Catch 22: The Rising Concern of Faith Being Removed From Counseling and the First Amendment Concerns Associated

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This article addresses a growing concern for a religious counselor. State statutes in California and New Jersey have been passed, banning the practice of sexual orientation change efforts for minors. Counseling students are being discharged from their programs for "discriminating," leading some to believe that this is the future for licensed counselors. This article examines the recent statutory enactments, recent case law, the ACA Code of Ethics, and an analysis of the issue moving forward.

I. INTRODUCTION

In the United States, it is essential for people of all faiths to be able to enjoy society's benefits and privileges without discrimination based upon religion. The Department of Justice proclaims that "people should not be

* The author wishes to encourage those who have to choose between their faith and their profession to stand firm, be courageous, and be strong. But, do everything in love. The author wishes to thank Alliance Defending Freedom for placing religious liberty on his heart. Finally, he would like to thank his wife, Gabrielle, for encouraging him to stand firm, be courageous, and to be strong himself.

forced to choose between their faiths and their jobs."[1] The purpose of Title VII of the Civil Rights Act of 1964 (Title VII)[2] was to address equal employment opportunities and to eliminate, among other things, religious discrimination in the workplace.[3] However, in the legal system today, this principle is followed in theory, but only to a point. When religious freedom presses up against the "tolerance" movement of today, religious freedom has been pushed aside.

Examples of this are plentiful. In New Mexico, a Christian photographer was found to have violated the New Mexico Human Rights Act when she refused to photograph a "commitment ceremony," which she felt was against her personal and religious beliefs.[4] Similarly, the Washington State Attorney General is suing a Christian florist for refusing to provide flowers for a same sex wedding.[5] Around the country, as a result of the Patient Protection and Affordable Care Act, the federal government has attempted to force Christian business owners to provide contraception coverage to employees, whether or not their religious beliefs allow them to do so.[6]

Though there are many examples illustrating this concern, the focus of this article is on the counseling profession. Whether it be at the university level[7] or at the state licensing level,[8] religious counselors are faced with the risk of losing their license for simply sticking to their own religious convictions. Some state governments, such as New Jersey, are making these intentions clear by mandating that religious counselors cease certain practices.[9] However, is this approach best for everyone? If religious counselors are stripped of their licenses and are removed from the workplace, what hap-

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1. U.S. DEP'T OF JUSTICE, *Combating Religious Discrimination and Protecting Religious Freedom*, *available at* http://www.justice.gov/crt/spec_topics/religiousdiscrimination/ff_employment.php (last visited Jan. 20, 2014).

2. 42 U.S.C. § 2000e-2 (2000).

3. H.R. Rep. No. 914, 2d Sess., at 2401 (1963).

4. Elane Photography v. Willock, 309 P.3d 53, 59-60 (N.M. 2013). Elane Photography was also ordered to pay $6,637.94 in attorney fees and costs. Elane Photography v. Willock, 284 P.3d 428, 433 (N.M. App. 2012).

5. Alyssa Newcomb, *Washington Florist Sued for Refusing to Provide Flowers for Same-sex Wedding*, ABC NEWS (Apr. 10, 2013), http://abcnews.go.com/Business/washington-florist-sued-refusing-provide-flowers-sex-wedding/story?id=18922065.

6. *See, e.g.*, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014). *See also* Archdiocese of St. Louis v. Sebelius, 920 F. Supp. 2d 1018 (E.D. Mo. 2013).

7. *See, e.g.*, Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011). *See also* Ward v. Polite, 667 F.3d 727 (6th Cir. 2011).

8. EDUC. REP., *Guidance Counselor Could Lose His License for Supporting Marriage* (Dec. 2009), *available at* http://www.eagleforum.org/educate/2009/dec09/supporting-marriage.html.

9. *See, e.g.*, N.J. STAT. ANN. § 45:1-55 (West 2013).

pens to the patients with similar views? Will they have a counselor to go to? This article first looks at recent legal trends. It will then evaluate the ACA Code of Ethics. Finally, it will develop a First Amendment approach to combat this trend with an analysis of the policy concerns associated.

II. RECENT LEGAL TRENDS

A. SEXUAL ORIENTATION CHANGE EFFORT LEGISLATION

State legislatures have begun the movement toward banning counseling practices which, today, are primarily conducted by religious counselors. Two states, New Jersey and California, have banned sexual orientation change efforts ("SOCE") therapy for minors. In New Jersey, "A person who is licensed to provide professional counseling . . . shall not engage in sexual orientation change efforts with a person under 18 years of age."[10] The statute defines "sexual orientation change efforts" to include "efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender."[11] This restriction subjects counselors who practice SOCE to criminal misdemeanor penalties.[12] These counselors' professional licenses would also be subject to suspension or revocation.[13]

The State of California has also banned SOCE therapy for minors.[14] They define the technique as "any practices by mental health providers that seek to change an individual's sexual orientation."[15] "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."[16] Conversely, the statute affirms therapy that:

> (A) provide[s] acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-

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10. N.J. STAT. ANN. § 45:1-55(a) (West 2013).
11. N.J. STAT. ANN. § 45:1-55(b) (West 2013).
12. N.J. STAT. ANN. § 45:1-11 (West 2013).
13. N.J. STAT. ANN. § 45:1-21 (West 2013). This statute provides for the following grounds for discipline:
> e. "Has engaged in professional or occupational misconduct as may be determined by the board."
> h. "Has violated or failed to comply with the provisions of any act or regulation administered by the board."

14. CAL. BUS & PROF. CODE § 865.2.
15. *Id.* at § 865(b)(1).
16. *Id.*

> neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and
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> (B) do[es] not seek to change sexual orientation.[17]

The practice of SOCE on patients under eighteen is "considered unprofessional conduct" and subjects the therapist to "discipline by the licensing entity."[18] The statute does not, however, prevent counselors from communicating about SOCE to the public, to express their views on homosexuality to patients, perform SOCE to someone who is eighteen years old or older, recommend SOCE, or refer someone to a religious leader.[19]

B. CASE LAW

Case law has developed alongside society's changing views on counseling practices. The New Jersey[20] and California[21] statutes have already been challenged in court. In *Pickup v. Brown*,[22] the Ninth Circuit found the California SOCE statute to be constitutional.[23] The plaintiffs, who sought injunctions to prevent the implementation of the statute, were SOCE practitioners, children undergoing SOCE, and their parents.[24] These practitioners used only non-aversive treatment, which is defined as a therapy technique that uses "assertiveness and affection training with physical and social reinforcement to increase other-sex behaviors."[25] The SOCE counselors attempt to "change gay men's and lesbians' thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation."[26] The Ninth Circuit addressed the issues regarding the constitutionality of California's SOCE ban based upon First

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17. *Id.* at § 865(b)(2).
18. *Id.* at § 865.2.
19. Pickup v. Brown, 728 F.3d 1042, 1049-50 (9th Cir. 2013). The language of the statute indicates that religious leaders would be permitted to perform SOCE. *See id.*
20. King v. Christie, 981 F. Supp. 2d 296 (D.N.J. 2013).
21. *Pickup*, 728 F.3d 1042.
22. This case combined two separate appeals. The first derived from Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. 2012), where the district court granted the plaintiffs a preliminary injunction, allowing them to continue SOCE practice. The second derived from Pickup v. Brown, No. 2:12-CV-02497-KJM-EF, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012), where the district court denied a similar preliminary injunction. *Pickup*, 728 F.3d at 1049.
23. *Id.* at 1061.
24. *Id.* at 1050.
25. *Id.* at 1049.
26. *Id.*

Amendment free speech, free expression, and the parents' fundamental right to direct the upbringing of their children.[27]

The Ninth Circuit determined that First Amendment Free Speech does not require heightened scrutiny.[28] It reasoned that the act of counseling is conduct, not speech.[29] As such, the court held that:

> (1) doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself;
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> (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and
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> (3) nevertheless, communication that occurs during psychotherapy does receive some constitutional protection, but it is not immune from regulation.[30]

The court described a continuum that allows doctors "robust" protection to be "soapbox orators and pamphleteers."[31] However, the California SOCE ban lands on the other side of the described continuum, which allows for regulation of professional conduct, where the state's power is great, despite the incidental effect on speech.[32] Further, the "First Amendment does not prevent a state from regulating treatment" and therefore, only requires rational basis review.[33] After citing to a number of studies concluding that SOCE is "harmful and ineffective," the court concludes that the

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27. Pickup v. Brown, 728 F.3d 1042, 1051 (9th Cir. 2013). The Ninth Circuit also held that the statute is neither overbroad nor vague. *Id.* It also declined to address the question as to whether the statute violates the First Amendment's religion clauses. *Id.* at 1062 n.3.

28. *Id.* at 1056.

29. *Id.* at 1055. The Ninth Circuit likens counseling to test taking and prescribing medicinal marijuana. Pickup v. Brown, 728 F.3d 1042, 1052-55 (9th Cir. 2013) (citing Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. Of Psychology, 228 F.3d 1043 (9th Cir. 2000); Conant v. Walters, 309 F.3d 629 (9th Cir. 2002)).

30. *Pickup*, 728 F.3d at 1053.

31. *Id.* at 1054.

32. *Id.* at 1054-55.

33. *Id.* at 1056.

SOCE ban is "rationally related to the legitimate government interest of protecting the well-being of minors."[34]

The Ninth Circuit sidestepped the issue of whether the California SOCE ban implicates the clients' First Amendment right to freedom of association. It stated that the law does not prevent mental health providers and clients from entering into and maintaining therapeutic relationships.[35] It found that the statute only prevents the practice of changing a minor's sexual orientation.[36] With regard to the parents' right to raise their children as they see fit, the court denied the plaintiff parents' their traditionally fundamental right.[37] It held that the plaintiffs cannot compel the state to license mental health professionals to engage in unsafe practices, that the state has constitutional control over parental discretion for children when their "physical . . . health is jeopardized,"[38] and that "substantive due process rights do not extend to the choice and type of treatment . . . ."[39] The court usurps the client's, and their parents', best judgment with its own position on SOCE. As a result, the minor patients and their parents are denied their freedom of association, and by extension, a form of therapy that they wish to receive.

In *King v. Christie*, the District Court of New Jersey "turn[s] to the Ninth Circuit's decision" in *Pickup* for guidance.[40] There, Tara King, a licensed counselor, and various counseling organizations filed First Amendment free speech and free religious expression claims against the New Jersey SOCE law.[41] For essentially the same reasons listed in *Pickup*, the court found counseling to be conduct, not speech, and subject to state regulation, despite the fact that counseling is administered primarily through speech.[42] The court also found that the Free Exercise Clause does not prohibit this law's regulation because the law is neutral and of general applicability and "makes no reference to any religious practice, conduct, or motivation."[43]

Christian counseling students have also had to navigate the testy waters of the tolerance movement. Two cases have been decided which have

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34. *Id.* at 1056-57. The Ninth Circuit was clear that this analysis does not apply to adult patients. Pickup v. Brown, 728 F.3d 1042, 1062 n.8 (9th Cir. 2013).

35. *Id.* at 1057.

36. *Id.* at 1058.

37. *Id.* at 1060-61. *See, e.g.*, Prince v. Mass., 321 U.S. 158, 166 (1944) (finding that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . .") *Id.*

38. *Pickup*, 728 F.3d at 1060-61 (citing Parham v. J.R., 442 U.S. 584, 603 (1979)).

39. *Pickup*, 728 F.3d at 1061 (citing Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. Of Psychology, 228 F.3d 1043, 1050 (9th Cir. 2000)).

40. King v. Christie, 981 F. Supp. 2d 296, 313 (D.N.J. 2013).

41. *Id.* at 302.

42. *Id.* at 317-18.

43. *Id.* at 331.

produced seemingly opposing results. In the first, decided in the Eleventh Circuit, Jennifer Keeton voiced concerns to counseling possible homosexual clients.[44] She believed that "sexual behavior is the result of personal choice for which individuals are accountable . . . and that homosexuality is a 'lifestyle,' not a 'state of being.'"[45] According to the court, she stated an intent to convert students from being homosexual to heterosexual, that she would seek to refer them to someone who performs conversion therapy (SOCE), and that it would be difficult for her to counsel GLBTQ clients in a way that keeps her personal views separate from those of her clients'.[46] Before allowing Keeton to participate in the school's clinical practicum, the faculty assigned her a remediation program to improve her "ability to be a multiculturally competent counselor. . . ."[47] Keeton challenged this plan on free speech and free exercise grounds.

Keeton claimed that Augusta State University ("ASU") violated her First Amendment rights because the plan discriminated against her viewpoint, was retaliatory, and it compelled her to express beliefs which she does not believe.[48] The Eleventh Circuit found that the counseling program is a non-public forum and their restrictions were viewpoint neutral.[49] The school's plan was imposed "because she expressed an intent to impose her personal religious views on her clients, in violation of the ACA Code of Ethics."[50] The court emphasized that the ACA Code of Ethics is part of the school's curriculum.[51] It felt that Keeton's remediation plan was due to her "unwillingness to comply with the ACA Code of Ethics," not her religious concerns associated.[52] The court found that the burden on Keeton's First

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44. Keeton v. Anderson-Wiley, 664 F.3d 865, 868-70 (11th Cir. 2011).

45. *Id.* at 868.

46. *Id.*

47. *Id.* at 869. This plan would require Keeton to: 1) attend three workshops improving cross-cultural communication with GLBTQ population, 2) read ten articles in counseling or psychological journals that pertain to improving counseling effectiveness with the GLBTQ population, 3) work to increase her exposure and interaction with the GLBTQ population, suggesting she attend a gay pride parade, 4) familiarize herself with the Association for Lesbian, Gay, Bisexual and Transgender Issues in Counseling Competencies for counseling gay and transgender clients, and 5) submit a two-page reflection paper summarizing what she learned, how it affected her beliefs, and how it would help future clients. *Id.* at 870.

48. Keeton v. Anderson-Wiley, 664 F.3d 865, 871 (11th Cir. 2011).

49. *Id.* at 871-72.

50. *Id.* at 872.

51. *Id.* at 874.

52. *Id.* at 874-75. Keeton was found to have violated the following provisions of the ACA Code of Ethics:

> (1) Section A.1.a: "The primary responsibility of counselors is to respect the dignity and to promote the welfare of clients";
> (2) Section A.4.b: "Counselors are aware of their own values,

Amendment rights was reasonable because Keeton's participation in the clinical practicum would "interfere with ASU's control over its curriculum" and that the school has a "legitimate pedagogical concern in teaching its students to comply with the ACA Code of Ethics."[53] The court also found that the school's policy was not retaliatory because she was unwilling to comply with the ACA Code of Ethics, not because of her beliefs on homosexuality.[54] The court also found that Keeton's speech was not compelled because "Keeton may choose not to attend ASU, and indeed may choose a different career."[55] Keeton would either have her faith, and the sincerely held beliefs that come with that faith, or her career, but not both.

Finally, the Eleventh Circuit found Keeton's free exercise claim to be viewpoint neutral and generally applicable because the ACA Code of Ethics is itself neutral and generally applicable.[56] It found that the ACA Code of Ethics is applied equally to all students, in that, all students are given remediation plans when a curricular weakness is observed, not just those who have religious objections.[57]

The Sixth Circuit has issued an opinion that, on its face, seems contradictory, but lends guidance. There, Julea Ward wished to refer a homosexual client to another student during a practicum, which resulted in her being

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> attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants"; (3) Section C.2.a: "Counselors gain knowledge, personal awareness, sensitivity, and skills pertinent to working with a diverse client population"; and (4) Section C.5: "Counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law."

Keeton v. Anderson-Wiley, 664 F.3d 865, 869 (11th Cir. 2011).

53. *Id.* at 875-76.

54. *Id.* at 877-78. The court also said that "if ASU's officials imposed the remediation plan because of Keeton's personal religious views on homosexuality, it is presumed that they violated her constitutional rights," but ultimately decided this was not the case. *Id.* at 872. Because requirement 5 of the school's remediation plan required Keeton to show "how her study has influenced her beliefs," it is implicit that it was expected for Keeton to *change her views* and to express how those views were changed through *written speech*. *Id.* at 870. It is for this reason that the Eleventh Circuit was wrong in its free speech analysis.

55. Keeton v. Anderson-Wiley, 664 F.3d 865, 878 (11th Cir. 2011).

56. *Id.* at 880.

57. *Id.* As stated in *supra* note 54*,* the court ignores that one of the remediation objectives for Keeton, specifically, expected for her to explain "how her study has influenced her beliefs." *Id.* at 870. It would be difficult to imagine other student's remediation plans involving an expectation that their beliefs be changed.

expelled.[58] Ward "had no problem counseling gay and lesbian clients, so long as the university did not require her to affirm their sexual orientation."[59] Eastern Michigan University's ("EMU") position was that Ward violated two provisions of the ACA Code of Ethics by "imposing values that are inconsistent with counseling goals[60] . . . and . . . engag[ing] in discrimination based on . . . sexual orientation.[61]"[62] Like in *Keeton*, the court applied the school standard to free speech, which allows for restrictions so long as they are "reasonably related to legitimate pedagogical concerns."[63] However, the "First Amendment does not permit educators to invoke curriculum 'as a pretext for punishing [a] student for her . . . religion.'"[64] Expelling Ward was to punish Ward for her religion because neither the ACA Code of Ethics nor school policy prohibited referring clients for non-religious reasons.[65] Further, the evidence established that values-based referrals are a "sound counseling practice."[66] It "makes sense to allow a student, concerned about her capacity to stay neutral . . . to refer clients seeking such therapy."[67] These principles caused EMU to fail a Free Exercise analysis. The school and ACA Code of Ethics allow for values-based referrals for, among other things, end-of-life decisions and for socioeconomic status.[68] "[P]ermitting secular exemptions[69] but not religious ones and failing to apply the policy in an even-handed, much less faith-neutral, manner to Ward" demonstrated that the school's implementation of non-referral rule is not neutral and generally applicable.[70] For these same reasons EMU's policy was not compelling and could not pass strict scrutiny.[71]

Finally, the Sixth Circuit cites to *Keeton* and creates a distinction.[72] Keeton requested a constitutional right to engage in, or promote, conversion

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58. Ward v. Polite, 667 F.3d 727, 730 (6th Cir. 2011).
59. *Id.* at 731.
60. *Id.* at 731 (Section A.4.B).
61. *Id.* at 731 (Section C.5).
62. *Id.* at 731.
63. Ward v. Polite, 667 F.3d 727, 734 (6th Cir. 2011) (citing Hazelwood Sch. Dist. v. Kuhlmeeir, 484 U.S. 260, 271 (1988)).
64. *Ward*, 667 F.3d at 734 (citing Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995)).
65. *Ward*, 667 F.3d at 736.
66. *Id.*
67. *Id.*
68. *Id.*
69. The school permits students to request certain types of clients to counsel and has in a previous instance allowed a student to refer a client because she was in a state of grief. *Id.* at 736-37.
70. Ward v. Polite, 667 F.3d 727, 739 (6th Cir. 2011).
71. *Id.* at 740.
72. *Id.* at 741.

therapy,[73] which imposes values on a client.[74] The sticking point, even for the *Ward* opinion, was Keeton's "intention to tell the client that his behavior is morally wrong and then try to change the client's behavior."[75] Where *Ward* differs from *Keeton* is that Ward did not impose values, but rather just wanted to not counsel the client at all.[76]

Another case, coming out of the Eleventh Circuit, is worth mentioning. In *Watts v. Florida International University*,[77] John Watts was enrolled in a master of social work program.[78] While participating in the school's practicum, the plaintiff counseled a Catholic patient.[79] As a part of the patient's treatment, Watts recommended joining a support group.[80] When the patient asked where to find such a support group, Watts suggested "church."[81] As a result of this recommendation, Watts was terminated from the program "due to his religious speech."[82] The court treated the termination as an employment free speech issue.[83] The court held that Watts' termination was not a violation of his free speech because the "government 'has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of speech of the citizenry in general.'"[84] The court treated the matter as a private concern, not a public concern; therefore, the regulation of speech did not warrant heightened scrutiny.[85]

The court did not conduct a free exercise analysis. It only stated that in order for a plaintiff to plead a sufficient free exercise claim, all a plaintiff must allege is that "the government has impermissibly burdened one of his 'sincerely held religious beliefs'"[86] and that courts "must not presume to determine . . . the plausibility of a religious claim."[87]

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73. SOCE, *supra* text accompanying § II.A, at 3-5.
74. *Id.*
75. *Id.* (citing Keeton v. Anderson-Wiley, 664 F.3d 865, 869 (11th Cir. 2011)).
76. *Ward*, 667 F.3d. at 741.
77. Watts v. Florida Int'l Univ., 495 F.3d 1289 (11th Cir. 2007).
78. *Id.* at 1291.
79. *Id.* at 1292.
80. *Id.*
81. *Id.*
82. Watts v. Florida Int'l Univ., 495 F.3d 1289, 1292 (11th Cir. 2007).
83. *Id.* at 1293.
84. *Id.* (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).
85. Licensing concerns would not be treated in this manner because not all licensees are employees of the state. For this reason, *Watts* is more of general interest here than a guidepost.
86. *Watts*, 495 F.3d at 1294 (citing Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 834 (1989)).
87. *Watts*, 495 F.3d at 1295.

III. ACA CODE OF ETHICS

It is not in the ACA Code of Ethics that a counselor must counsel within their client's value system or counsel outside of their own value system. Despite that, the ACA Code of Ethics is likely a mechanism that will be used against a religious counselor. In both *Keeton* and *Ward* the schools based their disciplinary actions on violations of the ACA Code of Ethics.[88] However, for a religious counselor, the ACA Code of Ethics could pose as a threat or serve as a tool, depending on how it is used.

In *Keeton,* the ACA Code of Ethics was a threat. ASU cited to four provisions that they felt that Keeton intended to violate.[89] Specifically, they cited to the following provisions:

> (1) Section A.1.a: "The primary responsibility of counselors is to respect the dignity and to promote the welfare of clients";
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> (2) Section A.4.b: "Counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals. Counselors respect the diversity of clients, trainees, and research participants";
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> (3) Section C.2.a: "Counselors gain knowledge, personal awareness, sensitivity, and skills pertinent to working with a diverse client population"; and
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> (4) Section C.5: "Counselors do not condone or engage in discrimination based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital status/partnership, language preference, socioeconomic status, or any basis proscribed by law."[90]

Similarly, in *Ward*, EMU claimed that Ward violated Sections A.4.b and C.5.[91] Other provisions that may be a threat are Sections:

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88. Keeton v. Anderson-Wiley, 664 F.3d 865, 869 (11th Cir. 2011); Ward v. Polite, 667 F.3d 727, 731 (6th Cir. 2011).

89. *Keeton*, 664 F.3d at 869.

90. *Id.*

91. *Ward*, 667 F.3d at 731.

> B.5.b., which states that "counselors are sensitive to the cultural diversity of families and respect the inherent rights and responsibilities of parents/guardians over the welfare of their children . . . ."[92]
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> E.8., which states that "counselors use with caution assessment techniques that were normed on populations other than that of the client. Counselors recognize the effects of . . . sexual orientation . . . on test administration and interpretation, and place test results in proper perspective with other relevant factors."[93]

Despite the perception that the courts leave, the ACA Code of Ethics has as many friendly provisions as threatening ones. Perhaps the most helpful language is Section D.1.a., which states, "[c]ounselors are respectful of approaches to counseling services that differ from their own. Counselors are respectful of traditions and practices of other professional groups with which they work."[94] For a religious counselor, this may serve as a shield from disciplinary actions initiated by boards, who themselves consist of counselors.[95] Even within the context of the ever more controversial area of SOCE, this is a consideration that counselors are instructed to keep in mind.[96]

There are numerous provisions that can be highlighted should a religious client present him or herself to a counselor. A counselor should not be prevented from invoking religion in a counseling session if a client should want religious counseling. Counselors are to respect "the freedom of choice of clients,"[97] are to "recognize that support networks" such as religious in-

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92. ACA CODE OF ETHICS, AM. COUNSELING ASS'N 1, 8 (2005), *available at* http://www.ncblpc.org/Laws_and_Codes/ACA_Code_of_Ethics.pdf.

93. *Id.* at 13.

94. *Id.* at 11.

95. For example, the Illinois Professional Counselor Licensing and Disciplinary Board consists of seven members, two licensed solely as professional counselors, three licensed solely as clinical professional counselors, one full-time faculty member of a college level, and one public member. PROFESSIONAL COUNSELOR LICENSING AND DISCIPLINARY BOARD, http://www.idfpr.com/dpr/learn/cb_doc/profcounsel.htm (last visited July 27, 2014).

96. Joy S. Whitman et al., *Ethical Issues Related to Conversion or Reparative Therapy*, AM. COUNSELING ASS'N (Jan. 16, 2013), http://www.counseling.org/news/updates/2013/01/16/ethical-issues-related-to-conversion-or-reparative-therapy. This source even strongly discourages SOCE, but yet acknowledges the respect that the ACA Code of Ethics is to give toward alternative techniques. *Id.*

97. AM. COUNSELING ASS'N CODE OF ETHICS, Section A.1.c (2005), *available at* http://www.ncblpc.org/Laws_and_Codes/ACA_Code_of_Ethics.pdf.

stitutions, "hold various meanings in the lives of clients," and the counselors are to "consider enlisting the support" of those institutions.[98] Further, if a non-religious client presents him or herself, "clients have the freedom to choose whether to enter into or remain in a counseling relationship," meaning, a client does not have to stick with a counselor if he or she does not like the counselor's methods.[99]

Speaking to the SOCE prohibitions, in cases involving a minor, a counselor should be able to look to the parents for decision making. "Counselors are sensitive to the cultural diversity of families and respect the inherent rights and responsibilities of parents/guardians over the welfare of their children."[100]

Even a provision that can, and has been, used against a religious counselor can be interpreted as a tool to that counselor. Section A.4.b states that, "Counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals."[101] It would seem that if a religious counselor were to recognize that their own values, attitudes, and beliefs put that counselor at risk of imposing those values on a non-religious client, a referral would be a perfect way to avoid imposing those values.

IV. FIRST AMENDMENT ANALYSIS[102]

In the First Amendment context, a religious counselor would be better suited to explore the less charted waters of a free exercise claim rather than free speech.[103] As summarized above, courts that side with tolerance have

98. *Id.* at Section A.1.d. Perhaps a provision like A.1.d would have been of assistance to the social worker in *Watts*.

99. *Id.* at Section A.2.a.

100. *Id.* at Section B.5.b.

101. *Id.* at Section A.4.b.

102. This article does not consider a Religious Freedom Restoration Act ("RFRA") analysis because professional licenses are regulated by the states. Pursuant to City of Boerne v. Flores, 521 U.S. 507 (1997), the RFRA is not applicable to state or local laws. However, should there become some sort of national ban on SOCE or a federally mandated non-discrimination policy for counselors, the RFRA could come into play. Further, if such a counselor resides in a state that has passed its own RFRA, that state law should be examined.

103. Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 882 (1990) brings up the potential of a "hybrid" claim whereby a free exercise claim could be combined with another constitutional claim to create an additional case for heightened scrutiny. If there were such a thing, a hybrid claim combining free exercise and free speech claims would be plausible. However, no court has ever relied on a hybrid claim and few have even recognized it. Frederick Mark Gedicks, *Three Questions about Hybrid Rights and Religious Groups*, YALE L.J. POCKET PART (Mar. 23, 2008), *available at* http://yalelawjournal.org/the-yale-law-journal-pocket-part/civil-rights/three-questions-about-hybrid-rights-and-religious-

made a concerted effort to define counseling as conduct, not speech. Other analyses only focus on the free speech issues and ignore the free exercise issues altogether.[104] As a result, religious objections are not explored in as much detail as free speech.

A. FREE SPEECH

The recommendation that a counselor focus on the free exercise claim over a free speech claim does not mean that a free speech claim cannot, or would not, be successful. Outside of *Ward*, free speech claims have not been successful.[105] There is just little credible guidance on how courts would properly handle a free speech claim of this sort. Both *Pickup* and *Christie* treat SOCE as regulated conduct, that is, treatment, rather than speech, worthy of regulation.[106] Another counseling case would potentially run the risk of being categorized in the same manner.[107]

Other courts may not, and should not, necessarily find counseling to be conduct. There is no consensus on the idea that profession-related speech is conduct. The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech."[108] Precedent is clear that the right to speak freely includes the right to refrain from speaking.[109] Even conduct that does not require spoken word can be protected speech.[110] In *Ward*, the court treated Ward's counseling practicum as speech.[111] Fortune telling has been treated as speech in a number of jurisdictions.[112] Similarly, in *Rust v.*

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groups/. This is not to say, however, that a hybrid-rights claim will not be viable at any point in the future. Rather, it has not gained enough traction to warrant significant attention.

104. *See, e.g.*, Nick Clair, *Chapter 835: "Gay Conversion Therapy" Ban: Protecting Children or Infringing Rights?*, 44 MCGEORGE L. REV. 550 (2013).

105. *Watts* is not a useful predictor in this context because Watts was treated as an employee, was not challenging the constitutionality of a statute or regulation, and was not as a subject of a state action against his license or business. Watts v. Florida Int'l Univ., 495 F.3d 1289, 1294 (11th Cir. 2007). To a lesser degree, *Keeton* and *Ward* are not as useful of indicators because they are analyzed under student free speech standards, which would not apply for a counselor who is already licensed to practice. Keeton v. Anderson-Wiley, 664 F.3d 865, 871-77 (11th Cir. 2011); Ward v. Polite, 667 F.3d 727, 732-38 (6th Cir. 2011).

106. Pickup v. Brown, 728 F.3d 1042, 1056-57 (9th Cir. 2013); King v. Christie, 981 F.Supp.2d 296, 317-20 (D.N.J. 2013).

107. *See, e.g.*, Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043 (9th Cir. 2000).

108. U.S. CONST. amend. I.

109. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977).

110. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (holding that burning a selective service card is selective free speech).

111. Ward v. Polite, 667 F.3d 727, 732-34 (6th Cir. 2011).

112. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and The Uncharted Zones*, 90 CORNELL L. REV. 1277, 1345 n.352 (2005).

Sullivan, the counseling done by doctors in regard to family planning, *i.e.* abortion treatment, was treated as speech, not conduct.[113]

Rust may provide some guidance in this context.[114] There, the court upheld regulations on the speech of doctors based almost entirely upon the idea that the doctors were state-funded doctors.[115] The Court did not declare speech related to treatment to be regulatable conduct outside the purview of First Amendment protection. It merely treated government funded speech as an exception to First Amendment protection. At the very least, courts should look to *Rust* to find that SOCE is speech, not conduct, and do a proper free speech analysis. A blanket prohibition on certain treatment, not related to government funding, can at least be reasonably argued to be unconstitutional.[116]

When treatment, like SOCE, is considered speech, it would be hard to argue that it is not content-based speech.[117] A regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas,[118] or if the regulation, by its very terms, singles out particular content for differential treatment.[119] The Supreme Court in *Snyder v. Phelps*[120] exemplified how to identify content-based speech well. There, the Court stated this with regard to Westboro Baptist protestors: "A group of parishioners standing at the very spot where Westboro stood, holding signs that said 'God Bless America' and 'God Loves You,' would not have been subjected to liability. It was what Westboro said that exposed it to tort damages."[121]

In the same way, a counselor who affirms same-sex attraction to a minor homosexual patient would go unpunished while a counselor who affirms opposite-sex attraction to that same patient would be subjected to punishment. It is clear that the California and New Jersey lawmakers intended to single out only SOCE therapy for differential treatment because they disagree with the message associated with the practice, that is, that same-sex attraction may be undesirable to some of the

113. Rust v. Sullivan, 500 U.S. 173, 207-15 (1991).

114. As it might in cases similar to *Elane Photography*.

115. *See generally Rust*, 500 U.S. at 207-15.

116. Volokh, *supra* note 112, at 1343-44. Volokh uses the example of a blanket prohibition on counselors to advising patients to get a divorce. It would seem the same logic would apply to SOCE prohibitions.

117. *Rust*, 500 U.S. at 209 (Blackmun, J., dissenting). Though this is the dissenting opinion, Justice Blackmun's dissent gives guidance on how the content-based analysis would have been approached for speech related to treatment.

118. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

119. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642-43 (1994).

120. Snyder v. Phelps, 562 U.S. 443 (2011).

121. *Id.*

people who experience such an attraction and that such an attraction is changeable.

The First Amendment "demands that content-based restrictions on speech be presumed invalid."[122] Further, professional speech may be entitled to "the strongest protection our Constitution has to offer."[123] The laws should have been subjected to strict scrutiny.

If a counselor were to be required to counsel someone in a way that conflicts with their own beliefs, it would be compelled speech. Under that doctrine, a government may not require an individual to "speak the government's message" or "to host or accommodate another speaker's message."[124] The U.S. Supreme Court has already demonstrated that, even in the face of anti-discrimination laws, a private party may exclude another party on the basis of sexual orientation.[125] The Court stated that "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one."[126] A rule disallowing a religious counselor from referring for religious purposes would similarly require that counselor to affirm a message that he or she does not share. While the speech may not be a "script" for a counselor to speak, it is still a mandate to "speak the government's message," that is, the government's message of affirmation of homosexuality.

B. FREE EXERCISE

1. Smith Test

With regard to religion, the First Amendment broadly proclaims that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ."[127] As the free exercise portion of the First Amendment is applied today, this means that "a law that is neutral and of general applicability need not be justified by a compelling govern-

122. Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).

123. Fla. Bar v. Went For It Inc., 515 U.S. 618, 634 (1995).

124. Rumsfeld v. Forum for Academic & Inst. Rights, Inc., 547 U.S. 47, 63 (2006).

125. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos., 515 U.S. 557, 578-79 (1995) (holding that an organization may prevent a homosexual organization from entering a float into a St. Patrick's day parade because the message of the float conflicts with the organizing party's overall message).

126. *Id.* at 579.

127. U.S. CONST. amend. I (emphasis added).

mental interest even if the law has the incidental effect of burdening a particular religious practice."[128] The exception to that rule is

> [I]f the law appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions or worse is a veiled cover for targeting a belief or a faith-based practice, the law satisfies the First Amendment only if it "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests."[129]

Courts have treated this language to mean strict scrutiny.[130]

In testing a law under the first prong of the free exercise test, that is, whether the law is neutral, the inquiry is whether "the object of the law is to infringe upon or restrict practices because of their religious motivation."[131] "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context."[132] "'[N]eutral' also means that there must be neutrality between religion and nonreligion."[133] The prime and often used example of a law that is not neutral is a law that targeted animal sacrifice conducted by the Santeria religion.[134] The language of the ordinances did not necessarily constitute religious language, but when the ordinances were applied, it became apparent that they allowed for "almost all killings of animals except for religious sacrifice."[135] The net result of those ordinances was a "gerrymander" with "careful drafting" that ensured that only Santeria sacrifices were the prohibited conduct.[136]

The SOCE laws, right or wrong, are not facially neutral because SOCE is a mainly religious practice in today's society. Chris Christie, the New Jersey Governor, himself injected religion into the equation in a press release accompanying his signing of the New Jersey law banning SOCE.[137] In that press release, Christie rationalized that "my religion says it's [homosexuality] a sin…but for me, I've always believed that people are born with

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128. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); (citing generally Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)).

129. *Lukumi*, 508 U.S. at 548.

130. *See, e.g.*, *id.* at 546; *see also Ward*, 667 F.3d at 739.

131. *Lukumi*, 508 U.S. at 533.

132. *Id.* at 533.

133. Hartmann v. Stone, 68 F.3d 973, 978 (6th Cir. 1995).

134. *Lukumi*, 508 U.S. at 533-40.

135. *Id.* at 536.

136. *Id.*

137. ASSOCIATED PRESS, *Chris Christie signs New Jersey ban on gay conversion therapy*, Aug. 19, 2013, *available at* http://www.politico.com/story/2013/08/chris-christie-gay-conversion-therapy-new-jersey-95666.html.

the predisposition to be homosexual."[138] By saying this, Christie implies that SOCE has a religious basis, and that those who do it, must have a religious justification for doing so.

In the secular realm of therapy, SOCE is not commonplace.

Homosexuality was taken out of the Diagnostic and Statistical Manual ("DSM") in 1973.[139] Today, "[t]he major mainstream mental health organizations have all issued policy statements affirming that homosexuality is not a mental disorder and disavowing treatments based upon this premise."[140] These secular studies are precisely the type of studies New Jersey relies on in its Legislative Findings and Declarations.[141] However, religion is a significant driving force on keeping the practice intact[142] and is one of the "primary characteristics" of patients who seek SOCE therapy.[143] Religion and SOCE are so intertwined that one would be hard pressed to find literature on the practice without it addressing religion in some fashion. While no reference to any religion is made in the California or New Jersey laws, it is clear that banning the practice, in today's world, is banning a primarily, if not exclusively, religious practice.[144]

The plaintiffs in *King* took the wrong approach when questioning the neutrality of the SOCE ban. They alleged that the law is "religious gerrymandering" by pointing to exemptions.[145] The law is religious gerrymandering, but only because it targets a type of therapy associated with religion, leaving all other types of therapy alone. The court in *King* noted that the "[p]laintiffs have not suggested that the Legislature was motivated by any religious purpose."[146] The court did say that religion was not a motivating

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138. *Id.*

139. Ariel Shidlo & Michael Schroeder, *Changing Sexual Orientation: A Consumer's Report*, 33 PROF. PSYCHOL., RES. & PRAC. 249, 249 (2002).

140. Douglas C. Haldeman, *Gay Rights, Patient Rights: The Implications of Sexual Orientation Conversion Therapy*, 33 PROF. PSYCHOL., RES. & PRAC., 260, 260 (2002).

141. N.J. STAT ANN. 45:1-54 (West 2013).

142. *See generally* Haldeman, *supra* note 140. This article cites to one study where ninety-six percent of those who reported a change to heterosexual attraction placed a great importance on religion. *Id.* at 261.

143. Elan Y. Karten & Jay C. Wade, *Sexual Orientation Change Efforts in Men: A Client Perspective*, 18 J. MEN'S STUD. 84, 85 (2010).

144. Some may argue that the exemptions given to religious counselors in both the New Jersey and California laws mean that religious counselors and clients are not the target of the legislation. However, the exemption does not change the reality that SOCE, as it exists today, is primarily a religious practice and is sought out by mainly religious people.

145. King v. Christie, 981 F. Supp. 2d 296, 331 (D.N.J. 2013). These exemptions included minors seeking to transition from one gender to another, minors struggling with or confused about heterosexual attractions, behaviors, or identity, counseling that facilitates exploration and development of same-sex attraction, behaviors, or identity, individuals over the age of eighteen who are seeking to reduce or eliminate same-sex attraction, and counseling provided by unlicensed persons. *Id.* at 331-32.

146. *Id.* at 332.

factor, [147] which was the wrong answer to the right question. The court was not pressed to look deeper into what SOCE is, who conducts it, and who seeks SOCE.[148] Such an analysis is likely the only way a court could conclude that the law is not neutral.

In testing a law under the second prong of the equal protection test, that is, whether the law is generally applied, the question is whether the government has "in a selective manner impose[d] burdens only on conduct motivated by religious belief."[149] While all laws have some degree of selectivity, the Free Exercise Clause "protect[s] religious observers against unequal treatment."[150] "Inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."[151] The animal sacrifice law from *Lukumi* was not generally applicable because other forms of animal killing, which fell under the language of the statute, were not being enforced.[152] In contrast, all-comers policies for student organizations are generally applicable because they apply to every student and every club.[153]

Keeton and *Ward*[154] give significant guidance on how courts will treat counselors' potential free exercise claims. Both cases demonstrate the likelihood that the ACA Code of Ethics[155] will be used against a religious coun-

147. *Id.* Based on the arguments made, however, one must wonder if evidence was presented to challenge this conclusion.

148. *See id.*

149. Church of the Lukimi Babulu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543 (1993).

150. *Id.* at 542.

151. *Id.* at 542-43.

152. *Id.* at 543-44. Some examples of animal killing that was not enforced include fishing, animal trapping such as mice traps, and humanely euthanizing animals.

153. Christian Legal Society v. Martinez, 561 U.S. 661 (2010) (holding that a nondiscrimination policy requiring access for all people to all clubs, including homosexuals to Christian organizations, does not violate the Free Exercise Clause).

154. *Watts* would appear to be another case in which a free exercise claim would have given guidance. However, there, the district court had incorrectly dismissed the free exercise claim because the plaintiff had failed to allege that the termination of Watts had "substantially burdened his observation of a central religious belief." Watts v. Florida Int'l Univ., 495 F.3d 1289, 1294 (11th Cir. 2007). The Eleventh Circuit corrected this error stating that all Watts had to allege was that it impermissibly burdened one of his "sincerely held religious beliefs." *Id.* A full free exercise analysis was not done. What can be learned from *Watts,* however, is that a "plaintiff need not prove the objective reasonableness of his religious belief." *Id.* at 1298.

155. There is not much consistency among the states as to whether the ACA Code of Ethics has been codified. However, as of 2010, twenty-one jurisdictions have either codified or use the ACA Code of Ethics in some way. AM. COUNSELING ASS'N, *State Licensure Boards that have Adopted the ACA Code of Ethics 2010* (2010), *available at http://www.counseling.org/docs/ethics/aca-code-of-ethics-2010-%2812-22-09%29.pdf?sfvrsn=2.* Other standards of ethics govern in different jurisdictions. Since the ACA Code of Ethics has been used by the gatekeepers to the professions, *i.e.* the universi-

selor. This analysis is likely to extend to the state boards as well. In *Keeton*, the Eleventh Circuit found the school's policy to be neutral and generally applicable because the school was simply applying the ACA Code of Ethics on everybody.[156] The court found the school's policy to be generally applicable because no evidence existed that it applied the ACA Code of ethics in a selective manner.[157] By using inverse logic, this should mean that if a student counselor can find examples of instances where a student counselor's beliefs, statements, or behavior violates the ACA Code of Ethics, and a remediation plan was not imposed, then the policy would not be generally applied. This is just what happened in *Ward*. Ward had been disciplined for making a values-based referral, but other forms of referrals were allowed by both the university and the ACA Code of Ethics.[158] The school had also disciplined Ward for "discrimination," but the ACA Code of Ethics allows for other secular forms of referrals that might seem discriminatory as well, such as for socioeconomic reasons and end of life issues.[159] In any circumstance where a counselor finds him or herself the recipient of a disciplinary action by a state board, they should find evidence of non-religious violations that are going without discipline, which would demonstrate that the ethics code is not generally applied. In a referral situation, counselors should point to the same referral provisions of the ACA Code of Ethics referenced in Ward.[160]

2. The Individualized-Exemption Exception

The discretionary authority given to state licensing boards leads to an analysis separate from the test laid out in *Smith*. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[161] "[I]n circumstances in which individualized exceptions from a general requirement are available, the government may not refuse to extend that system to

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ties, to discipline future counselors, and because it is the most well-known code of ethics, this analysis focuses on the ACA Code of Ethics. A state by state analysis will be required should an issue arise in a court that has not codified the ACA Code of Ethics. However, it is anticipated that any free exercise concern which manifests in a different jurisdiction would likely have a similar analysis.

156. Keeton v. Anderson-Wiley, 664 F.3d 865, 880 (11th Cir. 2011).

157. *Id.*

158. Ward v. Polite, 667 F.3d 727, 739 (6th Cir. 2011).

159. *Id.*

160. Otherwise, a counselor should look to the ACA Code of Ethics to look for provisions friendly to a religious counselor. *See supra* Part III.

161. Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 882 (1990) (citing Bowden v. Roy, 476 U.S. 693,708 (1986)).

cases of religious hardship without compelling reason."[162] A system that falls under this exception is one where "case-by-case inquiries are routinely made, such that there is an 'individualized governmental assessment of the reasons for the relevant conduct' that 'invites considerations of the particular circumstances' involved in the particular case."[163]

The most clear example of such an assessment comes from *Sherbert v. Verner*,[164] where a Seventh Day Adventist was fired because she refused to work on Saturdays.[165] She was denied unemployment benefits for failing to demonstrate "good cause" for her unemployment.[166] In *Sherbert*, the "'good cause' exemption required an official to examine an applicant's specific, personal circumstances."[167]

Similarly, in *Axson-Flynn*, a Mormon student actor was, more or less, told to leave the program because she would not curse during her assignments.[168] However, other religious requests were accommodated, indicating that discretionary exemptions from curricular requirements were granted. A Jewish student, for example, was excused from an exercise during Yom Kippur.[169]

A state licensing board would have to face scrutiny under this exception because of the discretionary power given to those boards. For example, in Illinois, the Counseling Department "may" refuse a license or "may" revoke, suspend, place on probation, or reprimand a licensee's license "as the Department deems appropriate," for a number of reasons.[170] Such an individualized assessment on whether to, and how to, discipline a licensee would surely fall under the case-by-case assessment the individualized-exemption exception would require.

Smith contemplated that the *Sherbert* test would survive in the limited cases involving the individualized governmental assessment.[171] "Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[172] In order for a disciplinary action against a licensee to be upheld, the regulation would either have to "represent[] no infringement by the State of [his or]

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162. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993).

163. Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) (citing *Smith*, 494 U.S. at 882).

164. Sherbert v. Verner, 374 U.S. 398 (1963).

165. *Axson-Flynn*, 356 F.3d at 1297 (citing *Sherbert*, 374 U.S. 398 (1963)).

166. *Axson-Flynn*, 356 F.3d at 1297.

167. *Id.* at 1298.

168. *Id.* at 1281-82.

169. *Id.*

170. 225 ILL. COMP. STAT. 107/80 (2013).

171. Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 884 (1990).

172. *Id.* at 883 (citing Sherbert v. Verner, 374 U.S. 398, 402-03 (1963)).

her constitutional rights of free exercise" or that "any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest.[']"[173] As stated, in finding that an unemployment statute burdens free exercise of religion, the *Sherbert* Court observed that, "The [lower court] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[174] Similarly, if a state licensing board were to discipline a counselor in a manner similar to *Keeton* and *Ward*, a counselor would be forced to choose between following the precepts of his or her religion and risk losing his or her license or abandoning the precepts of his or her religion in order to find work in the counseling field. Further, for the reasons cited in Section C below, the state interest is not compelling.

C. STRICT SCRUTINY AND POLICY ANALYSIS

The policy concerns surrounding both the SOCE laws and counselor discipline cases speak not only to policy, but also demonstrate why the interests of the state are not compelling. Both types of regulation should not pass strict scrutiny.[175] Laws that are susceptible to strict scrutiny analysis can prevail "*only to prevent grave and immediate danger* to interests which the state may lawfully protect."[176] Examples of laws that pass strict scrutiny, which come infrequently, include the compelling interests to eliminate child labor laws,[177] and eradicating racial discrimination in education.[178] However, SOCE laws and "discriminatory" counselors do not rise to the level of "compelling" because there is no consensus on the danger of SOCE. There are families who wish to have SOCE and other religious counseling available to them, and prohibiting "discrimination" is not in the best interest of the counselor or the patient.

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173. *Sherbert*, 374 U.S. at 403.

174. *Id.* at 404.

175. Michael J. Perry developed an interesting theory that, when examining the test laid out in *Smith* and *Lukumi*, a violation of the free exercise clause will, *ipso facto*, fail to meet the strict scrutiny test. "This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest." Michael J. Perry, *What Do the Free Exercise & Nonestablish Norms Forbid? Reflections on the Constitutional Law of Religious Freedom*, 1 U. ST. THOMAS L.J. 549, 563 n.35 (2004) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 579 (1993)). If true, this same logic may apply to protected speech.

176. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (emphasis added).

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

178. Bob Jones Univ. v. United States, 761 U.S. 574 (1983).

First, this Article is not written to convince its reader that SOCE is an acceptable practice. It is, however, designed to convince its reader that there is no consensus on the subject. It also is not a proponent of the archaic styles of SOCE therapy such as shock therapy, mental abuse or physical abuse.[179] California has banned any practices by mental health providers that seek to change an individual's sexual orientation.[180] New Jersey's ban is similarly broad.[181] It is the non-aversive form of this type of therapy, as described in *Pickup*,[182] that should be protected by the First Amendment.

The New Jersey statute is based upon the presupposition that "[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming."[183] The statute states that "[t]he major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years."[184] However, studies show that there are, at the very least, problems that correlate with same sex attractions. Some studies have shown that homosexual men will seek out treatment to reduce same sex attraction for reasons such as troubled relationships, problems with their marriage, and for religious reasons.[185] In the case of homosexual women, it has been shown that the women have a common history of underlying maternal deficiencies in their childhood or may have suffered from abuse and trauma, resulting in detachment from others and a lack of a core identity.[186] The problems can lead to lifelong feelings of depression.[187] If treatment for these issues, or others, would have an end result of reduced same-sex attraction, the problems may go untreated by counselors out of fear of violating the SOCE ban. This factor not only diminishes the states' cases that the laws are compelling, but it also indicates that the New Jersey and California laws may cause counselors to avoid other counseling goals. Therefore, the laws are not narrowly tailored to achieve only the targeted ban of SOCE.

The New Jersey law is also based on another presupposition that "sexual orientation change efforts can pose critical health risks to lesbian, gay,

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179. One would think that criminal laws would be neutrally written and generally applied in such a way to prevent these practices.

180. *See* CAL. BUS. & PROF. CODE § 865 (West 2013).

181. *See* N.J. STAT. ANN. § 45:1-55 (West 2013).

182. Pickup v. Brown, 728 F.3d 1042, 1049 (9th Cir. 2013).

183. N.J. STAT. ANN. §§ 45:1-54.1 (West 2013).

184. *Id.*

185. Karten & Wade, *supra* note 143, at 99-100. This study was done for males specifically, but, at the very least, it demonstrates that there are legitimate reasons for someone to seek out a therapist for SOCE therapy.

186. Janelle Hallman, *Helping Women with Same-Sex Attraction*, NARTH INST. 39-40 http://www.narth.org/docs/hallman.pdf (last visited Feb. 14, 2015).

187. *Id.*

and bisexual people . . . ."[188] This too has not garnered a consensus in the therapeutic community. One longitudinal study of SOCE efforts found that the only statistically significant trend was an *improvement* in global factors and stress intensity psychological factors.[189] It concluded that "the findings of this study appear to contradict the commonly expressed view that sexual orientation is not changeable and that the attempt to change is highly likely to result in harm for those who make such an attempt."[190] Again, while these studies may not tip the scale for the mind of the reader from an opponent of SOCE to a proponent of it, they do demonstrate examples of research that contradict the consensus that legislatures appear to draw upon. Because of this, the risks associated to SOCE are not a grave and immediate danger that rises to the level of a compelling interest of the state. Further, as stated above, the practice is mainly religious and often parents and their children themselves will seek out the treatment.[191] If the ban continues, counselors and patients alike will retreat to the churches, where regulation altogether ceases.[192] Otherwise, the patients will lose access to a service that they may otherwise want.

If a licensing board were to target a counselor for "discriminating" against a homosexual patient, both the counselor and the patient would be done a disservice. For the counselor, they would be forced to choose between their profession and their religion, which is a position that no person should be placed. But, the aim of those who push anti-discrimination laws is not for the well being of the discriminator, but rather the person they deem discriminated against.

Not all counseling patients are alike. Many counseling patients prefer to discuss religious or spiritual issues in a counseling session.[193] But, clients tend to want to have a counselor with a similar worldview as their own. For example, conservative Christians tend to prefer to be counseled by conservative Christian counselors,[194] homosexual men lend more credibility to

188. N.J. STAT. ANN. §§ 45:1-54.2 (West 2013).

189. Stanton L. Jones & Mark A. Yarhouse, *A Longitudinal Study of Attempted Religiously Mediated Sexual Orientation Change*, 37 J. SEX & MARITAL THERAPY 404, 424 (2011).

190. *Id.* at 425.

191. *See* Haldeman, *supra* note 140.

192. *See, e.g.*, Pickup v. Brown, 728 F.3d 1042, 1050 (9th Cir. 2013). Might this exception mean that the regulation of SOCE is not narrowly tailored to achieve the desired result?

193. Brian C. Post et al., *Religion & Spirituality in Group Counseling: Beliefs and Preferences of University Counseling Center Clients*, 18 GRP. DYNAMICS: THEORY, RES. & PRAC. 53, 63 (2013).

194. Christine Belaire et al., *Inclusion of Religious Behaviors & Attitudes in Counseling: Expectations of Conservative Christians*, 49 COUNSELING & VALUES 82, 90 (2005).

counselors who are homosexual,[195] and black clients tend to prefer black counselors.[196] However, if a counselor is not permitted to "discriminate," the client may not be able to receive a counselor best suited to his or her preferences. A counselor would be forced to provide services to a client, despite not being as well suited to serve that client as another counselor would be. Further, if the gatekeepers weed out religious counselors, the religious clients would be without their preferred counselors. Since the end result of regulation similar to that of *Keeton* and *Ward* would be to have counselor-client pairings that are less suitable to all parties involved, the interest is not compelling. Similar to the SOCE analysis, if licensure boards press this issue, counselors will simply retreat to the church.[197]

V. CONCLUSION

It would be wise for legislators and judges alike to look to the unintended consequences of prohibiting SOCE or forcing counselors to counsel against their own beliefs. In the case of SOCE, minor patients and their parents are left without a service they may otherwise want, wish, or need to have. In the case of declaring referrals to be "discrimination," *Ward* encapsulates the potential results well when it points out that such a position would also require a Muslim counselor to affirm a Jewish client's religious beliefs and an atheist counselor to affirm to a religious client that there is a God.[198] In order to be generally applied, these rather absurd situations would be mandated.

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195. *See generally* Donald Atkinson et al., *Sexual Preference Similarity, Attitude Similarity, and Perceived Counselor Credibility and Attractiveness*, 28 J. COUNS. PSYCHOL. 504 (1981).

196. *See generally* C. Edward Watkins, Jr. & Francis Terrell, *Mistrust Level and Its Effects on Counseling Expectations in Black Client-White Counselor Relationships: An Analogue Study*, 35 J. COUNS. PSYCHOL. 194 (1988).

197. *See, e.g.*, 225 ILL. COMP. STAT. ANN. 107/15 (West, Westlaw through P.A. 98-1150 of the 2014 Reg. Sess.), which states that "[d]uly recognized members of any religious organization shall not be restricted from functioning in their ministerial capacity provided they do not represent themselves as being professional counselors or clinical professional counselors . . . ."

198. Ward v. Polite, 667 F.3d 727, 735 (6th Cir. 2012).