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Introduction

> As a young teen, the anti-gay practice of so-called conversion therapy destroyed my life and tore apart my family. In order to stop the therapy that misled my parents into believing that I could somehow be made straight, I was forced to run away from home, surrender myself to the local department of human services, and legally separate myself from my family. At the age of 16, I had lost everything. My family and my faith had rejected me, and the damaging messages of conversion therapy, coupled with this rejection, drove me to the brink of suicide.[1]

These are the words of Ryan Kendall, who was forced to go through conversion therapy, which ruined his life.[2] Kendall described his horrific experience to the Assembly Business, Professions and Consumer Protection Committee in the summer of 2012, testifying in support of California's legislation to ban conversion therapy for minors.[3] Kendall used phrases such as "destroyed my life," "drove me to the brink of suicide," "misled my parents," and "tore apart my family" to show others the negative effects of conversion therapy on those forced to participate, but most especially on minors who feel their families have rejected them.[4] A description such

* Indiana University Maurer School of Law, 2014. Senior Managing Editor of *Indiana Journal of Law and Social Equality*.

1. James Eng, *California Becomes First State in Nation to Ban 'Gay Cure' Therapy for Children*, NBC (Sept. 30, 2012), http://usnews.nbcnews.com/_news/2012/09/30/14159337-california-becomes-first-state-in-nation-to-ban-gay-cure-therapy-for-children?lite (quoting Ryan Kendall).
2. *Id.*
3. *Id.*
4. *Id.*

as this causes one to question what kind of "therapy" conversion therapy truly is.

Conversion therapy[5] is a type of psychotherapy that attempts to "cure"[6] homosexuals by changing them into heterosexuals.[7] The basis of conversion is rooted in Sigmund Freud's idea that people are born bisexual and can move along a continuum from one end, homosexual, to the other end, heterosexual.[8] However, the techniques and procedures used by therapists and organizations that practice conversion therapy to "cure" homosexuals are considered medically unsound.[9] These methods include but are not limited to: behavioral therapy, electrical shock therapy, chemical aversive therapy, drug and hormone therapy, surgery, psychotherapy, homophobic counseling, religious propaganda, isolation, unnecessary medication, subliminal therapies designed to instill "feminine" or "masculine" behavior, "and 'covert desensitization' therapies that teach a young person to associate homosexual feelings with disgusting images."[10] The results of these so-called treatments are anything but "curing" for the homosexual, as the negative consequences include nervous breakdowns, feelings of guilt, genital mutilation, and even suicide, as Ryan Kendall discussed.[11]

In 2003, Dr. Robert L. Spitzer, an influential psychiatrist,[12] published a study about the effects of conversion therapy.[13] After talking with 200 men and women who had completed conversion therapy, Dr. Spitzer concluded that "the majority of participants gave reports of change from a predominantly or exclusively homosexual

5. Conversion therapy can also be called reparative therapy or sexual reorientation. *See, e.g.*, Benedict Carey, *Psychiatry Giant Sorry for Backing Gay 'Cure'*, N.Y. Times, May 18, 2012, http://www.nytimes.com/2012/05/19/health/dr-robert-l-spitzer-noted-psychiatrist-apologizes-for-study-on-gay-cure.html?pagewanted=all&_r=0.

6. The word "cure" will remain in quotation marks throughout this Note to emphasize that conversion therapy assumes that homosexuals need to be, or even can be, changed, which goes against scientific and medical findings.

7. John Alan Cohan, *Parental Duties and the Right of Homosexual Minors to Refuse "Reparative" Therapy*, 11 Buff. Women's L.J. 67, 75 (2002).

8. *See* Carey, *supra* note 5.

9. Karolyn Ann Hicks, Comment, *"Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse*, 49 Am. U. L. Rev. 505, 515 (1999).

10. *See id.* at 515, n.40.

11. *See id.* at 515; Eng, *supra* note 1.

12. In the 1970s, Dr. Spitzer was drawn to the controversy surrounding homosexuality as a mental illness. Carey, *supra* note 5. He compared homosexuality with other disorders, such as depression and alcoholism, and noticed a stark difference between homosexuality and the others. *Id.* Through this analysis, Dr. Spitzer was able to influence a rewriting of the American Psychiatric Association's diagnostic manual, including dropping homosexuality from the manual and replacing it with "sexual orientation disturbance." *Id.* Thus, homosexuality was no longer a "disorder." *Id.*

13. Carey, *supra* note 5; *see also* Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 Archives Sexual Behav. 403, 403 (2003).

orientation before therapy to a predominantly or exclusively heterosexual orientation in the past year."[14] However, there were many scientific flaws and inaccurate responses within Dr. Spitzer's study, which were brought to his attention prior to publication, and yet, despite these points, Dr. Spitzer proceeded with publication.[15] Dr. Spitzer's publication was even accompanied by commentary from other scientists, much of which denounced the idea of conversion therapy from the beginning, calling it flawed and morally wrong.[16]

Now, eleven years after conducting the study, Dr. Spitzer is apologizing to the homosexual community, saying, "I believe I owe the gay community an apology."[17] Dr. Spitzer recognizes that his study was flawed and now recants his original conclusion that conversion therapy can "cure" homosexuals.[18] Dr. Spitzer's major query after the study was conducted was "how do you know someone has really changed?"[19] The original structured interview only asked people whether they had changed; however, there was no scientific evidence of any real change.[20] People can lie to themselves and to others; they can also change their stories.[21] Thus, there is no proof that conversion therapy can *actually* "cure" those who participate.[22] The fact that Dr. Spitzer, the man who once condoned such a therapy to "cure" homosexuality, is now denouncing his study and calling it "the only regret" he has should be taken into consideration by those who still believe in using such a practice to attempt to make a person heterosexual.[23]

While mainstream medical communities continue to emphasize the damaging impact of conversion therapy, certain psychologists and religious organizations

14. Spitzer, *supra* note 13. One hundred and forty-three self-selected male participants and fifty-seven self-selected female participants reported at least some minimal change from homosexual to heterosexual that lasted at least five years. *Id.*at 403. The participants were given a structured interview via telephone, assessing same-sex attraction, fantasy, yearning, and overt homosexual behavior, which compared the tendencies of the participants in the year prior to therapy and in the year prior to the interview. *Id.* at 403, 406.

15. *See* Carey, *supra* note 5. The flaws of the study stemmed from asking participants to remember feelings from years before, making responses less accurate. *See id.* The study also examined ex-gay advocates who were politically active. *Id.* Finally, the study did not focus on any specific kind of therapy; half of the participants worked with a therapist while others worked with religious organizations. *Id.*

16. *Id.* (noting one commentary cited the Nuremberg Code of Ethics to show the study as not only flawed but also morally wrong).

17. *Id.* Dr. Spitzer wrote a letter to the same journal that published his original study, the Archives of Sexual Behavior, to recant his study. *Id.*

18. *See id.*

19. *Id.*

20. *See id.*

21. *Id.*

22. *See id.*

23. *See id.* After Dr. Spitzer called this study his only professional mistake and apologized for the misinterpretation of the data, he said, "That's something, don't you think?" *Id.*

continue to encourage people that changing their or their loved one's sexual orientation is both necessary as well as possible.[24] Currently, nearly seventy therapists in twenty states and the District of Columbia practice conversion therapy.[25] When it comes to minors, however, California is no longer home to such practices, as it is the first state to sign legislation banning the so-called treatments for persons less than eighteen years of age.[26]

This Note will explore the topic of conversion therapy for minors, focusing on a minor's right to choose whether they wish to undergo so-called treatments for homosexuality. Part I will focus on the social science understandings of homosexuality and conversion therapy while briefly discussing the ability of a minor to consent. Part II will further examine the ability of a minor to consent, concentrating on the legal aspect of parental rights. Part II will also detail California Senate Bill 1172 and its legal status at the time of this Note's publication. Finally, Part III will discuss five possible reform proposals, including California as a guide for other states to follow, a change to a lower age of consent, a mature minor judicial bypass, a fact-finding hearing for minors to be heard, and heavy warning labels attached to conversion therapy.

I. Social Science Understandings

A. Homosexuality and Conversion Therapy

While the medical community once considered homosexuality a mental health disorder, it has not been seen as a disease, disorder, illness, deficiency, or shortcoming for nearly forty years.[27] However, many religious organizations and psychologists still promote the concept of conversion therapy to change sexual orientation.[28] The research that has been conducted on the ability to "cure" homosexuals is limited, but the results denounce the effectiveness of conversion therapy and even show the negative impacts of such attempts at changing one's sexual orientation.[29]

Because of these conclusions, every major medical and mental health

24. *See* Hicks, *supra* note 9, at 514–15. This Note will *not* focus on religious uses of conversion therapy.

25. *Conversion Therapy*, S. Poverty L. Ctr., http://www.splcenter.org/conversion-therapy (Dec. 15, 2013).

26. S.B. 1172, 2012 Leg., Reg. Sess. (Cal. 2012) (codified at Cal. Bus. & Prof. Code § 865.1 (2012)).

27. *Id.*

28. *See 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; Hicks, *supra* note 9; *Conversion Therapy*, *supra* note 25 (stating that nearly seventy therapists in twenty states and the District of Columbia still practice conversion therapy).

29. *See The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, *supra* note 28.

organization in the United States has released a position statement denouncing the use of conversion therapy.[30] Position statements related to the medical field include: the American Medical Association, stating opposition to the use of reparative or conversion therapy that is based upon the assumption that homosexuality is a mental disorder or that homosexuals should change sexual orientation; the American Psychiatric Association, stating that scientific validity is questionable for conversion therapy, that reports of "cures" are counterbalanced by claims of psychological harm, and that ethical practitioners are to refrain from attempting to change sexual orientation; and the Pan American Health Organization (PAHO): Regional Office of the World Health Organization, stating that services aimed at "curing" people with homosexual orientation "lack medical justification and represent a serious threat to the health and well-being of affected people."[31]

Position statements related to psychology include: the American Counseling Association, stating that sexual orientation is not a mental illness and supporting "the dissemination of accurate information about sexual orientation, mental health, and appropriate interventions"; the American Psychological Association, stating that homosexuality is not a mental disorder and that "there is insufficient evidence to support the use of psychological intervention to change sexual orientation"; the American Psychoanalytic Association, stating that psychoanalytic technique does not encompass efforts to "convert" or "repair" sexual orientation, as such efforts are against fundamental principles of psychoanalytic treatment; and the National Association of Social Workers, stating that conversion therapy "cannot and will not change sexual orientation," and that "such treatment potentially can lead to severe emotional damage."[32]

Finally, position statements related directly to minors include: the American Academy of Pediatrics, stating that "[c]onfusion about sexual orientation is not unusual during adolescence" and that "[t]herapy directed specifically at changing sexual orientation is contradicted, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation"; the American Association for Marriage and Family Therapy, stating that "same sex orientation is not a mental disorder" and therefore "sexual orientation in and of itself does not require treatment or intervention"; and the American School Counselor Association, stating that homosexuality is not a sign of illness, mental disorder, or emotional problems and that the role of the professional student counselor is not to attempt to change a student's sexual orientation, but to provide support.[33]

In 2007, the American Psychological Association organized a Task Force on Appropriate Therapeutic Responses to Sexual Orientation and issued a report in

30. *See id.*
31. *Id.*
32. *Id.*
33. *Id.*

2009.[34] This report noted that there was very little methodologically sound research on the effectiveness of conversion therapy in altering sexual orientation and that the results of *scientifically* valid research show that it is doubtful that homosexuals would be able to reduce or eliminate their attraction to the same sex.[35] The task force concluded that sexual orientation change efforts, such as conversion therapy, can pose serious risks to those exposed to the "treatments," including lesbian, gay, and bisexual people.[36] These risks include, but are not limited to:

> confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.[37]

In response to the findings of the Task Force, the 2009 American Psychological Association resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts stated:

> [T]he [American Psychological Association] advises parents, guardians, young people, and their families to *avoid* sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services that provide *accurate* information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth.[38]

Thus, parents should be looking for accurate information and not looking at medically unsound services, especially given the listed risks associated with

34. *See id.*; S.B. 1172, 2012 Leg., Reg. Sess. (Cal. 2012) (codified at Cal. Bus. & Prof. Code § 865.1 (2012)) (stating that the task force conducted an organized review of peer-reviewed journal articles on sexual orientation change efforts to create their report).

35. *See The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, *supra* note 28.

36. S.B. 1172 § 1(b).

37. *Id.*; *see also* Am. Psychological Ass'n, Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (2009), *available at* http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

38. S.B. 1172 § 1(c) (emphasis added).

conversion therapy.[39]

Focusing on conversion therapy for youth, the American Academy of Child and Adolescent Psychiatry published an article in 2012 in its *Journal of the American Academy of Child and Adolescent Psychiatry*, which detailed the *lack* of empirical evidence to support the idea that making a gender nonconforming child more gender conforming would prevent adult homosexuality.[40] In fact, the journal article pointed out the lack of medical basis for attempting to prevent or "cure" homosexuality, which is not an illness, and that attempting to do so may actually be harmful.[41] Trying to change a child's sexuality may lead to family rejection as well as undermine the child's "self-esteem, connectedness, and caring."[42] Undermining these protective factors increases the risk of suicidal ideation and attempts.[43] Looking back at Ryan Kendall's story, his family's attempt at "curing" him led to these listed negative impacts and ultimately steered him close to suicide.[44]

B. Ability to Make Decisions

The legal age of majority is eighteen years.[45] This bright-line, categorical age is supposed to represent maturity and ability to function in society.[46] Psychological evidence also supports this reasoning, finding that most individuals have reached an adult competence in many areas by this age.[47] Other studies, though, support a mature decision-making capacity at a younger age.[48] Most persons, by the age of sixteen, have "the ability to engage in hypothetical and logical decision-making . . . to extend thinking into the future . . . and to understand and articulate [their] motives and psychological state."[49]

39. *See supra* text accompanying note 37.

40. *See* Stewart L. Adelson, *Practice Parameter on Gay, Lesbian, or Bisexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents*, 51 J. Am. Acad. Child & Adolescent Psychiatry 957 (2012), http://download.journals.elsevierhealth.com/pdfs/journals/0890-8567/PIIS089085671200500X.pdf.

41. *Id*. at 967.

42. *Id.* at 968.

43. *Id.*

44. *See supra* text accompanying note 1.

45. *E.g.*, Elizabeth Scott, *The Legal Construction of Childhood* 13 (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Papers, Working Paper No. 00-18, 2000).

46. *See id.* at 14.

47. *See id.*

48. *See* Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 Va. J. Soc. Pol'y & L. 389, 402 (1999).

49. *Id.*; *see also MacArthur Juvenile Competence Study Results*, MacArthur Found. Res. Network on Adolescent Dev. & Juv. Just., http://www.adjj.org/content/related_resources.php?cat_id=2&page_id=2 (Dec. 13, 2013) (noting that the performance of sixteen- and seventeen-year-olds did not differ from adults).

One study by Lois A. Weithorn and Susan B. Campbell even went so far as to conclude that fourteen-year-olds did not differ from adults in their ability to make *medical* treatment decisions.[50] To reach such a conclusion, the study was planned around legal concepts of competency, including tests such as evidence of choice (a showing of preference relative to the treatment choices); reasonable outcome of choice (the selection parallels what a "reasonable person" would choose); rational reasoning of choice (the selection was reached using rational or logical reasoning); and understanding of choice (comprehension of the risks, benefits, and alternatives to the selection).[51] Legal analysis, on the other hand, would conclude that competency to consent, as a minor, involves the capability to appreciate the "nature, extent, and probable consequences of the proposed treatments or procedures."[52]

The results of Weithorn and Campbell's study showed that, in general, minors at age fourteen are able to express competency equal to that of adults.[53] Even minors at age nine, while not as competent as adults with respect to their ability to reason about and understand treatment information, are able to express "clear and sensible treatment *preferences*" comparable to those of adults.[54] Minors at age nine focus on sensible and important reasons when making treatment decisions, suggesting that they are qualified to participate significantly in making health care decisions about themselves.[55] While the results of this study are helpful in showing the issues of the legal bright-line classification of age of majority to consent, the results might not be one hundred percent reflective of the actual decision-making of adolescents faced with *true* medical dilemmas.[56] Minors tested in this study were healthy individuals asked about hypothetical medical situations; they were not influenced by a current medical diagnosis or psychological situation, or the factors that might accompany such circumstances, and, in turn, lead to a decreased ability to make a decision.[57]

Overall, the findings of Weithorn and Campbell's study do not support the legal denial of adolescents in making health-related decisions on a presumption of incompetency.[58] Sometimes legally minor children are capable of making a competent decision on their own, leaving reason to challenge the current legal age, as it deprives mature and abled youths of the ability to exercise the rights that adults are

50. Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Dev. 1589 (1982) (study comparing the competency of groups of ages nine, fourteen, eighteen, and twenty-one).

51. *Id.* at 1590.

52. *Id.* (referencing the Restatement (Second) of Torts (1979)).

53. *Id.* at 1595.

54. *Id.* at 1595–96 (emphasis added).

55. *Id.* at 1596.

56. *See id.*

57. *See id.* (noting the ability of factors such as weakness, confusion, depression, or anxiety in decreasing one's ability to use cognitive capacities in health care decisions).

58. *See id.*

able to enjoy freely.[59]

II. Legal Responses

A. Parental Rights v. Adolescent Rights

The rights of minors are disabled in the eyes of the law and have been seen as such for nearly 100 years.[60] In *Meyer v. Nebraska*, the liberties of the Fourteenth Amendment were interpreted to include exclusive rights to parents in raising their children.[61] Since this time, the Constitution has consistently been interpreted to grant full authority to parents in the direct rearing of their children, as the "natural bonds of affection lead parents to act in the best interests of their children."[62] This has become a basic notion in the structure of today's society.[63] As the Supreme Court in *Bellotti v. Baird* stated, "We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[64] Because of this basic liberty granted to parents, the state is not to interfere with the moral and religious upbringing of children; in fact, the state is only to intervene when the health or safety of the child is threatened, or if there is a significant social burden.[65] However, this notion of harm is not firmly defined, as determinations are subjectively made by the state, depending on the situation, and are not always correct.[66] Further, there is also no definition of an ideal or exemplary parent and, therefore, the Supreme Court has stated that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents."[67] Thus, parents are continuously left to exert the rights of their children on their children's behalf.[68]

The rights of parents are extremely strong, but the state is ultimately in

59. *See* Scott, *supra* note 45, at 15; Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 Am. Psychologist 99 (1983); Weithorn & Campbell, *supra* note 50, at 1589.

60. *See* Part II.A., *infra* notes 61–92 and accompanying text.

61. 262 U.S. 390, 398–400 (1923).

62. Parham v. J.R., 442 U.S. 584, 602 (1979); Ginsberg v. New York, 390 U.S. 629, 639 (1968).

63. *See Ginsberg*, 390 U.S. at 639.

64. 443 U.S. 622, 634 (1979).

65. *See* Wisconsin v. Yoder, 406 U.S. 205, 233–34 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

66. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989) (finding no duty to act if child is not in state custody).

67. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

68. *See supra* notes 61–67 and accompanying text.

control.[69] While there are many sources of parental rights,[70] there are also limits of parental rights, including by the state[71] as well as by the child.[72] For example, in *Prince v. Massachusetts*, free exercise of religious rights clashed with the obligation of the state to protect children.[73] The state system created to help children is legitimized by *Prince*, as the state limits the power of the parents.[74] Further, in *Bellotti*, the parental right is reduced by a judicial bypass for mature minors to receive an abortion without the consent of her parents.[75] And, in *Parham v. J.R.*, the power of the parents is actually limited by the child, who is given due process rights concerning his mental health treatment.[76]

Parents do not have absolute rights in committing their child to a mental hospital, but the adolescent is also not left to his or her sole discretion.[77] Children, even into adolescence, are presumed by the court as incapable of making sound judgments about anything, let alone about their need for medical attention.[78] Thus, parents *do* maintain substantial weight in the decision of commitment and are believed to be acting in the best interest of their child, but the child's rights must also be considered.[79] This consideration is because of the high risk of error in parental decisions to institutionalize their children, which is large enough that a "neutral factfinder" is necessary to determine, through examining the child's background

69. *See*, *e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944). "Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.* at 170.

70. *See*, *e.g.*, *Yoder*, 406 U.S. 205; *Pierce*, 268 U.S. 510; Meyer v. Nebraska, 262 U.S. 390 (1923).

> It is cardinal with [the Supreme Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder. And it is in recognition of this that [prior] decisions have respected the private realm of family life which the state cannot enter.

Prince, 321 U.S. at 166.

71. *See*, *e.g.*, *Prince*, 321 U.S. at 166 ("The state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.").

72. *See*, *e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979) (examining the rights of minors in the context of a mature minor bypass of parental consent requirement for abortion); Parham v. J.R., 442 U.S. 584 (1979) (addressing due process rights of minors in the context of commitment).

73. 321 U.S. at 158 (limiting exercise of religion is constitutional because it is not targeting a certain population for religious reasons; the child labor was incidental to religion).

74. *Id.*

75. 443 U.S. at 622.

76. 442 U.S. at 584–85.

77. *Id.*

78. *Id.* at 603.

79. *Id.* at 604 (noting that the nature of the commitment decision is "such that parents cannot always have absolute and unreviewable discretion to decide").

via all available sources, including an interview with the child, if the standards for the child's admission are met.[80] This review is to be conducted by medical personnel and not by the court, as the ultimate question requires a determination on mental or emotional illness and possible treatments.[81] A fact-finding court hearing would not be helpful in this scenario, not only because judges are not specialized in medical decisions, but also because parent-child relationships would be intruded upon and adversely affected, which could impede the healing or treatment process.[82]

While *Parham* gave adolescents due process rights, albeit small, the majority in the earlier case of *Wisconsin v. Yoder* did not believe in hearing the opinion of adolescents.[83] In *Yoder,* the Supreme Court said that since the children were not parties to the litigation, as only their parents were, the children's expressed desires were not of consequence to the decision; thus, even where children might be competent and should be able to make decisions, parents still control the final result, which could go against the child's voiced opinion.[84] Justice Douglas, however, dissented, arguing that where an adolescent is mature enough to voice possibly contradictory desires from those of his or her parents, it would be an invasion of the adolescent's rights to allow his or her parents' will to be done without asking the adolescent.[85] Further, in a footnote, Justice Douglas said that "the moral and intellectual maturity of the 14-year-old approaches that of an adult."[86]

The competency of an adolescent to consent to medical treatment varies throughout case law, especially depending on the situation.[87] Similarly, the competency of an adolescent to consent to sexual activity also varies depending on state, with the median age of consent being sixteen.[88] While *Lawrence v. Texas* overruled *Bowers v. Hardwick* and the criminality of homosexuality, the opinion specifically states that minors were not involved, but rather two consenting adults.[89] The majority does, however, discuss the Due Process Clause of the Fourteenth Amendment and quote *Planned Parenthood of Southeastern Pennsylvania v. Casey* in stating that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[90] The Court never

80. *Id.* at 606–07.
81. *Id.* at 607, 609.
82. *See id.* at 609–10.
83. *See id.*; Wisconsin v. Yoder, 406 U.S. 205 (1972).
84. *See* 406 U.S. at 230–31.
85. *See id.* at 242 (Douglas, J., dissenting).
86. *Id.* at 245 n.3 (Douglas, J., dissenting).
87. *See supra* notes 61–86 and accompanying text.
88. Joseph H. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279, 300 (2010) (stating that the median age of consent in the United States is sixteen, with some states at seventeen or eighteen years of age).
89. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).
90. *Id.* at 575–78 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851

calls homosexuality a "fundamental right," but it still appears to be treating it as such.[91] Thus, even though minors do not have an expressly granted right to be homosexual, the *Lawrence* opinion lends more credibility to the argument that homosexual minors should be conferred the same ability to consent to sexual activity as heterosexual minors, making homosexuality for minors a legal activity.[92]

B. California Ban on Conversion Therapy for Minors

California Senate Bill 1172 prohibits a "mental health provider"[93] from utilizing "sexual orientation change efforts"[94] with a patient less than eighteen years of age.[95] If a mental health provider does attempt sexual orientation change efforts with a patient less than eighteen years of age, his or her conduct will be seen as unprofessional and he or she will be subject to discipline by his or her licensing entity.[96] This newly enacted legislation, sponsored by Senator Ted W. Lieu, was signed by Governor Jerry Brown on September 30, 2012, and was supposed to go into effect January 1, 2013.[97] When Governor Brown signed the legislation, he

(1992)).

91. *Id.* at 586 (Scalia, J., dissenting).

92. *See supra* notes 88–91 and accompanying text.

93. CAL. BUS. & PROF. CODE § 865(a) (2012):

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

94. *Id.* at § 865(b)(1) ("Sexual orientation change efforts" means any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.). § 865(b)(2):

> "Sexual orientation change efforts" does not include psychotherapies that: (A) 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; and (B) do not seek to change sexual orientation.

95. *Id.* at § 865.1.

96. *Id.* at § 865.2.

97. Michele Richinick, *Gay-Conversion Therapy Ruled Illegal in California*, MSNBC (Aug. 29, 2013), http://tv.msnbc.com/2013/08/29/gay-conversion-therapy-ruled-illegal-in-california/.MSNBC; AnneClaire Stapleton, *California Law Banning Gay 'Conversion Therapy' Put on Hold*, CNN (Dec. 22, 2012), http://www.cnn.com/2012/12/04/us/california-gay-thera-

commented that conversion therapy "[has] no basis in science or medicine" and that he hopes the new law will relegate such efforts "to the dustbin of quackery."[98] However, after two challenges at the district court level, which rendered conflicting opinions, the Ninth Circuit Court of Appeals enjoined the legislation on December 21, 2012, and held oral arguments on April 17, 2013, to determine the ban's constitutionality.[99] After four months of waiting, the Ninth Circuit released its opinion on August 29, 2013, upholding the ban on conversion therapy for minors.[100]

In SB 1172, the findings of the California Legislature focused on the fact that homosexuality is not a "disease, disorder, illness, deficiency, or shortcoming" and has not been seen as such by the professional medical community for nearly forty years.[101] California already has existing laws regarding the licensing and regulation of various medical and mental health providers, including physicians, surgeons, psychologists, marriage and family therapists, educational psychologists, social workers, and clinical counselors.[102] These regulations are based on legislative recognition of the "actual and potential consumer harm that can result from the unlicensed or incompetent practice."[103] The Legislature also noted the compelling interest the state has in protecting both the physical and the psychological health of its minors, including those who are homosexual, from such harms as those created and caused by conversion therapy.[104] The bill also notes that while parents cannot

py-ban/; Cheryl Wetzstein, *Youth 'Conversion Therapy' Banned*, Wash. Times (Sept. 30, 2012), http://www.washingtontimes.com/news/2012/sep/30/youth-conversion-therapy-banned-gay-activists-call/?page=all. After Governor Brown signed the legislation, Senator Lieu said:

> I am deeply honored Governor Brown signed SB 1172. The bill is necessary because children were being psychologically abused by reparative therapists who would try to change the child's sexual orientation. An entire house of medicine has rejected gay conversion therapy. Not only does it not work but it is harmful. Patients who go through this have gone through guilt and shame, and some have committed suicide.

Eng, *supra* note 1.

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

99. Erik Eckholm, *Court Hears Gay 'Conversion Therapy' Arguments*, N.Y. Times, Apr. 17, 2013, http://www.nytimes.com/2013/04/18/us/day-in-court-for-california-law-banning-conversion-therapy.html?_r=0; *see* Stapleton, *supra* note 97.

100. *See* Richinick, *supra* note 97.

101. S.B. 1172, 2012 Leg., Reg. Sess. (Cal. 2012) (codified at Cal. Bus. & Prof. Code § 865.1 (2012)).

102. Appellants' Opening Brief at 10, Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. Dec. 3, 2012) (No. CIV. 2:12–2484 WBS KJN), *rev'd sub nom* Pickup v. Brown, 740 F.3d 1208 (9th Cir. filed Aug. 29, 2013).

103. *Id.* (citing Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1047 (9th Cir. 2000)).

104. S.B. 1172. "The Legislature has declared that '[p]rotection of the public shall be the highest priority' for the governing Boards 'in exercising [their] licensing, regulatory, and disci-

commit minor children to conversion therapy and minors cannot provide consent for themselves to conversion therapy, Section 124260 of the Health and Safety Code, which allows those who are twelve years of age or older to consent to mental health treatments or counseling services, has not been affected.[105]

Those supporting the legislation include lesbian and gay rights groups, such as Equality California, mental health associations, and survivors of conversion therapy.[106] A spokesperson for Equality California praised the legislation, saying, "This law will ensure that state-licensed therapists can no longer abuse their power to harm LGBT youth and propagate the dangerous and deadly lie that sexual orientation is an illness or disorder that can be 'cured.'"[107] The Human Rights Campaign is grateful to Governor Brown for signing the legislation as well, releasing a statement saying, "LGBT youth will now be protected from a practice that has not only been debunked as junk science, but has been proven to have drastically negative effects on their well-being."[108]

Those opposed to the legislation include the National Association for Research and Therapy of Homosexuality (NARTH), individual therapists, individual minors who participate in conversion therapy, and religious organizations.[109] A spokesperson for NARTH said, "We do competent therapy, therapy that truly works . . . for [California] to have a bill that says, 'No, we can't even talk about these issues, we can't do anything to help these children resolve their homosexual feelings and maximize their heterosexual potential' — that's the height of political and therapeutic responsibility."[110] Both NARTH and the Pacific Justice Institute, a network of more than 1,000 attorneys "defending religious, parental, and other constitutional rights," filed suit against the legislation, calling it a "freedom-killing bill[]" and challenging its constitutionality because the ban hinders parents' rights to provide psychological care for children and interferes with the First Amendment.[111]

One of the district court cases challenging the ban, *Pickup v. Brown*, found

plinary functions.'" Appellants' Opening Brief, *supra* note 102 (citing Cal. Bus. & Prof. Code §§ 2001.1, 2920.1, 4990.16).

105. S.B. 1172.

106. Brief *Amicus Curiae* of Survivors of Sexual Orientation Change Efforts, in Support of Defendants-Appellants Urging Reversal, Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. Dec. 3, 2012) (No. 13–15023); Eng, *supra* note 1; Levs, *supra* note 98.

107. Levs, *supra* note 98. Equality California is the largest statewide advocacy group in California working for full equality for lesbian, gay, bisexual, and transgender people. *Id.*

108. Associated Press, *California Bans "Gay Cure" Therapy*, CBS News (Oct. 1, 2012), http://www.cbsnews.com/8301-201_162-57523211/california-bans-gay-cure-therapy/.

109. *See, e.g.*, Joan Frawley Desmond, *Reparative Therapy on Trial*, Nat'l Catholic Reg. (Dec. 4, 2012), http://www.ncregister.com/daily-news/reparative-therapy-on-trial/; Levs, *supra* note 98.

110. Levs, *supra* note 98.

111. *Id.*; *see also* Ronnie Cohen, *Lawsuit Challenges California Ban on Conversion Therapy for Youth*, Reuters (Oct. 2, 2012), http://www.reuters.com/article/2012/10/02/us-usa-california-gaytherapy-idUSBRE8911B420121002; Associated Press, *supra* note 108.

conversion therapy efforts to be subject to state regulation,[112] meaning SB 1172 does not involve constitutional rights and thus should be analyzed under a rational basis review.[113] Such a regulation then survives a constitutional challenge so long as it is reasonable and related to a legitimate government interest, which is why the court in *Pickup* denied the preliminary injunction.[114] The second district court case, *Welch v. Brown*, however, found conversion therapy efforts to be professional speech, which SB 1172 restricted.[115] This finding then led the judge to apply strict scrutiny.[116] The court in *Welch* found the ban unlikely to overcome such strict scrutiny, as the state's compelling interest in regulating and protecting the physical and physiological well-being of minors did not seem to outweigh the evidence that conversion therapy is harmful.[117] Thus, the preliminary injunction was granted.[118]

While the Ninth Circuit's decision to enjoin the legislature surprised many, the plaintiffs in the suits made compelling arguments that required further time and questioning to resolve.[119] The Ninth Circuit Court of Appeals heard oral arguments on April 17, 2013, where both appellants and appellees had trouble identifying empirical evidence on either the harm or the success of conversion therapy.[120] In support of their motion, the plaintiffs argued that counselors are already allowed to offer therapy aimed at changing sexual orientation, attractions, behavior, or identity, so passing the legislative ban on conversion therapy would actually be a change from the status quo, causing irreparable harm to all involved.[121] The plaintiffs also argued that the ban would have a chilling effect on counselor speech and that minors who are currently benefiting from such services would be prevented from following through with the counseling they, as well as their families, have chosen.[122]

The state argued that SB 1172 is an "ordinary exercise of the states' power to regulate professional conduct," and that such a regulation must only be reasonable and related to a legitimate government interest in order to be constitutional.[123] Based on medical denouncements of conversion therapy, the Legislature found

112. 2:12-CV-02497-KJM-EF, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012), *aff'd,* 728 F.3d 1042 (9th Cir. 2013).

113. Appellants' Opening Brief, *supra* note 102, at 30.

114. 2012 WL 6021465, at *25.

115. 907 F. Supp. 2d 1102, 1112 (E.D. Cal. 2012) *rev'd sub nom.* Pickup v. Brown, 740 F.3d 1208 (9th Cir. filed Aug. 29, 2013).

116. *Id.* at 1117.

117. Appellants' Opening Brief, *supra* note 102, at 6–7.

118. *Id.*

119. *See* Robyn Hagan Cain, *Ninth Circuit Enjoins Gay Conversion Therapy Ban*, FindLaw (Dec. 28, 2012, 12:01 PM), http://blogs.findlaw.com/ninth_circuit/2012/12/ninth-circuit-enjoins-gay-conversion-therapy-ban.html.

120. Scott Graham, *9th Circuit Likely to Uphold Ban on Gay 'Conversion Therapy,'* Recorder (Apr.17, 2013), http://www.therecorder.com/id=1202596465037.

121. Cain, *supra* note 119.

122. *Id.*

123. Appellants' Opening Brief, *supra* note 102, at 2.

that "California has a compelling interest in protecting the physical well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts."[124] In fact, the California Legislature has already banned certain unprofessional or criminal conduct for mental health providers, including "sexual abuse; misconduct or relations with a client; failure to discuss with a client in a manner provided by law the client's admission of sexual contact with a pervious therapist; and sexual exploitation of a client."[125]

Along the same lines, SB 1172 makes it unprofessional conduct *per se* for a mental health provider to *engage* in conversion therapy with a patient less than eighteen years of age.[126] The ban on conversion therapy is not a complete ban on speech; it allows mental health professionals to discuss with a parent or child "information, opinions, and advice about [conversion therapy], about the morality of homosexuality, about religious proscriptions, and about the changeability of same-sex attractions."[127] The ban also allows mental health professionals to refer children to religious organizations or to other counselors who practice outside of California's licensing.[128] Further, while the plaintiffs argued that SB 1172 is a ban on protected speech, the state pointed out that where speech is "part of the practice of medicine," it is "subject to reasonable licensing and regulation by the State."[129]

In coming to its decision, the Ninth Circuit Court of Appeals had to focus on whether the law attempted to regulate protected speech or whether the law only regulated medical practices.[130] Had the Ninth Circuit Court of Appeals viewed the ban on conversion therapy as a regulation of protected speech then the ban would have had to withstand strict scrutiny, making the ban less likely to be upheld.[131] However, the Court found the ban to be a regulation on the medical profession instead, and therefore only applied rational basis review to uphold the legislation.[132]

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124. S.B. 1172, 2012 Leg., Reg. Sess. (Cal. 2012) (codified at Cal. Bus. & Prof. Code § 865.1 (2012)).

125. Appellants' Opening Brief, *supra* note 102, at 11 (citing Cal. Bus. & Prof. Code §§ 726, 728, 729).

126. *See* Pickup v. Brown, 2:12-CV-02497-KJM-EF, 2012 WL 6021465, at *9 (E.D. Cal. Dec. 4, 2012), *aff'd,* 728 F.3d 1042 (9th Cir. 2013) ("what SB 1172 proscribes is actions designed to effect a difference, not recommendations or mere discussions of [conversion therapy]"); Appellants' Opening Brief, *supra* note 102, at 11.

127. Appellants' Opening Brief, *supra* note 102, at 3.

128. *Id.*

129. *Id.* at 27 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)).

130. *See* Scottie Thomaston, *Ninth Circuit Court of Appeals Hears Challenge to California's Ban on Conversion Therapy for LGBT Youths*, Equal. on Trial (Apr. 18, 2013), http://equalityontrial.com/2013/04/18/ninth-circuit-court-of-appeals-hears-challenges-to-californias-ban-on-conversion-therapy-for-lgbt-youths/.

131. *See id.*

132. Pickup v. Brown, 13-15023, 2013 WL 4564249 at *9 (9th Cir. Aug. 29, 2013).

III. Reform Proposals

The California ban is an example for other states to follow. However, even if there is an appeal to the United States Supreme Court that results in a finding that Senate Bill 1172 must be reformed in order to be constitutional, there are slight adjustments that will still ultimately protect minors, even if the protection is not as great as a complete ban. These changes include an age adjustment instead of a ban on all those less than eighteen years of age, a mature minor judicial bypass, an ability for a minor to be heard, or even heavy warnings instead of legislative intervention.

A. Other States to Follow

The Human Rights Campaign, supporting the California ban on conversion therapy for minors, has called on other states to follow California's lead.[133] In October 2012, New Jersey Assemblyman Timothy J. Eustace announced that he would soon introduce similar legislation in his state.[134] On June 27, 2013, New Jersey's Senate approved the bill, voting twenty-eight to nine to outlaw the practice for minors.[135] Then, on August 19, 2013, New Jersey Governor Chris Christie signed the legislation, even though he felt great deference should be given to parents in making decisions for their children.[136] And, even though Christie signed the ban, he still opposes marriage equality, which is a factor that could impact the chances of other states following California's, and now New Jersey's, lead.[137] Most recently, in July 2013, a Massachusetts bill sponsored by State Representative Carl Sciortino banning the practice of conversion therapy on minors was highly regarded by others.[138]

133. Associated Press, *supra* note 108.

134. Joelle Farrell, *Assemblyman Plans to Introduce NJ Bill to Limit 'Conversion' Therapy*, Philly.Com (Oct. 4, 2012), http://articles.philly.com/2012-10-04/news/34240250_1_conversion-therapy-len-deo-gay-marriage.

135. Victoria Cavaliere, *New Jersey One Step Closer to Outlawing Conversion Therapy for Gay Youths*, Reuters (June 27, 2013), http://www.reuters.com/article/2013/06/27/us-usa-gay-newjersey-idUSBRE95Q18H20130627 ("Citing medical and psychiatric research that sexual orientation is determined at birth, the bill would ban state-licensed counselors, therapists and social workers from practicing a method of talk therapy that opponents have said is deeply damaging to the self esteem [sic] and identity of gay youths."); Wetzstein, *supra* note 97.

136. *See* Casey Mutchler, *Groups to Fight N.J. Ban on Gay Conversion Therapy: Outlawed Treatment Targets Teenagers Looking to Change Sexual Orientation*, Wash. Times (Aug. 19, 2013), http://www.washingtontimes.com/news/2013/aug/19/groups-to-fight-nj-ban-on-gay-conversion-therapy/ (challenge expected from Liberty Counsel, the same group that challenged California's ban); Amanda Terkel, *Chris Christie Undecided on Gay Conversion Therapy Ban*, Huffington Post (Mar. 20, 2013), http://www.huffingtonpost.com/2013/03/20/chris-christie-gay-conversion-therapy_n_2920097.html.Huff.

137. Terkel, *supra* note 136.

138. Steve Annear, *Advocacy Groups Seek Ban on Sexual Orientation Change Therapy for*

If passed, the bill would:

> [P]rohibit any licensed healthcare professional in the state from using techniques or therapies that would otherwise try [to] change the "sexual orientation or gender identity" of anyone under 18 years old. If a licensed physician or professional in the field were found in violation of the proposed legislation, he or she could face a statewide suspension of their practice or have their license revoked.[139]

The ban on conversion therapy has the possibility to spread to different states in a manner analogous to gay marriage—through court rulings, legislative action, or popular vote—as the jurisdiction or community will play a large role in the acceptance or denial of such legislation.[140] If a jurisdiction already prohibits discrimination against homosexuals in other aspects, such as "employment, accommodations, education, housing, credit practices, and union practices" then it is more likely to extend protection to homosexual youths by banning conversion therapy.[141] Also, states that recognize same-sex marriage are likely to be more open to a ban such as this.[142] States allowing same-sex marriage, however, might not be the ultimate predictor of banning conversion therapy for minors, especially since New Jersey, when it became the second state to ban conversion therapy for minors, did not allow same-sex marriage under its constitution but did recognize those marriages performed in other jurisdictions.[143]

B. Change in Age

The California ban on conversion therapy prevents treatment of patients under eighteen years of age.[144] Some oppose the ban because it denies the right to treatment for those under the age of majority who willingly volunteer for conversion therapy—those minors who want to attempt to change their sexual

Children, Bos. Daily (July 16, 2013), http://www.bostonmagazine.com/news/blog/2013/07/16/sexual-orientation-change-therapy/.

139. *Id.*

140. *See* Hicks, *supra* note 9, at 543–45.

141. *See id.* at 543.

142. *See id.* Same-sex couples can legally marry in nineteen states and the District of Columbia, including California, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *See Same Sex Marriage Laws*, Nat'l Conference of State Legislatures, http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx#1 (Dec. 2, 2013).

143. *See id.*; *see also* N.J. Stat. Ann. § 45:1–55 (West 2013).

144. Cal. Bus. & Prof. Code § 865.1 (2012).

orientation.[145] Taking into account the psychological determinations on the ability of someone as young as sixteen to make a rational decision, it could be argued that the California legislation should be amended to protect only those younger than sixteen years of age from conversion therapy, allowing those sixteen and over to make their own decision.[146] The legal bright-line rule of eighteen years of age disregards one's individual developmental and emotional maturity, grouping all minors into one legally disabled category.[147] However, even though some minors between the ages of sixteen and eighteen might want to make treatment decisions for themselves, there is no evidence proving that having to wait two additional years until age eighteen would make any significant difference.[148] In fact, there is no empirical evidence that treating a minor will prevent him or her from being homosexual as an adult; trying to make a gender nonconforming child more gender conforming does not mean the child will not be homosexual as an adult.[149] Thus, there is no rush on beginning conversion therapy at a younger age; minors can wait until they are eighteen to make the decision.

C. Mature Minor Judicial Bypass

Another argument regarding amending the California ban calls for a case-by-case analysis of each individual minor and his or her decision to choose conversion therapy. Similar to the "mature minor" exception or judicial bypass hearings in abortion cases for minors,[150] the minor's level of maturity would be analyzed by a judge as a final determinate of whether or not the minor has the capacity and maturity to choose conversion therapy for himself or herself. The key difference between the conversion therapy ban and an abortion ban is that the California ban does not allow *any* minor under age eighteen to participate, even with parental permission, whereas abortions for minors can be legal with parental permission.[151] Thus, a judicial bypass for conversion therapy would differ from a judicial bypass for abortion because a minor seeking conversion therapy might have the support of his or her parents and would simply be looking for a legal loophole to allow him or her to participate in therapy, whereas minors approaching judicial bypass for abortion are looking to avoid asking parental permission or have been denied parental

145. Desmond, *supra* note 109. The Pacific Justice Institute, a California-based public interest group, in its lawsuit against the legislation, alleged that the banning of change efforts for minors, "irrespective of their wishes or beliefs," is a violation of the Constitution. *Id.*

146. *See* Part I.B, *supra* notes 45–59 and accompanying text.

147. *See* Scott, *supra* note 45, at 15.

148. *Id.* at 14–15.

149. *See* S.B. 1172, 2012 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865.1 (2012)).

150. *See* Bellotti v. Baird, 443 U.S. 622, 647–48 (1979).

151. *See*, *e.g.*, Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); *Bellotti*, 443 U.S. at 622.

permission already.[152]

However, trying to tailor an approach for every individual minor based on his or her maturity is more likely to cause greater uncertainty and error.[153] Allowing a judge to be the ultimate decider of a minor's decision to pursue conversion therapy would be a burden on the system, reducing judicial economy by taking up time and money.[154] Specialized procedures such as this are hard to apply and, in some cases, they disrupt family dynamics regarding parental rights.[155] Regardless of a psychological age of maturity, and based on the negative outcomes of conversion therapy, the California ban on all minors under the age of eighteen should stand.

D. Ability for Minor to Be Heard

Similar to a mature minor judicial bypass, allowing the child to voice his or her opinion alongside that of his or her parents would allow the child a chance to be heard by the court. Analyzing the California ban against conversion therapy for minors alongside *Parham*, it might be suggested that parents should still maintain substantial weight in the decision making of sending their children to conversion therapy, but that the child's input should still at least be heard so as to not overtake completely his or her rights.[156] The high risk of error in parents incorrectly and wrongfully subjecting their children to treatment is present in conversion therapy just as much as it is present in mental health commitment.[157] Thus, a neutral factfinder would likewise be necessary to determine if the standards for the child's admission are met.[158] In *Parham*, the ultimate question required a determination on mental or emotional illness and necessitated the neutral factfinder to be from the medical field, as a judge would not have the expertise necessary to make the medical decision.[159] However, in the case of conversion therapy, the ultimate question does *not* come down to mental or emotional illness; in fact, there is no medical analysis

152. *See Bellotti*, 443 U.S. at 646–47 (noting the abortion decision differs in important ways from other decisions that may be made during minority and that every minor must have the opportunity to go directly to a court without first consulting or notifying her parents).

153. *See* Scott, *supra* note 45, at 16.

154. *See id.*

155. *See*, *e.g., Bellotti*, 443 U.S. 622.

> There is, however, an important state interest in encouraging a family rather than a judicial resolution . . . . [P]arents naturally take an interest in the welfare of their children—an interest that is particularly strong where a normal family relationship exists and where the child is living with one or both parents.

Id. at 648.

156. *See* Parham v. J.R., 442 U.S. 584, 604 (1979).

157. *See id.* at 606–07.

158. *See id.*

159. *See id.* at 606–08.

whatsoever since homosexuality is not an illness per today's medical standards.[160] Therefore medical personnel would not be required to make the decision.[161]

Unlike *Parham*, a fact-finding court hearing could be appropriate for conversion therapy.[162] Then, an adolescent could voice his or her opinion without his or her rights being disregarded, and the judge could make a decision based on both the child's and the parents' testimony. While a judge might not be in the best position to determine whether a child should participate in conversion therapy, the judge will be able to tell if the parents have the child's best interest in mind and are not simply trying to change the child from who he or she may be.[163]

E. Heavy Warnings

If something is to be considered therapy, it should first be proven to be effective, or at least safe.[164] Analogizing conversion therapy to a prescription drug, Neuroscience journalist Maia Szalavitz suggests that a federal agency, like the Food and Drug Administration (FDA), would need to approve the treatment before use.[165] And if conversion therapy were a medical drug, it is likely that it would have been quickly banned from use because of its harmful effects, including "associated deaths, injuries, and psychological damage."[166] However, since conversion therapy is a behavioral approach and not a drug, it is not regulated by any federal agency.[167] Conversion therapy thus does not have to be shown to be effective or even safe in order to be practiced.[168] Even though all major medical associations have denounced the use of conversion therapy, certain individuals still continue to practice the so-called therapy, and parents continue to send their children.[169] The fact that no medical backing to conversion therapy exists should be a warning sign and enough evidence to outlaw the practice; however, that is not the case.[170] This is why, if conversion therapy is allowed to be practiced, heavier, and *accurate*, warning labels

160. *See supra* text accompanying note 27.

161. *See* S.B. 1172, 2012 Leg., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865.1 (2012)).

162. *See* 442 U.S. at 609–10 (discussing generally the appropriateness of judicial-type hearings with respect to mental and emotional illness).

163. *See id.* at 602–03 (noting that at some times parents may not be acting in the best interest of the child).

164. Maia Szalavitz, *Why California's Conversion Therapy Ban is Only the First Step*, TIME (Oct. 12, 2012), http://healthland.time.com/2012/10/12/why-californias-conversion-therapy-ban-is-only-the-first-step/.

165. *See id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *See supra* Part I.A.

170. *See id.*

should be attached, making all aware of the risks involved, which include, but are not limited to:

> Confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.[171]

Conclusion

All medical, psychological, and counseling professionals are to follow a code of ethics. Psychiatrists are to be "dedicated to providing competent medical care, with compassion and respect for human dignity and rights."[172] Social workers' primary responsibility is to promote the well-being of clients.[173] Psychologists are to do no harm.[174] Marriage and family therapists are to advance the welfare of families and individuals.[175] However, the treatment and results of conversion therapy to change sexual orientation do not seem to follow these ethical guidelines.[176]

Conversion therapy has been denounced by all major medical organizations because it claims to "cure" something that is not a disease or illness.[177] The serious risks posed by the so-called treatments outweigh any positives that might possibly be considered.[178] As such, California is taking the proper steps toward protecting today's youth from harm.[179] Even if an appeal to the United States Supreme Court is

171. *See* S.B. 1172, 2012 Leg., Reg. Sess. (Cal. 2012) (codified at Cal. Bus. & Prof. Code § 865.1 (2012)); *see also* Am. Psychological Ass'n, *supra* note 37.

172. The Principles of Med. Ethics 2 (Am. Psychiatric Ass'n 2013), www.psychiatry.org/File%20Library/Practice/Ethics%20Documents/principles2013--final.pdf

173. Code of Ethics of the Nat'l Ass'n of Soc. Workers (Nat'l Ass'n of Soc. Workers 2008), http://www.socialworkers.org/pubs/code/code.asp.

174. Ethical Principles of Psychologists and Code of Conduct 3 (Am. Psychological Ass'n 2010), http://www.apa.org/ethics/code/principles.pdf.

175. *See, e.g.*, Mary Jo Zygmond & Harriet Boorhem, *Ethical Decision Making in Family Therapy*, 28 Fam. Process 269 (1989), http://www.mftcourses.net/var/www/mftcourses/documents/zygmond%20borhem%2089.pdf.

176. *See supra* notes 9–11 and accompanying text.

177. *See supra* text accompanying notes 27, 30–33.

178. *See supra* text accompanying notes 36–37.

179. *See* S.B. 1172, 2012 Leg., Reg. Sess. (Cal. 2012) (codified at Cal. Bus. & Prof. Code § 865.1 (2012)).

successful, adjustments can be made to make the legislation legal, as there is absolutely no reason why there should not be restraints on the availability of conversion therapy, especially for minors.[180]

First and foremost, the adolescent should have a say in the decision to receive any kind of treatment.[181] "[A] child may provide effective consent if he or she is capable of appreciating the nature, extent, and probable consequences of the proposed treatments or procedures."[182] But, no child should unwillingly be forced into conversion therapy by his or her parents.[183] Parents should utilize an authoritative model of parenting, where they listen to the child and take the child's opinion into consideration before making a decision.[184] This is the healthiest model of parental control and influence over children.[185]

Homosexuality is not a disease or illness; it cannot be cured. Thus, conversion therapy should be banned. As Ryan Kendall said in the summer of 2012:

> I never believed [I could be fixed]. I know I'm gay just like I know I'm short and I'm half Hispanic. I've never thought that those facts would change. It's part of my core fundamental identity. So the parallel would be sending me to tall camp and saying, 'If you try very hard, one day you can be 6-foot-1.'[186]

Ryan Kendall's story is not the only tragedy of conversion therapy. There are numerous examples available, all of which claim the same thing: you cannot change who you are.

180. *See supra* Part III.

181. *See* Part III.D.

182. Weithorn & Campbell, *supra* note 50, at 1590 (referencing the RESTATEMENT (SECOND) OF TORTS (1979)).

183. *See supra* text accompanying note 157.

184. *See* Laurence Steinberg, Julie D. Elmen & Nina S. Mounts, *Authoritative Parenting, Psychological Maturity, and Academic Success Among Adolescents*, 60 CHILD DEV. 1424, 1433 (1989).

185. *See id.* at 1425 (comparing authoritative parenting to the authoritarian and permissive models).

186. Levs, *supra* note 98 (quoting Ryan Kendall).