that seek to change an individual’s sexual orientation.”\(^{24}\) And Section 865(b)(2) clarifies that this definition of SOCE “does not include psychotherapies that . . . provide acceptance, support, and understanding of clients or the facilitation of clients’ coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices.”\(^{25}\)

The other new sections, Sections 865.1 and 865.2, effectuate the ban on SOCE. Section 865.1 states that “[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a minor under 18 years of age.”\(^{26}\) And Section 865.2 provides a penalty for violating the ban: any “attempted” SOCE efforts on a minor “shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider.”\(^{27}\)

III. LEGAL CHALLENGES TO SB 1172

Within days of its passage, several groups sought a preliminary injunction to prevent the scheduled implementation of SB 1172 on January 1, 2013. One


\(^{22}\) Id. at 6571. Though the California Legislature did not appear to rely on this rationale, some have also noted the ethical issues inherent in exposing minors who are unable to effectively consent, or simply do not have a choice in the matter, to an unproven, potentially harmful treatment such as SOCE. AM. PSYCHOLOGICAL ASS’N, supra note 10, at 85-86.


\(^{24}\) Id. (internal quotation marks omitted).

\(^{25}\) Id.

\(^{26}\) Id. at 6572.

\(^{27}\) Id.
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31. Pickup, 2012 WL 6021465, at *7 (internal quotation marks omitted).

32. Id. at *12.

33. Id. at *16.

34. Welch, 907 F. Supp. 2d at 1109-20.

35. Pickup, 2012 WL 6021465, at *7-11. This was not the final step of the analysis, as SB 1172 still had to withstand rational basis scrutiny, but the law easily cleared this hurdle. See id. at *12.

36. Id. at *19-24.
liminary relief. Considering the First Amendment claim, the court held that “Senate Bill 1172 regulates conduct. It bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients.” Moving to the vagueness claim, the court held that the definitions in Section 865 were sufficiently clear. The court closed its opinion by dismissing the fundamental liberty claim, holding that parents do not have an “affirmative right” to “choose a specific type of provider for a specific medical or mental treatment that the state has deemed reasonably harmful.” In January 2014, the panel denied the plaintiffs’ petitions for rehearing en banc. The plaintiffs responded by filing a petition for a writ of certiorari on February 6, 2014.

IV. IMPLICATIONS OF SB 1172

The most immediate impact of SB 1172 will likely be the adoption of bans on SOCE in other states around the country. New Jersey signed a SOCE ban into law in August 2013 and bills proposing similar bans have been introduced in recent months in Florida, Maryland, Massachusetts, Minnesota, New York, Ohio, Pennsylvania, and Virginia. Many view this as a positive development that will help protect vulnerable gay youths from the potentially harmful side effects of SOCE. Members of the mental health treatment community also support the symbolic value of these bans as advancing the idea that “same sex orientation is not a mental disorder.”

37. Pickup v. Brown, 728 F.3d 1042, 1055 (9th Cir. 2013), amended and superseded on denial of reh’g en banc by 740 F.3d 1208 (9th Cir. 2014).
38. Id. at 1058-59.
39. Id. at 1060-61.
40. Pickup, 740 F.3d at 1214. Judge O’Scannlain wrote a dissent on behalf of himself and two other judges to this denial of rehearing en banc. He strongly criticized the panel’s opinion for its untenable “conduct/speech distinction,” which he characterized as ultimately grounded in “political or moral judgment about the content or purpose of the communications.” Id. at 1216-20 (O’Scannlain, J., dissenting from the denial of rehearing en banc).
44. The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy (quoting this and a number of similar statements that have been made by mental health professional organizations) (last visited Apr. 30, 2014).
SB 1172 and the outcome in *Pickup v. Brown* also likely signal that further legal victories are ahead for the gay rights movement. In this respect, the Ninth Circuit is already on a roll—it has issued at least one landmark opinion expanding gay rights each of the past three years. In 2012, a panel concluded in *Perry v. Brown* that California’s ban on same-sex marriage violated both the Equal Protection Clause and the Due Process Clause. In 2013, as discussed in this Note, a panel upheld SB 1172. And just recently, in 2014, another panel held that classifications based on sexual orientation are subject to heightened scrutiny. This matches larger trends across the country; twelve different federal judges have issued opinions either enjoining same-sex marriage bans or requiring the recognition of out-of-state same-sex marriages since December 2013. SB 1172 and *Pickup v. Brown* seem to fit nicely within this growing body of jurisprudence recognizing that homosexuality simply is not a characteristic for which discrimination of any kind is appropriate.

Others view the implications of SB 1172 through a quite different lens. Beyond their specific legal claims, opponents of SB 1172, and opponents of SOCE bans more generally, continue to argue that these measures infringe upon fundamental liberty interests. Though it is somewhat hard to generalize, this objection is usually not framed in exclusively religious terms. This is likely because the religious claim does not carry much weight unless there is some argument that homosexuality is a choice (SOCE would be pointless otherwise). Once religious opponents reach this intermediate step, they typically make the

45. 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded on other grounds sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

46. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014).


argument that therapy bans interfere with more fundamental freedoms of personal autonomy.\textsuperscript{49} As such, in their eyes, the spread of SOCE bans represents a slippery slope of eroding liberty we should all be concerned about.

Although many may brush off these arguments as ultimately rooted in extremely conservative, and perhaps anachronistic beliefs, there may be something to these contentions. The Ninth Circuit used strong language in rejecting plaintiffs’ parental liberty objections. Remarking that “parents’ judgment may be clouded by this emotionally charged issue,”\textsuperscript{50} the court rejected any notion that the plaintiffs have an “affirmative right” to subject their children to a treatment deemed harmful by the state.\textsuperscript{51} This language suggests that the court was concerned with protecting children “already vulnerable with respect to sexual identity” from the beliefs of their parents.\textsuperscript{52}

This is quite remarkable. In the context of health care and religious decisions, of which SOCE arguably sit at the intersection, the Supreme Court often takes the position that the “children’s interests are best protected when represented by their parents’ interests.”\textsuperscript{53} Even when the child’s interests are taken into account, such as when challenging involuntarily commitment to a mental institution, the parents usually retain a “substantial, if not the dominant, role in the decision.”\textsuperscript{54} The Court made this point crystal clear in Wisconsin v. Yoder—a 1972 decision that held that Wisconsin could not require Amish children to comply with its compulsory-attendance school laws.\textsuperscript{55} In considering the dissent’s argument that these laws served to benefit children who wanted to attend public schools in contravention of their parents’ wishes, the Court noted that such an intrusion would “call into question traditional concepts of parental control over the religious upbringing” of their children and “give rise to grave questions of religious freedom.”\textsuperscript{56}

The Ninth Circuit’s logic, however, seems to cut against this precedent. Rather than defer to parents when dealing with issues of religious liberty or medical treatment, the court suggests that parents may often be the biggest

\textsuperscript{49} See, e.g., Gabe Lyons, Op-Ed., My Take: Let’s Protect Religious Counselors Amid ‘Conversion Therapy’ Debate, CNN BELIEF BLOG (Dec. 11, 2012, 2:35 PM), http://religion.blogs.cnn.com/2012/12/11/my-take-lets-protect-religious-counselors-amid-conversion-therapy-debate (“Everyone possesses attributes we’d like to change: behaviors, character qualities, temptation patterns. Therapy, of all kinds, can help us stare those down and create the life we desire to live.”); Backholm, supra note 9 (“When you oppose legislation like this, you aren’t simply defending consumer choices for clients and conscience rights for therapists, you’re defending liberty generally.”).

\textsuperscript{50} Pickup v. Brown, 740 F.3d 1208, 1232 n.8 (9th Cir. 2013).

\textsuperscript{51} Id. at 1235.

\textsuperscript{52} See id. at 1232 n.8.


\textsuperscript{55} 406 U.S. 205 (1972).

\textsuperscript{56} Id. at 231.
danger facing their children. But, then, what else do children need protecting from? If children who are confused, or uncomfortable, about their sexual identity need to be protected while visiting their therapist, maybe they need to be protected at home. Maybe they even need to be protected at church—if their particular congregation or denomination is hostile towards their sexual orientation. In a similar vein, perhaps we shouldn’t let extremely racist parents send their children to meetings or camps where they might become indoctrinated with ideas concerning the “struggle for . . . racial redemption.”57 This does seem to open a can of worms. Yet, until there is evidence of courts moving beyond things that are generally accepted to be objectively harmful to children, such as SOCE, maybe this slippery slope of tolerance isn’t the worst thing in the world.
