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# “Labeling Games”: Classification of Counseling as Speech Versus Conduct

Diahann DaSilva

*Boston College Law School*, [diahann.mccooley@bc.edu](mailto:diahann.mccooley@bc.edu)

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# PLAYING A “LABELING GAME”: CLASSIFYING EXPRESSION AS CONDUCT AS A MEANS OF CIRCUMVENTING FIRST AMENDMENT ANALYSIS

**Abstract:** Courts have long recognized that the First Amendment protects both certain classes of speech and certain forms of conduct. Recently, in the context of state regulations prohibiting a particular form of counseling, courts have considered whether mental health counseling in the form of talk therapy falls within the category of conduct protected under the First Amendment. This Note argues that labeling an activity that takes place by means of speech as conduct is improper and leads to the perverse result of avoiding First Amendment analysis. In doing so, this Note examines the protection of speech and conduct under the First Amendment, explores opposing outcomes reached by several courts in considering the protection of counseling communications, and ultimately concludes that courts should not engage in “labeling games” that permit regulations of expression to be upheld without ever being subjected to First Amendment analysis.

## INTRODUCTION

Use of mental health treatment by adults in the United States has become more widespread since such treatment originated after World War II.<sup>1</sup> Recent studies show that millions of adults in the United States receive mental health treatment each year.<sup>2</sup> One form of mental health treatment is psychotherapy or

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<sup>1</sup> See *The Prevalence and Treatment of Mental Health Today*, HARV. HEALTH PUBLICATIONS (Dec. 5, 2005) <http://www.health.harvard.edu/mind-and-mood/the-prevalence-and-treatment-of-mental-illness-today>, archived at <http://perma.cc/HKU7-YP2P> (stating that Americans have increased their use of mental health services due to “greater public awareness, more effective diagnosis, less stigma, more outreach programs, and greater availability of medications”).

<sup>2</sup> Karen Pallarito, *Poll: Mental Health Care Goes Mainstream*, HEALTHDAY, <http://consumer.healthday.com/mental-health-information-25/depression-news-176/poll-mental-health-care-goes-mainstream-518741.html>, archived at <http://perma.cc/9FNF-L6GB> (last updated May 7, 2004) (providing that a poll showed that one in four adults in the United States had received mental health treatment in the two years preceding the poll); *Results from the 2012 National Survey on Drug Use and Health: Mental Health Findings*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Dec. 2013), [http://archive.samhsa.gov/data/NSDUH/2k12MH\\_FindingsandDetTables/2K12MHF/NSDUHmhfr2012.htm](http://archive.samhsa.gov/data/NSDUH/2k12MH_FindingsandDetTables/2K12MHF/NSDUHmhfr2012.htm), archived at <http://perma.cc/TK9M-L67G> (providing that, in 2012, “34.1 million persons aged 18 or older (14.5 percent of the population aged 18 or older) received mental health treatment or counseling during the past 12 months”); *Use of Mental Health Services and Treatment Among Adults*, NAT’L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/statistics/prevalence/use-of-mental-health-services-and-treatment-among-adults.shtml>, archived at <http://perma.cc/6HMJ-7QB9> (last visited Mar. 17, 2015).

“talk therapy,” which involves a patient discussing the problems, issues, and events in their life with a therapist.<sup>3</sup> The goal of this process is for the patient to improve their quality of life by gaining insight and relief from the stressors that caused them to seek treatment.<sup>4</sup>

The extent of what can be said in these talk therapy sessions, however, has recently become a subject of controversy.<sup>5</sup> California and New Jersey both have statutes prohibiting the use of conversion therapy as applied to minors.<sup>6</sup> Conversion therapy involves a counselor using therapeutic techniques to change a patient’s sexual orientation.<sup>7</sup> The legislation has been challenged in both states by plaintiffs who claim that their right of free expression under the First Amendment has been violated by this ban.<sup>8</sup> One of the threshold issues courts must face in analyzing these claims is whether counseling communications should be classified as speech or conduct.<sup>9</sup> After considering counseling communications, some courts have determined that it is speech, while other

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(providing that in 2008, “13.4 percent of adults in the United States received treatment for a mental health problem”).

<sup>3</sup> Kendra Cherry, *What Is Talk Therapy?*, PSYCHOLOGY.ABOUT.COM, <http://psychology.about.com/od/tindex/f/talk-therapy.htm>, archived at <http://perma.cc/P57Q-JGHE> (last visited Mar. 17, 2015); *Psychotherapies*, NAT’L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/psychotherapies/index.shtml>, archived at <http://perma.cc/UBC3-ZHXP> (last visited Mar. 17, 2015). Other forms of therapy include medication and brain stimulation therapies. *Mental Health Information*, NAT’L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/index.shtml>, archived at <http://perma.cc/9DV4-PXDS> (last visited Mar. 17, 2015). Medication alone may be provided to treat mental disorders or it may be provided in conjunction with psychotherapy. *Mental Health Medications*, NAT’L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/publications/mental-health-medications/index.shtml>, archived at <http://perma.cc/EPV4-F2SX> (last visited Mar. 17, 2015). Brain stimulation therapies refer to treatments that involve “activating or touching the brain directly with electricity, magnets, or implants to treat depression and other disorders.” *Brain Stimulation Therapies*, NAT’L INST. OF MENTAL HEALTH, <http://www.nimh.nih.gov/health/topics/brain-stimulation-therapies/brain-stimulation-therapies.shtml>, archived at <http://perma.cc/7E5Y-WF55> (last visited Mar. 17, 2015).

<sup>4</sup> Cherry, *supra* note 3.

<sup>5</sup> See *Pickup v. Brown (Pickup II)*, 728 F.3d 1042, 1051 (9th Cir. 2013), *abrogated and superseded by Pickup v. Brown (Pickup III)*, 740 F.3d 1208 (9th Cir. 2014); *King v. Christie (King I)*, 981 F. Supp. 2d 296, 303 (D. N.J. 2013), *aff’d*, 767 F.3d 216 (3d Cir. 2014); *Pickup v. Brown (Pickup I)*, 42 F. Supp. 3d 1347, 1349 (E.D. Cal. Dec. 4, 2012), *aff’d*, 740 F.3d 1208 (9th Cir. 2014); *Welch v. Brown*, 907 F. Supp. 2d 1102, 1112 (E.D. Cal. 2012), *rev’d sub nom.*, *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013).

<sup>6</sup> See CAL. BUS. & PROF. CODE § 865.1 (West 2012 & Supp. 2015); N.J. STAT. ANN. § 45:1-55 (West 2004 & Supp. 2014).

<sup>7</sup> See CAL. BUS. & PROF. CODE § 865.1. Sexual orientation change efforts (“SOCE”) include techniques that are intended to change a person’s sexual orientation from homosexual to heterosexual. See *Pickup I*, 42 F. Supp. 3d at 1350–51.

<sup>8</sup> See *Pickup II*, 728 F.3d at 1051; *King I*, 981 F. Supp. 2d at 303.

<sup>9</sup> See *Pickup II*, 728 F.3d at 1051; *King I*, 981 F. Supp. 2d at 312; *Pickup I*, 42 F. Supp. 3d at 1358; *Welch*, 907 F. Supp. 2d at 1112.

courts have concluded that it is conduct.<sup>10</sup> Once a communication is determined to be conduct, regulation of that communication need not withstand First Amendment analysis.<sup>11</sup>

These cases raise the issue of whether a regulation of speech can be upheld without being subject to First Amendment analysis.<sup>12</sup> Additionally, these cases consider the constitutionality of a state's restriction on certain forms of counseling when it does not approve of the message being conveyed.<sup>13</sup> The constitutional analysis requires a determination as to whether counseling constitutes expression that should be afforded protection under the First Amendment.<sup>14</sup> In answering these questions, courts begin by classifying counseling as either speech or conduct.<sup>15</sup> That classification determines whether First Amendment protection is afforded to counseling communications.<sup>16</sup>

This Note considers whether counseling communications should be classified as speech or conduct and argues that counseling communications should be considered speech, which means that any restriction of those communications should be subject to First Amendment analysis.<sup>17</sup> Part I examines the significance of freedom of speech, the speech versus conduct dichotomy, and prior cases involving the classification of counseling communications as speech or conduct.<sup>18</sup> Part II explores the classification of counseling communications by courts as speech or conduct and the standard of review applied to a regulation restricting communication during counseling sessions.<sup>19</sup> Finally, Part III argues

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<sup>10</sup> Compare *Pickup II*, 728 F.3d at 1051 (determining that counseling communications were conduct), and *King I*, 981 F. Supp. 2d at 320 (holding that counseling communications amounted to conduct), with *Pickup I*, 42 F. Supp. 3d at 1358 (holding that counseling communications were conduct), and *Welch*, 907 F. Supp. 2d at 1112 (finding that counseling communications were speech for purposes of First Amendment analysis).

<sup>11</sup> See *Pickup II*, 728 F.3d at 1057 (applying rational basis review after determining that counseling was conduct).

<sup>12</sup> See *Pickup III*, 740 F.3d at 1214–15 (O’Scannlain, J., dissenting) (observing that the ability to avoid First Amendment scrutiny by classifying “disfavored talk” as conduct is “what these cases are really about”).

<sup>13</sup> See *Pickup II*, 728 F.3d at 1051; *King I*, 981 F. Supp. 2d at 303.

<sup>14</sup> *Pickup II*, 728 F.3d at 1051; *King I*, 981 F. Supp. 2d at 312.

<sup>15</sup> See *Pickup II*, 728 F.3d at 1051.

<sup>16</sup> See *id.*; *King I*, 981 F. Supp. 2d at 312; cf. John T. Haggerty, Note, *Begging and the Public Forum Doctrine in the First Amendment*, 34 B.C. L. REV. 1121, 1125 (1993) (showing that courts determine whether an activity is considered speech as a threshold issue in the First Amendment context). In this Note, “counseling” refers to treatment provided by a licensed mental health professional to a patient. Cf. CAL. BUS. & PROF. CODE § 2903 (West 2012 & Supp. 2015) (providing that no person may engage in practicing psychology without a license).

<sup>17</sup> See *infra* notes 185–243 and accompanying text.

<sup>18</sup> See *infra* notes 21–101 and accompanying text.

<sup>19</sup> See *infra* notes 102–184 and accompanying text.

that counseling communications is not conduct and, therefore, regulations restricting counseling communication should be subject to strict scrutiny.<sup>20</sup>

## I. SPEECH VERSUS CONDUCT: TREATMENT UNDER THE FIRST AMENDMENT AND PRIOR CLASSIFICATIONS OF COUNSELING

To determine the proper level of constitutional protection for counseling communications, it is necessary to understand the distinction between speech and conduct and how classification of an activity affects the level of scrutiny applied to regulations restricting that activity.<sup>21</sup> Furthermore, it is helpful to reflect upon the importance of freedom of speech under the First Amendment.<sup>22</sup> This Part examines the distinction between speech and conduct, the implications of that distinction, and how courts have classified various activities as speech or conduct.<sup>23</sup> First, Section A discusses the importance of freedom of speech under the First Amendment.<sup>24</sup> Section B then explains the test that courts have established to determine whether an activity is speech or conduct, the standard used to determine whether a regulation is constitutional, and examples from relevant cases decided by the U.S. Supreme Court.<sup>25</sup> Finally, Section C considers two cases decided by the U.S. Court of Appeals for the Ninth Circuit analyzing the regulation of speech in contexts similar to counseling.<sup>26</sup>

### A. First Amendment: Protecting Even Hated Speech

The First Amendment of the U.S. Constitution guarantees the right of free expression by providing that “Congress shall make no law . . . abridging the freedom of speech.”<sup>27</sup> Under the First Amendment, the government is generally unable to restrict certain classes of speech in any way.<sup>28</sup> When the govern-

<sup>20</sup> See *infra* notes 185–243 and accompanying text.

<sup>21</sup> See Haggerty, *supra* note 16, at 1125; see also Michael A. Henderson, Comment, *Today’s Symbolic Speech Dilemma: Flag Desecration and the Proposed Constitutional Amendment*, 41 S.D. L. REV. 533, 543–47 (1996) (describing symbolic conduct and the level of scrutiny applied by courts depending on whether a regulation is content-based or content-neutral).

<sup>22</sup> See Henderson, *supra* note 21, at 535 (discussing the significance of the right to free speech under the First Amendment).

<sup>23</sup> See *infra* notes 27–101 and accompanying text.

<sup>24</sup> See *infra* notes 27–41 and accompanying text.

<sup>25</sup> See *infra* notes 42–90 and accompanying text.

<sup>26</sup> See *infra* notes 91–101 and accompanying text.

<sup>27</sup> U.S. CONST. amend. I.

<sup>28</sup> See *Marsh v. Alabama*, 326 U.S. 501, 511 (1946) (Frankfurter, J., concurring) (observing that “[w]here the First Amendment applies, it is a denial of all governmental power in our Federal system”); Brent Hunter Allen, Note, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation*, 47 VAND. L. REV. 1073, 1082 (1994) (recognizing that full protection is granted to political speech and certain kinds of non-political speech, including art and literature).

ment attempts to restrict protected classes of speech, courts apply a particular level of scrutiny in their judicial review of the regulation's constitutionality.<sup>29</sup> Courts determine the appropriate level of scrutiny to apply based on the class of speech that the government is attempting to restrict and the type of regulation.<sup>30</sup>

Freedom of speech has been recognized as a fundamental aspect of individual liberty and our democratic system of government.<sup>31</sup> In reflecting on this right, the U.S. Supreme Court has stated that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>32</sup> The three leading justifications for affording high levels of protection to speech include the marketplace of ideas theory,<sup>33</sup> the self-governance theory,<sup>34</sup> and the self-fulfillment theory.<sup>35</sup>

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<sup>29</sup> *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 642 (1994) (describing various levels of scrutiny that may be applied in examining a restriction on speech); see Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1095 (2000) (recognizing that certain classes of speech may be restricted only by laws that pass strict scrutiny); Haggerty, *supra* note 16, at 1125–26 (describing how courts determine the level of scrutiny to apply when analyzing a restriction on speech).

<sup>30</sup> See *Turner*, 512 U.S. at 642 (providing that the level of scrutiny applied to a restriction on speech turns on certain factors, such as whether the restriction is content-neutral or content-based); Haggerty, *supra* note 16, at 1125–26 (providing that whether a regulation of speech is content-neutral or content-based determines the level of scrutiny that will be applied in examining the regulation); *infra* notes 76–90 and accompanying text (describing the various levels of scrutiny applied by courts and how courts determine which level of scrutiny should be applied).

<sup>31</sup> See *Dennis v. United States*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting) (stating that the protection of free speech is “essential to the very existence of a democracy”); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (describing the freedom of speech as “among the fundamental personal rights and liberties which are secured to all persons”); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (explaining that “those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth” and this freedom “should be a fundamental principle of the American government”); see also *Henderson*, *supra* note 21, at 535 (stating that the “concept of free speech has long been recognized as a cornerstone of individual liberty”).

<sup>32</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>33</sup> RODNEY A. SMOLLA, *THE FIRST AMENDMENT: FREEDOM OF EXPRESSION, REGULATION OF MASS MEDIA, FREEDOM OF RELIGION* 14 (1999). The marketplace theory opposes speech regulation because it holds that the best test of an idea is its ability to prevail in a competitive market. See *id.* The marketplace metaphor is based on an “essentially optimistic vision of human history, a faith that over the long run, good will conquer evil.” See *id.* Under this theory, free speech allows truth to persist as long as necessary to overcome falsehoods. See *id.*; see also Haggerty, *supra* note 16, at 1130 (describing the marketplace of ideas theory as one of the values underlying the First Amendment).

<sup>34</sup> See SMOLLA, *supra* note 33, at 14–15. The self-governance theory holds that free speech is an essential instrument of self-governance in a democratic society. See *id.* at 14. This theory recognizes several ways in which free speech supports self-governance. *Id.* For example, it enables public participation in the decision-making process that shapes society. See *id.* It also furthers the pursuit of political truth and helps ensure that the will of the majority is implemented. See *id.* Finally, it prevents government from acting beyond the constraints of its power and encourages stability. See *id.*

Justice Oliver Wendell Holmes, Jr. recognized that the immense value of the First Amendment derives from its protection of not only “free thought for those who agree with us but freedom for the thought that we hate.”<sup>36</sup> The freedom to discuss ideas that are hated serves an important role as a test for society’s biases and preconceptions.<sup>37</sup> Moreover, free exchange allows society to better prepare to deal with conflicts that threaten to undermine stability.<sup>38</sup>

Oral speech and the printed word are generally protected under the First Amendment.<sup>39</sup> Nevertheless, the First Amendment does not provide absolute protection to speak free from restriction depending on the content of speech and the location where speech occurs.<sup>40</sup> Courts have identified certain kinds of speech as unprotected, including fighting words, obscenity, and child pornography.<sup>41</sup>

<sup>35</sup> *See id.* at 15. The self-fulfillment theory views free speech as an end in itself. *See id.* According to this theory, free speech requires protection not because it benefits the common good, but rather because it is “intertwined with human autonomy and dignity.” *See id.* The state, therefore, should not be able to regulate an individual’s speech because it is connected to the ability to “think, imagine, and create,” which is a revered aspect of individuality. *See id.*

<sup>36</sup> *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). In 2010, Justice Samuel Alito endorsed this statement by noting that the “proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’” *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 706 (2010) (Alito, J., dissenting).

<sup>37</sup> *See Dennis*, 341 U.S. at 584 (Douglas, J., dissenting) (“Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions.”); *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”); *Abrams v. United States* 250 U.S. 616, 630 (1919) (“[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

<sup>38</sup> *See Dennis*, 341 U.S. at 584 (Douglas, J., dissenting) (“Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.”); *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (“[O]rder cannot be secured merely through fear of punishment for its infraction . . . that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . .”).

<sup>39</sup> *See Dennis*, 341 U.S. at 585 (Douglas, J., dissenting) (stating that “free speech is the rule, not the exception”); DAVID L. HUDSON JR., *THE FIRST AMENDMENT: FREEDOM OF SPEECH* 48 (2012) (noting that both oral and written speech is generally protected under the First Amendment).

<sup>40</sup> *See Cohen v. California*, 403 U.S. 15, 19 (1971) (providing that the First Amendment has “never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses”).

<sup>41</sup> *See Henderson*, *supra* note 21, at 543. The U.S. Supreme Court has held that obscene speech, “sexually explicit material that violates fundamental notions of decency,” was not protected under the First Amendment. *United States v. Williams*, 553 U.S. 285, 288 (2008). Likewise, the U.S. Supreme Court has recognized that child pornography, in the form of sexually explicit images featuring children, is a category of prohibited speech. *Id.* Otherwise, however, images of sexual acts are generally a form of communication and, thus, speech protected by the First Amendment. *See Ashcroft v. Free*

*B. Protecting Expression: Distinguishing Activities Warranting Protection  
and Subjecting Attempted Regulation  
to More Demanding Scrutiny*

Modern courts have recognized that the protection afforded by the First Amendment is not limited to the “spoken or written word.”<sup>42</sup> Certain kinds of conduct are also protected under the First Amendment.<sup>43</sup> Subsection 1 discusses how courts distinguish between conduct that receives protection under the First Amendment and conduct that is not protected.<sup>44</sup> Subsection 2 then explores the different levels of scrutiny applied to each.<sup>45</sup>

### 1. Distinguishing Protected Conduct

The U.S. Supreme Court has established a standard for determining when conduct is sufficiently expressive and should be protected.<sup>46</sup> Conduct receives First Amendment protection when it is intended to convey a message and that message is likely to be understood.<sup>47</sup> Communication often occurs in a manner other than oral speech or the printed word.<sup>48</sup> Many types of expression involve

Speech Coal., 535 U.S. 234, 246 (2002) (recognizing that child pornography as a class of unprotected speech does not include virtual child pornography which is not produced with real children); Andrew Koppelman, *Free Speech and Pornography: A Response to James Weinstein*, 31 N.Y.U. REV. L. & SOC. CHANGE 899, 908–09 (2007) (recognizing that the Supreme Court has deemed child pornography to be “constitutionally distinct” from virtual images of child pornography). Fighting words are words that cause injury immediately after being spoken and are likely to cause a swift breach of peace. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

<sup>42</sup> See *Johnson*, 491 U.S. at 404 (providing that the Court has “long recognized that its protection does not end at the spoken or written word,” but also includes certain kinds of conduct); *Spence v. Washington*, 418 U.S. 405, 409 (1974) (holding that where conduct is sufficiently expressive, it is protected under the First Amendment).

<sup>43</sup> See *Spence*, 418 U.S. at 409. The Court determined that protected conduct must contain sufficient communicative elements to implicate the First Amendment. See *id.*; see also *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (holding that nude dancing was expressive conduct protected under the First Amendment); *United States v. Eichman*, 496 U.S. 310, 315 (1990) (recognizing flag burning as expressive conduct that merits First Amendment protection).

<sup>44</sup> See *infra* notes 46–75 and accompanying text.

<sup>45</sup> See *infra* notes 76–90 and accompanying text.

<sup>46</sup> *Spence*, 418 U.S. at 410–11 (establishing the test for when conduct is considered sufficiently expressive to deserve First Amendment protection); see *infra* notes 51–56 and accompanying text (describing the U.S. Supreme Court’s test for determining when conduct is sufficiently expressive to warrant First Amendment protection).

<sup>47</sup> *Spence*, 418 U.S. at 410–11 (establishing the test for whether a form of conduct is protected under the First Amendment); see Haggerty, *supra* note 16, at 1124 (explaining that for conduct to be protected, the speaker must have intended the conduct to convey a certain message and there must be a great likelihood that the message would be understood); Sally A. Specht, Comment, 40 WASH. U. J. URB. & CONTEMP. L. 173, 179 (1991) (same).

<sup>48</sup> See *Pap’s A.M.*, 529 U.S. at 289 (explaining that nude dancing was expressive conduct, although it was in the outer limits of First Amendment protection); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (holding that nude dancing was expressive conduct); *Eichman*, 496 U.S. at



some form of conduct, such as participating in a protest.<sup>49</sup> Consequently, courts have struggled to classify certain forms of expression as either purely speech or purely conduct.<sup>50</sup>

The Supreme Court has held that certain kinds of conduct are sufficiently communicative to be considered expressive and receive First Amendment protections.<sup>51</sup> The Court employs a two-prong test to determine whether conduct is sufficiently communicative to warrant protection.<sup>52</sup> The first prong requires that the party intended to communicate a particularized message.<sup>53</sup> The second prong requires a determination of whether the message would be reasonably understood by those who receive it.<sup>54</sup> If an act satisfies both prongs, it qualifies as expressive conduct.<sup>55</sup> Courts have applied this test in many different cases,

315 (recognizing flag burning as expressive conduct); *Johnson*, 491 U.S. at 405–06 (determining that the burning of an American flag as part of a political demonstration was sufficiently expressive to warrant First Amendment protection); see also Haggerty, *supra* note 16, at 1123–24 (providing that the First Amendment reflects the desire to protect ideas and not merely words).

<sup>49</sup> See John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1494 (1975) (“To some extent expression and action are always mingled . . .”). Peaceful picketing has also been determined to be expressive conduct that is protected under the First Amendment. *Carey v. Brown*, 447 U.S. 455, 460 (1980). Additionally, flying an American flag with a peace symbol attached was sufficiently expressive to warrant First Amendment protection. *Spence*, 418 U.S. at 410–11.

<sup>50</sup> See Haggerty, *supra* note 16, at 1124 (noting that the U.S. Supreme Court has had difficulty distinguishing protected expression from ordinary conduct).

<sup>51</sup> See *Spence*, 418 U.S. at 409 (providing that even when a message is not conveyed via written or spoken words, it may be protected under the First Amendment if it is “sufficiently imbued with elements of communication”); Haggerty, *supra* note 16, at 1123 (providing that the U.S. Supreme Court has “not limited the First Amendment to the spoken or written word, but has extended the Amendment’s sweep to include conduct that conveys a message”).

<sup>52</sup> *Spence*, 418 U.S. at 410–11 (establishing a two-part test requiring that the speaker intended to convey a message and that there was a significant likelihood that the recipients of the message would understand it); see Haggerty, *supra* note 16, at 1124 (providing that the two-prong test requires that the speaker must have intended the conduct to convey a certain message and there must be a great likelihood that the message would be understood); Specht, *supra* note 47, at 179 (explaining that, in order for conduct to merit protection, the speaker must intend to convey a message and that message must be likely to be understood).

<sup>53</sup> *Spence*, 418 U.S. at 410–11 (holding that the speaker must have intended to convey a message for the conduct to be protected under the First Amendment); Haggerty, *supra* note 16, at 1124 (providing that the first prong of the test laid out in *Spence v. Washington* requires that the speaker intended to convey a message).

<sup>54</sup> *Spence*, 418 U.S. at 410–11 (requiring a great likelihood “that the message would be understood by those who viewed it” for conduct to be protected under the First Amendment); Haggerty, *supra* note 16, at 1124 (providing that the “Court required a strong likelihood that the audience could discern the intended message” for conduct to be protected).

<sup>55</sup> *Spence*, 418 U.S. at 410–11 (requiring both that the speaker intended to convey a message and that there was a significant likelihood that the recipients of the message would understand it for conduct to be protected under the First Amendment); Haggerty, *supra* note 16, at 1124 (stating that both prongs of the test set out in *Spence* must be satisfied before conduct receives First Amendment protection).

but a universal rule has proved elusive because the unique attributes of each activity must be considered.<sup>56</sup>

Due to the fact driven nature of determining whether an activity is speech or conduct, it is helpful to consider the Supreme Court's classification of those activities it has reviewed.<sup>57</sup> The Court has expressly rejected the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."<sup>58</sup>

The Court has found a variety of activities to be sufficiently expressive to warrant First Amendment protection.<sup>59</sup> For example, displaying an American flag with a peace symbol attached was a "pointed expression" as opposed to "mindless nihilism," and thus was a protected form of expression.<sup>60</sup> Additionally, the Court determined that nude dancing<sup>61</sup> and peaceful picketing constituted expressive conduct.<sup>62</sup> Conversely, the Court has determined that other

<sup>56</sup> See Specht, *supra* note 47, at 174 (stating that it "remains unclear what type of conduct is sufficiently expressive to warrant [F]irst [A]mendment protection").

<sup>57</sup> See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2010) (holding that the provision of material support by means of speech could not be considered solely conduct); *Pap's A.M.*, 529 U.S. at 289 (explaining that nude dancing was expressive conduct, although it was in the outer limits of First Amendment protection); *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (holding that physical assault was not expressive conduct and not protected under the First Amendment); *Eichman*, 496 U.S. at 315 (recognizing that the government's concession that flag burning was expressive conduct was necessary); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (concluding that prostitution manifested no expressive element); *Carey*, 447 U.S. at 460 (holding that peaceful picketing was expressive conduct that was protected under the First Amendment); *Spence*, 418 U.S. at 410–11 (holding that displaying an American flag with a peace symbol attached to it is sufficiently expressive to be protected under the First Amendment).

<sup>58</sup> *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

<sup>59</sup> See, e.g., *Johnson*, 491 U.S. at 405–06 (concluding that the burning of an American flag was protected under the First Amendment); *Carey*, 447 U.S. at 460 (determining that peaceful picketing was protected under the First Amendment); *Spence*, 418 U.S. at 410–11 (holding that flying an American flag with a peace symbol attached was constitutionally protected expressive conduct).

<sup>60</sup> *Spence*, 418 U.S. at 410–11; see also *Johnson*, 491 U.S. at 405–06 (noting that state's concession that the burning of an American flag as part of a demonstration was expressive conduct was "prudent").

<sup>61</sup> *Pap's A.M.*, 529 U.S. at 289 (holding that nude dancing was a form of protected expression, although it was nearing the boundaries of protected expression).

<sup>62</sup> *Carey*, 447 U.S. at 460 (concluding that there was "no doubt" that picketing by members of a civil rights organization on a public sidewalk in a residential neighborhood constituted expressive conduct).

activities, including prostitution<sup>63</sup> and physical assault, do not constitute expressive conduct.<sup>64</sup>

When the Court has found that an activity was sufficiently expressive to warrant protection, it has considered the activity's nature, context, and setting.<sup>65</sup> For example, the Court noted that activities involving flags and peaceful picketing had historically been recognized as expressive.<sup>66</sup> The Court also considered whether an activity occurred in the context of responding to a political event or issue, for instance in response to an American military action.<sup>67</sup> Furthermore, the Court noted the environment where the activity occurred, and whether those who were exposed to the activity would understand what was meant by it.<sup>68</sup> By comparison, in those cases where the Court determined that an activity was not sufficiently expressive to warrant protection, the Court relied upon the determination that there was not any expressive element of the activity at issue.<sup>69</sup> Based on the Court's reasoning, the context and environment where an activity occurs can provide additional support for a determination that an activity was expressive, but an activity fails to be expressive based only on the lack of an expressive element and not necessarily for the particular context or environment.<sup>70</sup>

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<sup>63</sup> See *Arcara*, 478 U.S. at 705 (holding that prostitution was not expressive conduct because such sexual activity did not have even "the semblance of expressive activity"). The Court distinguished prostitution from protected speech, such as the burning of a draft card, based on the fact that the burning of the card was meant to "carry a message," whereas the sexual activity "manifest[ed] absolutely no element of protected expression." See *id.*

<sup>64</sup> See *Mitchell*, 508 U.S. at 484 (concluding that physical assault was "not by any stretch of the imagination expressive conduct protected by the First Amendment").

<sup>65</sup> See *Spence*, 418 U.S. at 409–10. The communicative nature of flags had been recognized by the Court for decades. See *id.* at 410. The Court also looked to context to give meaning to the use of the flag. See *id.* The displaying of the flag had been "triggered by the Cambodian incursion and the Kent State tragedy," both important public issues. *Id.* The Court also noted that the majority of students who saw the flag would have understood what was meant by it. *Id.*; see *Johnson*, 491 U.S. at 406 (considering that the American flag was burned in the context of a political demonstration); *Carey*, 447 U.S. at 460 (recognizing that peaceful picketing had historically been treated as protected under the First Amendment).

<sup>66</sup> *Carey*, 447 U.S. at 460 (holding that peaceful picketing was expressive conduct protected under the First Amendment); *Spence*, 418 U.S. at 410 (recognizing the burning of an American flag as expressive conduct).

<sup>67</sup> See *Spence*, 418 U.S. at 410.

<sup>68</sup> See *id.* (noting that "it would have been difficult for the great majority of citizens to miss the drift" of the message); see also *Kime v. United States*, 459 U.S. 949, 950 (1982) (recognizing that it was "clear from the context" that by burning an American flag the petitioners were "making a statement of political protest" and that most citizens who observed the act would understand that message).

<sup>69</sup> See *Mitchell*, 508 U.S. 476 at 484; *Arcara*, 478 U.S. 697 at 705.

<sup>70</sup> See, e.g., *Mitchell*, 508 U.S. 476 at 484 (determining that physical assault was not protected expression without looking to the environment or context in which the conduct took place); *Arcara*, 478 U.S. at 705 (concluding that prostitution was not protected expression without examining the context because the activity contained "absolutely no element of protected expression"); *Carey*, 447

More recently, in 2010, in *Holder v. Humanitarian Law Project*, the U.S. Supreme Court considered an activity closer in nature to counseling than the previous examples.<sup>71</sup> The Court examined whether the provision of “material support” to particular groups in the form of speech was conduct or speech.<sup>72</sup> The plaintiffs claimed that their right to free expression had been violated because they were not able to provide legal training and advocacy advice to groups that had been classified as foreign terrorist organizations by the Secretary of State.<sup>73</sup> The Court reasoned that the regulation was content-based because it regulated the plaintiffs’ speech in communications with certain groups based on what they said.<sup>74</sup> Thus, the Court concluded that the law applied to the activity of providing support because the speech involved communicated a certain message and, therefore, a standard more demanding than intermediate scrutiny should be applied.<sup>75</sup>

## 2. Applying First Amendment Scrutiny

After reaching a conclusion as to whether an activity is protected under the First Amendment, courts must determine the appropriate level of scrutiny for analyzing the constitutionality of that activity’s regulation.<sup>76</sup> The level of First Amendment protection differs depending on whether an activity is con-

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U.S. at 460 (considering the historical treatment of peaceful picketing as part of the context in reaching the determination that the conduct was protected); *Spence*, 418 U.S. at 410 (considering both the environment where the conduct took place and the expressive nature of flags in reaching determination that attaching a peace symbol to the flag was expressive conduct).

<sup>71</sup> See 561 U.S. at 26.

<sup>72</sup> *Id.* The term “material support” is defined in the statute at issue as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials.” 18 U.S.C. § 2339A(b)(1) (2012).

<sup>73</sup> *Humanitarian Law Project*, 561 U.S. at 10–11. The Government argued that the statute only regulated conduct because it prohibited “material support,” which occurs in forms other than speech, and only “incidentally burdened” expression. *Id.* at 26. The Court recognized that the plaintiffs were able to speak freely about various groups and advocate for them independently, but that did not mean that the plaintiffs’ speech had not been impacted. See *id.*

<sup>74</sup> *Id.* at 26–28. The Court determined that the government was “wrong that the only thing actually at issue . . . [was] conduct” and, thus, incorrect in arguing that intermediate scrutiny was the appropriate standard of review. *Id.* at 26.

<sup>75</sup> *Id.* at 27–28. The Court rejected the government’s argument that, because the statute generally regulated conduct rather than speech, intermediate scrutiny should apply. *Id.*

<sup>76</sup> See *Pickup III*, 740 F.3d at 1231 (determining that rational basis review applied after concluding that the regulation in question had only an incidental effect on speech); *King I*, 981 F. Supp. 2d at 312 (explaining that courts must first determine whether an activity consists of protected speech and then decide the level of scrutiny that should apply when examining a restriction on that activity); Haggerty, *supra* note 16, at 1125 (providing that “[o]nce an activity is found to be protectable speech, a court must determine the level of scrutiny to apply to restrictions on that activity”).

sidered speech or conduct.<sup>77</sup> If an activity is considered conduct, courts apply rational basis review because the regulation does not impact protected expression.<sup>78</sup> Under rational basis review, a statute will be upheld if the state meets its burden of identifying a legitimate state interest that the state legislature could have rationally concluded was advanced by the statute at issue.<sup>79</sup> This is a highly deferential standard; therefore, it is uncommon for courts to declare a regulation unconstitutional under rational basis review.<sup>80</sup>

In contrast, if a court classifies an activity as speech and the regulation of that activity restricts the expression involved in the activity, then the court takes a two-track approach in reviewing the constitutionality of the regulation based on whether restrictions are content-based or content-neutral.<sup>81</sup> Content-based restrictions are targeted to prohibit speech, whereas content-neutral restrictions are aimed at another activity and merely affect speech incidentally.<sup>82</sup> The primary test for determining whether a regulation is content-neutral or content-based is by looking at whether certain kinds of speech have been prohibited as a result of the government's disagreement with the message conveyed.<sup>83</sup>

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<sup>77</sup> See *Humanitarian Law Project*, 561 U.S. at 4 (recognizing that a restriction on conduct that communicates a message is subject to higher scrutiny than conduct that does not communicate a message); *Pickup III*, 740 F.3d at 1225, 1231 (noting that heightened scrutiny applies to speech and conduct that is protected under the First Amendment, although rational basis review applies to unprotected conduct); *King I*, 981 F. Supp. 2d at 312 (providing that rational basis review is applied if protected speech is not burdened and a higher level of scrutiny is applied if speech is burdened).

<sup>78</sup> See *King I*, 981 F. Supp. 2d at 312 (providing that rational basis review is applied "if the statute does not implicate or burden constitutionally protected speech or expression in any matter").

<sup>79</sup> See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440–41 (1985) (applying rational basis review in the context of an equal protection challenge); *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976); see also *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 644 (3d Cir. 1995).

<sup>80</sup> See Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L. J. 591, 606 (2000). In practice, a judge applying the standard essentially asks whether, given the information available, the legislature could have conceivably believed that the statute "might, even if only in the most remote or tenuous way, further or promote a legitimate actual or hypothetical goal." *Id.* As expected, the statute is typically upheld. *Id.* The standard is so lenient that rational basis review has been described as amounting to a "virtual rubber stamp" because it is nearly impossible to fail the test. See Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997) (stating that "judicial scrutiny under rational basis review is typically so deferential as to amount to a virtual rubber stamp").

<sup>81</sup> See *Turner*, 512 U.S. at 642; see also Haggerty, *supra* note 16, at 1125; Anthony M. Masero, Note, *I Came, ITAR, I Conquered: The International Traffic in Arms Regulation, 3D-Printed Firearms, and the First Amendment*, 55 B.C. L. REV. 1291, 1298–1302 (2014) (discussing the Supreme Court's treatment of content-based versus content-neutral restrictions).

<sup>82</sup> See *Turner*, 512 U.S. at 642; see also Haggerty, *supra* note 16, at 1125.

<sup>83</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The purpose of the government in enacting the restriction is the key factor in determining whether a regulation is content-based or content-neutral. *Id.* If the government purpose is not related to the content of the expression, then the regulation is content-neutral. *Id.*

Courts apply strict scrutiny to content-based restrictions.<sup>84</sup> Under strict scrutiny, courts ask whether the restriction serves a “compelling state interest” and is “narrowly tailored” to achieve that purpose.<sup>85</sup> Strict scrutiny is a more demanding standard than rational basis review; thus, there is a greater probability of a regulation being struck down under this standard.<sup>86</sup>

Intermediate scrutiny applies to content-neutral restrictions that incidentally affect speech.<sup>87</sup> Under intermediate scrutiny, a regulation is upheld if the court concludes that the state interest in regulating the non-speech element is sufficiently compelling to justify an incidental limitation of free expression.<sup>88</sup> Under intermediate scrutiny, a “sufficiently important governmental interest” has the following characteristics: it “furthers an important or substantial government interest;” it is “unrelated to the suppression of free expression;” and restricts alleged First Amendment freedoms no more than is necessary to further the government interest.<sup>89</sup> Under intermediate scrutiny, a restriction on speech is as likely to be upheld as it is to be struck down.<sup>90</sup>

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<sup>84</sup> *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 804 (2000) (determining that when a restriction “is content based, it can stand only if it satisfies strict scrutiny”); Haggerty, *supra* note 16, at 1126 (providing that strict scrutiny is applied to content-based regulations); Masero, *supra* note 81, at 1299 (“Content-based restrictions are generally subject to strict scrutiny because they present the greatest risk of government actively suppressing ideas”).

<sup>85</sup> Haggerty, *supra* note 16, at 1126. A compelling state interest is one of greater significance than the “important” state interest required in intermediate scrutiny or the “legitimate” state interest required in rational basis review. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2007). Compelling state interests are “not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests.” *Id.* The “narrowly tailored” element requires “an especially tight connection between challenged legislative means and the ends they . . . promote.” *Id.* at 1274. “Narrow tailoring” is a stricter requirement than the rational relationship required under rational basis review and the substantial relationship required under intermediate scrutiny. *Id.*

<sup>86</sup> See Norman T. Deutsch, *Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 190–91 (2003).

<sup>87</sup> *Turner*, 512 U.S. at 642 (providing that “regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny”); *O’Brien*, 391 U.S. at 377 (establishing that a content-neutral restriction on speech may be upheld if it is “within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”); see also Haggerty, *supra* note 16, at 1127 (recognizing that a content-neutral restriction on speech “receives a lower level of scrutiny and must only be narrowly tailored to serve a significant state interest”).

<sup>88</sup> *O’Brien*, 391 U.S. at 376 (providing that a “sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms”); see also Haggerty, *supra* note 16, at 1126.

<sup>89</sup> *O’Brien*, 391 U.S. at 377 (providing an outline of the intermediate scrutiny standard).

<sup>90</sup> See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 318 (1998) (“The most striking feature of intermediate scrutiny is that, unlike strict scrutiny or rationality review, the tier of scrutiny that the Court decides to apply does not predetermine the outcome of the case; with intermediate scrutiny, sometimes the state wins, and some-

*C. Psychoanalysis and Physician Communications Recognized as Protected by the Ninth Circuit*

Unlike the U.S. Supreme Court, the Ninth Circuit has had the opportunity to examine speech in the context of psychoanalysis as well as communication between a physician and patient in earlier cases.<sup>91</sup> In 2000, in *National Ass'n for the Advancement of Psychoanalysis v. California Board of Psychology* (*NAAP*), the U.S. Court of Appeals for the Ninth Circuit considered the claim that the California mental health licensing laws restricted psychoanalysts' rights under the First Amendment.<sup>92</sup> The court concluded that "special First Amendment protection" was not owed to psychoanalysts because it determined that the treatment of emotional suffering and depression rather than speech was the most significant aspect of psychoanalysis.<sup>93</sup> Nevertheless, the court acknowledged that "communication that occurs during psychoanalysis" is constitutionally protected.<sup>94</sup> Moreover, the court also found California's licensing rules to be content-neutral because they did not dictate the parameters of permitted speech between the patient and psychologist during treatment and, thus, strict scrutiny was not triggered.<sup>95</sup>

In contrast, in 2002, in *Conant v. Walters*, the U.S. Court of Appeals for the Ninth Circuit invalidated a federal policy that sought to punish physicians for communicating with their patients about the use of medical marijuana be-

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times it loses."); see also Melissa Reynolds, Note, *How Old Is Too Old?: The Need for Federal Regulation Imposing a Maximum Age Limit on Women Seeking Infertility Treatment*, 7 IND. HEALTH L. REV. 277, 301 (2010) (stating that it is difficult to "predict the outcome if intermediate scrutiny review is applied" since it depends on the balancing of private and governmental interests).

<sup>91</sup> See *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002); Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology (*NAAP*), 228 F.3d 1043, 1046 (9th Cir. 2000).

<sup>92</sup> 228 F.3d at 1046. Under the California Business and Professions Code, a "psychologist" is defined as an individual who represents himself or herself "to the public by any title or description," including "psychoanalysis" and "psychoanalyst." CAL. BUS. & PROF. CODE § 2902(c) (West 2012 & Supp. 2015). Furthermore, a person must have a license to practice psychology, which is defined as the rendering of any psychological service to the public for a fee. *Id.* § 2903. Section 2529 provides that graduates of four California psychoanalytic institutes or equivalent institutes "may engage in psychoanalysis as adjunct to teaching, training, or research and hold themselves out to the public as psychoanalysts," but may not spend more than one third of his professional time providing psychoanalytic services for a fee. *Id.* § 2529.

<sup>93</sup> *NAAP*, 228 F.3d at 1054. The plaintiffs argued that because psychoanalysis was the "talking cure," it consisted of "pure speech" and was due special protection under the First Amendment. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1055. "Whether the government has adopted [the] regulation . . . because of [agreement or] disagreement with the message it conveys" was the test the court laid out to determine whether the regulation was content-neutral or content-based. *Id.* (internal quotation marks omitted). The court also noted that the regulation did not prevent the practice of psychoanalytical methods if no fee was charged. *Id.*

cause it impacted protected expression.<sup>96</sup> The court noted that in *NAAP*, it had previously recognized that communication in the context of psychoanalysis treatment is entitled to protection under the First Amendment.<sup>97</sup> It also recognized that the U.S. Supreme Court has concluded that a physician's communication with his patient was afforded protection under the First Amendment because of the importance of the relationship.<sup>98</sup> Furthermore, the Ninth Circuit concluded that the government's policy was content-based because only doctor-patient communication about a particular issue, the medical use of marijuana, triggered the policy.<sup>99</sup> The court distinguished *NAAP* based on the fact that the regulation in that case was content-neutral as it "did not attempt to 'dictate the content of what is said in therapy' and did not prevent licensed therapists from utilizing particular 'psycho-analytical methods.'"<sup>100</sup> In contrast, the federal policy was content-based because it was only triggered when marijuana use was discussed, which is problematic in the context of the First Amendment.<sup>101</sup>

## II. FAILURE TO REACH CONSENSUS: COURTS CANNOT AGREE ON THE APPROPRIATE CLASSIFICATION OF COUNSELING COMMUNICATIONS

Counseling commonly occurs by means of the spoken word and, therefore, it seems that these communications should qualify for some level of protection under the First Amendment.<sup>102</sup> Courts have differed, however, as to whether a restriction on certain counseling communications impacts speech.<sup>103</sup> The issue is a novel one, and few courts have addressed whether such communications are entitled to constitutional protection.<sup>104</sup>

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<sup>96</sup> 309 F.3d at 632. The challenged policy provided for the investigation of physicians who professionally recommended the use of medical marijuana and the potential loss of their license for prescribing controlled substances. *Id.*

<sup>97</sup> *Id.* at 637.

<sup>98</sup> *Id.* at 636 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion)) (noting that a physician has the right not to speak under the First Amendment).

<sup>99</sup> *Id.* at 637.

<sup>100</sup> *Id.* (citation omitted).

<sup>101</sup> *Id.* "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>102</sup> See Paul Sherman & Robert McNamara, Op-Ed., *Protecting the Speech We Hate*, N.Y. TIMES, Oct. 10, 2013, at A31 (arguing that it is a "no-brainer" that counseling communications should be protected as free speech).

<sup>103</sup> See *Pickup v. Brown* (*Pickup I*), 42 F. Supp. 3d 1347, 1358 (E.D. Cal. Dec. 4, 2012), *aff'd*, 740 F.3d 1208 (9th Cir. 2014); *Welch v. Brown*, 907 F. Supp. 2d 1102, 1112 (E.D. Cal. 2012), *rev'd sub nom.*, *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013).

<sup>104</sup> See *King v. Christie* (*King I*), 981 F. Supp. 2d 296, 312 (D.N.J. 2013), *aff'd*, 767 F.3d 216 (3d Cir. 2014).



This Part examines the approaches taken by courts in analyzing the constitutionality of regulations prohibiting certain counseling communications and more specifically, whether counseling should be considered speech or conduct.<sup>105</sup> Section A discusses the reasoning employed by two district courts in coming to opposing conclusions as to whether counseling communications amounted to speech or conduct.<sup>106</sup> Section B then examines how the Ninth Circuit came to the holding that counseling should be considered conduct and how the Third Circuit instead determined that counseling communications should be classified as speech.<sup>107</sup> Finally, Section C discusses the dissenting opinion from the Ninth Circuit's denial of an en banc hearing of the same case and how it adds to the classification analysis.<sup>108</sup>

### *A. Clashing Conclusions: District Courts Reaching Opposing Results in Classifying Counseling Communications*

Recently, several courts have considered whether counseling communications should be protected under the First Amendment.<sup>109</sup> In California, two groups of plaintiffs brought lawsuits seeking to enjoin enforcement of section 865 of the California Business and Professions Code because it violated their right of free speech.<sup>110</sup> Section 865 prohibits state-licensed mental health providers from engaging in sexual orientation change efforts ("SOCE") with patients younger than eighteen years of age.<sup>111</sup> Two California district courts considered the constitutionality of the statute, and each court applied different

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<sup>105</sup> See *infra* notes 109–184 and accompanying text.

<sup>106</sup> See *infra* notes 109–143 and accompanying text.

<sup>107</sup> See *infra* notes 144–168 and accompanying text.

<sup>108</sup> See *infra* notes 169–184 and accompanying text.

<sup>109</sup> See *Pickup v. Brown (Pickup II)*, 728 F.3d 1042, 1051 (9th Cir. 2013), *abrogated and superseded by Pickup v. Brown (Pickup III)*, 740 F.3d 1208 (9th Cir. 2014); *King I*, 981 F. Supp. 2d at 303; *Pickup I*, 42 F. Supp. 3d at 1356; *Welch*, 907 F. Supp. 2d at 1112; see also *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1211, 1217 (11th Cir. 2014) (holding that the law in question was a valid regulation of professional conduct despite plaintiffs' allegation that their right to engage in firearms counseling had been restricted in violation of the First Amendment).

<sup>110</sup> *Pickup I*, 42 F. Supp. 3d at 1349; *Welch*, 907 F. Supp. 2d at 1105.

<sup>111</sup> See CAL. BUS. & PROF. CODE § 865.1 (West 2012 & Supp. 2015); see also N.J. STAT. ANN. § 45:1-55 (West 2004 & Supp. 2014) (defining SOCE as "the practice of seeking to change a person's sexual orientation, including, but not limited to, 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"). SOCE therapy includes techniques that are intended to change a person's sexual orientation from homosexual to heterosexual. See *Pickup I*, 42 F. Supp. 3d at 1350–51. These techniques may include psychoanalysis, behavioral therapy, religious counseling, and spiritual counseling. *Id.* Additionally, treatments may be aversive or nonaversive. *Id.* at 1351. Aversive techniques, which are not recommended based on current research and professional ethical standards, include inducing nausea, shame aversion, orgasmic reconditioning, and satiation therapy. *Id.* Nonaversive therapies focus on altering "thought patterns by reframing desires, redirecting thoughts, or using hypnosis." *Id.*

reasoning and reached a different result as to whether the activity should be treated as protected speech or unprotected conduct.<sup>112</sup> Although the two cases were ultimately combined in a case heard by the Ninth Circuit,<sup>113</sup> the reasoning demonstrates the difficulty involved in determining whether an activity that occurs by means of oral communication should be classified as speech or conduct.<sup>114</sup> Subsection 1 describes *Welch v. Brown*, the 2012 case where the U.S. District Court for the Eastern District of California concluded that the regulation was content-based and therefore subject to strict scrutiny.<sup>115</sup> Subsection 2 then discusses *Pickup v. Brown (Pickup I)*, another 2012 case, where the U.S. District Court for the Eastern District of California determined that the statute regulated conduct and therefore only needed to withstand rational basis review.<sup>116</sup>

### 1. Section 865 is a Content-Based Restriction on Speech That Demands Strict Scrutiny

In *Welch*, the district court found that section 865 was a content-based restriction on speech that required strict scrutiny.<sup>117</sup> The court relied on the 2000 decision *Conant v. Walters* from the U.S. Court of Appeals for the Ninth Circuit, which determined that communication occurring during psychoanalysis was protected under the First Amendment.<sup>118</sup> The court treated *Conant* as conclusive in determining that the speech at issue was protected,<sup>119</sup> and reasoned that the despite the fact that the statute regulated professional conduct, heightened scrutiny should apply if the regulation is content-based.<sup>120</sup> Furthermore, the court noted that in 2000, in *National Ass'n for the Advancement of Psychoanalysis v. California Board of Psychology (NAAP)*, the U.S. Court of Appeals for the Ninth Circuit recognized that content-based professional regulations were subject to strict scrutiny.<sup>121</sup>

<sup>112</sup> See *Pickup I*, 42 F. Supp. 3d at 1356, 1358; *Welch*, 907 F. Supp. 2d at 1105, 1112.

<sup>113</sup> *Pickup II*, 728 F.3d at 1048.

<sup>114</sup> See *Pickup I*, 42 F. Supp. 3d at 1358; *Welch*, 907 F. Supp. 2d at 1112.

<sup>115</sup> See *infra* notes 117–131 and accompanying text.

<sup>116</sup> See *infra* notes 132–143 and accompanying text.

<sup>117</sup> See 907 F. Supp. 2d at 1105, 1117. Plaintiffs challenged the constitutionality of the statute under 42 U.S.C. § 1983. *Id.* at 1106–07. Section 1983 grants a private right of action under federal law for individuals who have been deprived of rights guaranteed by the Constitution or laws. 42 U.S.C. § 1983 (2012).

<sup>118</sup> *Welch*, 907 F. Supp. 2d at 1109; see *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (“[C]ommunication that occurs during psychoanalysis is entitled to First Amendment protection.”).

<sup>119</sup> See *Welch*, 907 F. Supp. 2d at 1109.

<sup>120</sup> *Id.* at 1111.

<sup>121</sup> 228 F.3d 1043, 1055 (9th Cir. 2000) (holding that a statute was not subject to strict scrutiny because it was content-neutral rather than because it was a professional regulation); see also *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 431 (9th Cir. 2008) (observing that U.S. Supreme Court prece-

Next, the *Welch* court addressed the issue of whether section 865 could avoid strict scrutiny because it regulated conduct.<sup>122</sup> After describing a variety of techniques involved in SOCE therapy, the court concluded that there was not a single method that was universally accepted by mental health providers.<sup>123</sup> Moreover, the court reasoned that SOCE performed through talk therapy necessarily involved speech—which the Ninth Circuit had already declared as being protected under the First Amendment.<sup>124</sup> The court likened the plaintiffs here to the plaintiffs who intended to provide prohibited “material support” by means of speech in *Holder v. Humanitarian Law Project*, a 2010 case where the U.S. Supreme Court held that an activity consisting of talking and writing could not be classified as conduct.<sup>125</sup> Additionally, the court determined that “a law regulating conduct that incidentally affects speech is subject to strict scrutiny if it is content or viewpoint-based” and, thus, it was irrelevant that SOCE also occurred through conduct.<sup>126</sup>

Moreover, the court determined that section 865 was not content-neutral and, therefore, must be subjected to strict scrutiny.<sup>127</sup> Licensing laws are considered content-neutral if they do not “dictate what can be said . . . during treatment.”<sup>128</sup> The *Welch* court concluded that the fact that a mental health provider may still discuss potential benefits of SOCE with patients does not mean that the statute is content-neutral.<sup>129</sup> Rather, the regulation was content-based because it “dr[ew] a line in the sand governing a therapy session and the moment that the mental health provider’s speech ‘seek[s] to change an individu-

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dent does not require an application of heightened scrutiny when a regulation is content-neutral and viewpoint-neutral).

<sup>122</sup> *Welch*, 907 F. Supp. 2d at 1111. The speech-conduct distinction was analyzed after the standard of review was determined because the court viewed the speech that occurred during counseling as protected under the First Amendment based on the holding in *Conant*. See *id.* at 1109.

<sup>123</sup> *Id.* at 1112.

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

<sup>125</sup> Compare *id.* at 1113 (deliberating on the plaintiffs’ use of SOCE talk therapy), with *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (discussing the plaintiffs’ “material support,” provided by means of speaking and writing, to foreign terrorist organizations). In *Humanitarian Law Project*, the Court held that the material support provided could not be considered pure conduct. See 561 U.S. at 27.

<sup>126</sup> See *Welch*, 907 F. Supp. 2d at 1113.

<sup>127</sup> *Id.* at 1117.

<sup>128</sup> *Id.* at 1115 (quoting Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology (*NAAP*), 228 F.3d 1043, 1055–56 (9th Cir. 2000)).

<sup>129</sup> *Id.* Defendants argued that the regulation would not “preclude a mental health provider from expressing his or her views to a minor patient that the minor’s sexual orientation could be changed, informing a minor about SOCE, recommending that a minor pursue SOCE, providing a minor with contact information for an individual who could perform SOCE . . . .” *Id.* at 1114. Nevertheless, the court concluded that, although the regulation was not based on viewpoint, the regulation was still not content-neutral. *Id.* at 1115.

al's sexual orientation' . . . the mental health provider can no longer speak."<sup>130</sup> When the conveyance of a message was prohibited based on its subject matter, as was the case with section 865, the court held that the regulation cannot be considered content-neutral.<sup>131</sup>

## 2. Counseling Does Not Implicate the First Amendment and Is Subject to Rational Basis Review

In *Pickup I*, the district court also considered free speech arguments made by therapists and reached a different conclusion than that of the *Welch* court.<sup>132</sup> The plaintiffs in *Pickup I* argued that the regulation in question violated their First Amendment rights because it amounted to viewpoint and content discrimination.<sup>133</sup> Specifically, they claimed that licensed mental health providers were prohibited from "even mentioning the viewpoint that unwanted same-sex attractions can be changed" and that they were forced to "espouse one viewpoint regarding same-sex sexual attractions [such as stating] that they . . . cannot be stopped."<sup>134</sup> Plaintiffs also alleged that section 865 regulated speech because psychotherapy was based on speech and therefore similar to ordinary

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<sup>130</sup> *Id.* at 1115 (quoting CAL. BUS. & PROF. CODE § 865 (West 2012 & Supp. 2015)). The court further acknowledged that the regulation would result in disciplinary action based only on the mental health provider's speech or message. *Id.* Furthermore, the court determined that it was very difficult for SOCE treatment occurring through speech to be separated from the viewpoint of the mental health provider. *Id.* at 1116 ("When a mental health provider's pursuit of SOCE is guided by the provider's or patient's views of homosexuality, it is difficult, if not impossible, to view the conduct of performing SOCE as anything but integrally intertwined with viewpoints, messages, and expression about homosexuality.").

<sup>131</sup> *See id.* at 1117.

<sup>132</sup> *Compare Pickup I*, 42 F. Supp. 3d at 1358, 1360 (concluding that counseling communications were merely conduct which fell outside of First Amendment protection), *with Welch*, 907 F. Supp. 2d at 1105 (determining that counseling communications involved speech that was deserving of First Amendment protection).

<sup>133</sup> *Pickup I*, 42 F. Supp. 3d at 1356. Content discrimination occurs when government regulations determine the topics that may be discussed. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (describing content-based discrimination as "selective regulation of speech based on content"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (establishing that the determination that a regulation is content-based turns on "whether the government has adopted a regulation of speech because of disagreement with the message it conveys"). Viewpoint discrimination refers to the government suppression of a viewpoint concerning an issue because the speech of certain speakers has been prohibited. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 893 (1995) (providing that viewpoint discrimination occurs when a burden on speech can be explained by a desire to repress a certain point of view); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (providing that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject").

<sup>134</sup> *Pickup I*, 42 F. Supp. 3d at 1356. The plaintiffs alleged that it would not withstand strict scrutiny whether the statute was interpreted as restricting content or a viewpoint. *Id.*

conversation.<sup>135</sup> The state claimed that the prohibition was not content-based because the regulated activity was conduct as opposed to speech.<sup>136</sup>

The court concluded that the restrictions set out in section 865 did not implicate First Amendment rights and, thus, rational basis review was the appropriate standard.<sup>137</sup> The court reasoned that the statute, given its ordinary meaning, prohibited “actions designed to effect a difference,” not recommendations or conversations.<sup>138</sup> Based on a previous Ninth Circuit decision,<sup>139</sup> the court concluded that psychoanalysis was not speech because treatment of a patient was its primary feature.<sup>140</sup> Unlike the *Welch* court, the court viewed counseling as pure conduct, essentially placing it in the same category as if the treatment had been a physical procedure such as electroshock therapy.<sup>141</sup> Although psychotherapy was classified as conduct, the court recognized that it could be protected if it was sufficiently expressive conduct.<sup>142</sup> Nevertheless, since the plaintiffs failed to show that they could demonstrate counseling communications amounted to expressive speech, the court did not engage in First Amendment analysis.<sup>143</sup>

### B. Divide Among Circuits: The Ninth Circuit Versus the Third

Just as the district courts in California came to opposite conclusions as to the classification of counseling communications, so have the Ninth and Third Circuits.<sup>144</sup> Subsection 1 describes the reasoning employed by the Ninth Cir-

<sup>135</sup> *Id.* Additionally, the plaintiffs argued that the statute “dictate[d] the content of what is said in therapy.” *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1358, 1360, 1376 (arguing that in addition to regulating conduct rather than speech, the regulation does not prevent mental health providers from mentioning SOCE to minors).

<sup>138</sup> *Id.* at 1358. The court determined that the statute did not preclude the therapist from indicating that the patient might benefit from SOCE. *Id.* Nor did it prevent a minor from obtaining information about SOCE and then receiving SOCE therapy from someone other than a licensed professional. *Id.*

<sup>139</sup> *NAAP*, 228 F.3d at 1054 (determining that “the key component of psychoanalysis is the treatment of emotional suffering and depression, not speech”).

<sup>140</sup> *Pickup I*, 42 F. Supp. 3d at 1358–59. (relying on multiple sources that define psychotherapy to support this statement).

<sup>141</sup> *See id.* at 1358.

<sup>142</sup> *Id.* at 1359 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)); *see supra* notes 59–64 and accompanying text (outlining the court’s understanding of the term “sufficiently expressive”).

<sup>143</sup> *Pickup I*, 42 F. Supp. 3d at 1360–61. Additionally, the court determined that the plaintiffs were unlikely to succeed on the merits of their claim because the state was responsible for regulating the medical profession. *Id.* at 1361.

<sup>144</sup> *Compare King v. Governor of N.J. (King II)*, 767 F.3d 216, 224 (3d Cir. 2014) (holding that counseling communications constituted speech), and *Welch*, 907 F. Supp. 2d at 1112 (finding that counseling communications were speech for purposes of First Amendment analysis), with *Pickup II*, 728 F.3d at 1051 (determining that counseling communications were conduct), *King I*, 981 F. Supp. 2d at 317 (concluding that the counseling communications were conduct rather than speech), and *Pickup I*, 42 F. Supp. 3d at 1358 (holding that counseling communications were conduct).

cuit in determining that counseling communications should be classified as conduct.<sup>145</sup> Subsection 2 then examines how the Third Circuit came to the conclusion that counseling communications must be classified as speech.<sup>146</sup>

### 1. Ninth Circuit Concludes That Counseling Communications Are Conduct

The opposing results reached by the district courts in California were soon combined and resolved in the Ninth Circuit.<sup>147</sup> In 2013, in *Pickup v. Brown (Pickup II)*, the U.S. Court of Appeals for the Ninth Circuit held that section 865 of the California Business and Professions Code regulated conduct and that rational basis review was the appropriate standard.<sup>148</sup> The court's analysis began with an examination of whether section 865—which prohibited mental health providers from engaging in SOCE therapy with minor patients—regulated conduct or speech.<sup>149</sup>

Similar to the analysis of the district courts, the court also interpreted and applied both of the prior related Ninth Circuit cases: *NAAP* and *Conant*.<sup>150</sup> Unlike the *Welch* court, however, the Ninth Circuit did not distinguish *NAAP* because it dealt with the constitutionality of a content-neutral regulation.<sup>151</sup> Rather, the court relied on the conclusion in *NAAP* that a content-neutral regulation may be upheld even if an interest in speech was impacted and that strict scrutiny was not triggered by a content-neutral regulation.<sup>152</sup> With regard to

<sup>145</sup> See *infra* notes 147–158 and accompanying notes.

<sup>146</sup> See *infra* notes 159–168 and accompanying notes.

<sup>147</sup> See *Pickup II*, 728 F.3d at 1048.

<sup>148</sup> See *id.* at 1055, 1056.

<sup>149</sup> See *id.* at 1051. As part of its analysis, the court viewed speech in terms of a spectrum with varying levels of protection. *Id.* at 1053–55. First Amendment protection is at its greatest when, for example, a professional is taking part in a public dialogue. *Id.* at 1053. There is reduced protection for speech within a professional relationship. See *id.* at 1054. States have the power to subject professions to licensing and supervision to protect the public. See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 834 (1999). Regulations of professional speech are generally upheld if they are rationally related to an individual's "fitness or capacity" to practice the profession. *Id.* The nuances of a professional's First Amendment right to speak with a client have been rarely considered by the U.S. Supreme Court or lower courts. *Id.* Therefore, a particular manner of analysis has not been established, although based on the few cases that have been decided, courts have taken a "contextual approach centered around the social roles of speaker and listener." *Id.* at 834–35. With regard to professional speech, the court "may be understood as attempting to ascertain whether the conversation between the interlocutors takes place within defined social relationships and as seeking to afford such speech the constitutional protection necessary to preserve its particular social function." *Id.* at 777. Moreover, the state has the power to regulate professional conduct even when that regulation has an incidental effect on speech. See *Pickup II*, 728 F.3d at 1055.

<sup>150</sup> See *Pickup II*, 728 F.3d at 1051–52.

<sup>151</sup> See *id.* at 1053; cf. *NAAP*, 228 F.3d at 1054 (holding that California's medical licensing scheme was content-neutral).

<sup>152</sup> See *Pickup II*, 728 F.3d at 1052 (citing *NAAP*, 228 F.3d at 1053).

*Conant*, the court relied on the distinction made in that case between treating patients—which was considered conduct—and discussing treatment with patients—which was considered speech.<sup>153</sup> The court did not recognize, as the *Welch* court had, that the *Conant* court’s conclusion that communication occurring during psychoanalysis was entitled to protection.<sup>154</sup>

After this preliminary analysis, the Ninth Circuit concluded that section 865 regulated conduct.<sup>155</sup> The court reasoned that mental health providers were only prevented from engaging in the treatment of minors, but were still free to discuss SOCE or recommend SOCE.<sup>156</sup> Because the court concluded that section 865 regulated conduct and not speech, the court also held that the proper standard of review should be rational basis.<sup>157</sup> After applying rational basis review, the Court determined that section 865 was rationally related to legitimate government interests.<sup>158</sup>

## 2. Third Circuit Determines That Counseling Communications Are Speech

The *Pickup II* approach taken by the Ninth Circuit was also echoed by a similar case in a district court in New Jersey.<sup>159</sup> In 2013, in *Christie v. King* (*King I*), the U.S. District Court for the District of New Jersey considered a claim brought by licensed therapists alleging that the state infringed upon their rights under the First Amendment by prohibiting them from engaging in SOCE.<sup>160</sup> Finding the reasoning of *Pickup II* persuasive and noting that the

<sup>153</sup> See *id.* at 1053; *cf. Conant*, 309 F.3d at 634, 639 (affirming a district court decision that reasoned that the treatment of patients by means of prescribing medication could be regulated, but mere discussions about a potential treatment could not).

<sup>154</sup> Compare *Welch*, 907 F. Supp. 2d at 1109 (noting that “[t]he Supreme Court has recognized that physician speech is entitled to First Amendment protection”), with *Pickup II*, 728 F.3d at 1052–53 (discussing the *Conant* case, but failing to note that the *Conant* court held that counseling communications were protected under the First Amendment).

<sup>155</sup> See *Pickup II*, 728 F.3d at 1055. The court reasoned that California was authorized under its police power to regulate therapies that the legislature found harmful. *Id.* Disallowing conduct in this case was not transformed into disallowing speech merely because speech was the method by which the conduct was carried out. *Id.*

<sup>156</sup> See *id.*

<sup>157</sup> See *id.* at 1056.

<sup>158</sup> See *id.* at 1057. Protecting minors against harm caused by SOCE therapy was determined to be a legitimate state interest. See *id.* The court reasoned that it was not necessary to decide whether SOCE actually caused such harm because it was sufficient that a governmental decision maker could reasonably conceive that it is true. See *id.* Furthermore, the court concluded that the legislature acted rationally in implementing section 865. See *id.*

<sup>159</sup> See *King I*, 981 F. Supp. 2d at 303.

<sup>160</sup> See *id.* The New Jersey statute prohibits individuals who are licensed to practice in particular counseling professions from engaging in “the practice of seeking to change a [minor’s] sexual orientation.” N.J. STAT. ANN. § 45:1-55 (West 2004 & Supp. 2014). Plaintiffs alleged that the statute unconstitutionally restricted the content of their message to their clients by barring them from engaging in, or referring to another licensed professional who engages in, counseling a minor regarding “unwant-

disputed statutes in both cases were identical, the court adopted the Ninth Circuit's holding and concluded that regulation of the "application of psychological principles and procedures" amounted to regulation of conduct.<sup>161</sup> Additionally, the *King I* court held that rational basis review was appropriate because counseling was not inherently expressive and that the statute in question satisfied the rational basis review test.<sup>162</sup>

The district court's classification of counseling communications was rejected, however, in 2014 by the U.S. Court of Appeals for the Third Circuit in *King v. Governor of New Jersey (King II)*.<sup>163</sup> Instead of adopting the Ninth Circuit's reasoning, the Third Circuit held that counseling communication "is speech that enjoys some degree of protection under the First Amendment."<sup>164</sup> In reaching this conclusion, the court considered whether counseling communications become conduct when they are used as the means of administering mental health treatment.<sup>165</sup> In determining that such a transformation did not

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ed" same-sex sexual attraction. *See King I*, 981 F. Supp. 2d at 305. Plaintiffs also argued that it "authorizes only one viewpoint on SOCE and unwanted same-sex sexual attractions, behaviors, and identity by forcing . . . Plaintiffs . . . to present only one viewpoint on the otherwise permissible subject matter of same-sex attractions." *Id.*

<sup>161</sup> *See King I*, 981 F. Supp. 2d at 312, 316. In determining whether talk therapy was conduct or speech, the court referred to a different New Jersey statute that defines "counseling," which indicated that counseling was the "the application of psychological principles and procedures." *Id.* at 316; *see* N.J. STAT. ANN. § 45:14B-2. The distinction between speech and conduct in the context of counseling was determined to be "whether the counselor is attempting to communicate information or a particular viewpoint to the client or whether the counselor is attempting to apply methods, practices, and procedures to bring about a change in the client—the former is speech and the latter is conduct." *King I*, 981 F. Supp. 2d at 319. The court reasoned that counseling's "core characteristic" was not the fact that it occurred by means of talk therapy, but rather that therapeutic psychological methods were being applied to the patient. *Id.* at 317.

<sup>162</sup> *See King I*, 981 F. Supp. 2d at 324, 326. The court recognized that the issue of the appropriate standard of review turned on whether the conduct was sufficiently expressive to warrant First Amendment protection by being conduct that conveys a message that would be reasonably understood by the person receiving that message. *Id.* at 320. To demonstrate that counseling was "inherently expressive," plaintiffs would have had to demonstrate that it was "intended to be communicative" and that clients would understand it as such, which they failed to do in their statements about their roles as counselors. *Id.* at 321, 322. The state's interest was the protection of minors from a harmful form of therapy. *Id.* at 325. The regulation helped to serve that interest by preventing counselors from engaging in SOCE therapy with minors. *Id.* The court noted that for the regulation to withstand review, it was only necessary that the legislature reasonably believed that SOCE therapy was harmful to minors and that the regulation would protect them. *Id.* The legislature based their belief on a number of findings—including, for example, that SOCE posed health risks and that reputable associations had advised parents to avoid SOCE treatment for their children. *Id.* at 325–26.

<sup>163</sup> 767 F.3d at 224.

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

<sup>165</sup> *Id.* The court noted that defendants had not provided "authority from the Supreme Court or this circuit that have characterized verbal or written communications as 'conduct' based on the function these communications serve." *Id.* at 225. In fact, the Third Circuit recognized that the Supreme Court had rejected that proposition. *Id.* (recognizing that in *Humanitarian Law Project*, the Supreme



occur, the Third Circuit adhered to the U.S. Supreme Court's rejection of the proposition in *Humanitarian Law Project* that communications become conduct when used for the purpose of professional services.<sup>166</sup> The Third Circuit viewed the classification of counseling communications as straightforward, stating "[s]imply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment."<sup>167</sup> Additionally, the Third Circuit reprimanded the district court for effectively creating a new category of speech that falls outside of First Amendment protection by labeling counseling communication as conduct, which is in direct contravention to the U.S. Supreme Court's instruction not to exercise such authority.<sup>168</sup>

*C. Against Analytical Manipulation: The Dissent from the Ninth Circuit's Denial of an En Banc Rehearing*

After the *Pickup II* decision, in 2014, the U.S. Court of Appeals for the Ninth Circuit in *Pickup v. Brown (Pickup III)* denied a petition for a rehearing en banc, from which Circuit Judge Diarmuid O'Scannlain filed a dissenting opinion.<sup>169</sup> In his dissenting opinion, Judge O'Scannlain focused on whether the legislature should be permitted to circumvent First Amendment judicial scrutiny by "defining disfavored talk as 'conduct.'"<sup>170</sup> The dissent argued that if such circumvention were allowed, the government would effectively be given a "new and powerful tool to silence expression based on a political or moral judgment about the content and purpose of the communications."<sup>171</sup> The dissent recognized that classifying counseling communication as conduct means that the First Amendment analysis of restrictions on that communication can be

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Court rejected the proposition that verbal communications could be classified as conduct when they serve a particular function).

<sup>166</sup> *Id.* at 224. The court stated that "*Humanitarian Law Project* makes clear that verbal or written communications, even those that function as vehicles for delivering professional services, are 'speech' for purposes of the First Amendment." *Id.* at 225–26; see *Humanitarian Law Project*, 561 U.S. at 27–28.

<sup>167</sup> *King II*, 767 F.3d at 228–29.

<sup>168</sup> *Id.* at 229 (providing that the U.S. Supreme Court has repeatedly cautioned against exercising "freewheeling authority to declare new categories of speech outside the scope of the First Amendment" and that, by labeling some communications as conduct, the district court had assured that they would not receive any constitutional protection) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)).

<sup>169</sup> See *Pickup III*, 740 F.3d at 1214–15 (O'Scannlain, J., dissenting), *cert. denied*, 134 S. Ct. 2871 (2014), and *cert. denied sub nom.*, *Welch v. Brown*, 134 S. Ct. 2881 (2014). Plaintiffs had filed a petition for panel rehearing and a petition for a rehearing en banc. *Id.* Judge O'Scannlain was joined by two other Circuit Judges. *Id.*

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

<sup>171</sup> *Id.* at 1216.

completely circumvented.<sup>172</sup> Moreover, the dissent noted that there is no doctrinal basis to indicate the criteria used to distinguish between “utterances” that are actually speech and those that are conduct.<sup>173</sup>

Additionally, the dissent reasoned that the panel had misinterpreted U.S. Supreme Court precedent.<sup>174</sup> In *Humanitarian Law Project*, the Supreme Court recognized that a distinction could not be made between conduct and speech with regard to an activity that consisted of talking and writing.<sup>175</sup> The regulation at issue in *Humanitarian Law Project* prohibited the provision of “material support” to terrorist organizations in the form of verbal communications.<sup>176</sup> Although the government argued that the regulation only targeted conduct, the Court rejected that line of reasoning because the conduct consisted of “communicating a message.”<sup>177</sup> Ultimately, the Supreme Court refused to permit a constitutional distinction between conduct and speech when an activity consisted of speaking and writing.<sup>178</sup>

The dissent in *Pickup III* also determined that the *Pickup II* court did not succeed in distinguishing *Humanitarian Law Project* because it misunderstood both the facts of that case and how the facts related to the holding.<sup>179</sup> The dis-

<sup>172</sup> See *id.* The dissent concluded that by “labeling such speech as ‘conduct,’ the panel’s opinion has entirely exempted such regulation from the First Amendment.” *Id.* at 1215. The dissent argued that there was “no principled doctrinal basis” for the classification and that the court’s decision was “contrary to common sense and without legal authority.” *Id.* at 1215–16.

<sup>173</sup> *Id.* at 1215–16.

<sup>174</sup> *Id.* at 1215 (providing that the *Pickup II* court’s decision “contravenes recent Supreme Court precedent”); cf. *Humanitarian Law Project*, 561 U.S. at 27 (concluding that the provision of “material support” through speaking and writing could not be treated as mere conduct).

<sup>175</sup> 561 U.S. at 27; see *Pickup III*, 740 F.3d at 1216 (O’Scannlain, J., dissenting).

<sup>176</sup> 561 U.S. at 7. The term “material support” is defined in the statute at issue as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials.” 18 U.S.C. § 2339A(b)(1) (2012); see *Pickup III*, 740 F.3d at 1216 (O’Scannlain, J., dissenting) (noting that plaintiffs had “challenged a Federal statute forbidding ‘material support’ to terrorist organizations for criminalizing protected verbal communications”).

<sup>177</sup> *Humanitarian Law Project*, 561 U.S. at 28; see *Pickup III*, 740 F.3d at 1216 (O’Scannlain, J., dissenting) (noting that the U.S. Supreme Court did not conclude that the statute at issue in *Humanitarian Law Project* regulated only conduct because the conduct at issue communicated a message).

<sup>178</sup> *Humanitarian Law Project*, 561 U.S. at 28 (establishing that an activity that consists of speaking and writing is related to expression and, therefore, more demanding scrutiny must be applied); *Pickup III*, 740 F.3d at 1217 (O’Scannlain, J., dissenting) (explaining that the Supreme Court had already “flatly refused to countenance the government’s purported distinction between ‘conduct’ and ‘speech’ for constitutional purposes when the activity at issue consisted of talking and writing”).

<sup>179</sup> *Pickup III*, 740 F.3d at 1216. The *Pickup II* court referred to the plaintiffs in *Humanitarian Law Project* as ordinary citizens to distinguish them from licensed mental health professionals. *Id.* Among the plaintiffs in that case, however, was a human-rights organization that had consultative status to the United Nations and offered “professional expertise and advice on various international and humanitarian issues.” *Id.* at 1216–17; see also *Humanitarian Law Project*, 561 U.S. at 10 (provid-

sent concluded that, in *Humanitarian Law Project*, the Supreme Court had made it abundantly clear that legislatures were unable to “nullify the First Amendment’s protections for speech by playing this labeling game.”<sup>180</sup> Furthermore, the dissent argued that an exception to the First Amendment has never been recognized for state professional regulations.<sup>181</sup> The dissent determined that the *Pickup II* court was mistaken in relying on *NAAP* and *Conant* as legal authority for the principal that there was an exception for professional regulations.<sup>182</sup> For example, *NAAP* had stated that psychoanalysis did not receive “special First Amendment protection,” but the *Pickup II* court relied on that to support the conclusion that counseling received *no* protection whatsoever.<sup>183</sup> In addition, the dissent noted that *Conant* explicitly stated that speech in the context of psychoanalysis was entitled to protection under the First Amendment.<sup>184</sup>

### III. RECOGNIZING SPEECH AS SPEECH: COUNSELING COMMUNICATIONS SHOULD RECEIVE PROTECTION

Although some courts, such as the Ninth Circuit, believe that counseling should be considered conduct and subject to rational basis review, others, such as the Third Circuit, have concluded that such communications should instead be subject to a more robust First Amendment analysis.<sup>185</sup> This Part argues that

ing that among the plaintiffs were both professionals and a human rights organization with consultative status to the United Nations).

<sup>180</sup> *Pickup III*, 740 F.3d at 1218; see *Humanitarian Law Project*, 561 U.S. at 26 (finding that the defendant went “too far, claiming that the only thing truly at issue in this litigation [was] conduct, not speech”).

<sup>181</sup> *Pickup III*, 740 F.3d at 1218 (providing that federal courts have not recognized a First Amendment exception for professional regulations and have instead determined that professional regulations as a category do not fall outside of the protections of the First Amendment); see, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622–24 (1995) (determining that the First Amendment applied to a state regulation on attorney advertising); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 454–59 (1978) (concluding that the First Amendment applied to a state restriction on in-person solicitation by attorneys); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 758–61 (1976) (reasoning that the First Amendment applied to a professional regulation prohibiting price advertising by pharmacists).

<sup>182</sup> *Pickup III*, 740 F.3d at 1218; see *Conant*, 309 F.3d at 637 (establishing that doctor communications with patients are entitled to full constitutional protection); *NAAP*, 228 F.3d at 1054 (concluding that, although psychoanalysis is not entitled to “special First Amendment protection,” it is entitled to First Amendment protection).

<sup>183</sup> *Pickup III*, 740 F.3d at 1218–19; see *NAAP*, 228 F.3d at 1054.

<sup>184</sup> *Pickup III*, 740 F.3d at 1219; see *Conant*, 309 F.3d at 637.

<sup>185</sup> See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28 (2010) (holding that an activity consisting of speaking and writing could not be treated as pure conduct for constitutional purposes); *Pickup v. Brown (Pickup III)*, 740 F.3d 1208, 1214, 1215 (9th Cir. 2014) (O’Scannlain, J., dissenting) (arguing that the court had improperly engaged in a “labeling game” by treating counseling communication as conduct to avoid heightened scrutiny), *cert. denied*, 134 S. Ct. 2871 (2014) and *cert. denied*

counseling communications should be considered speech and should be subject to strict scrutiny because the restriction is content-based.<sup>186</sup> Section A argues that counseling should not be classified as mere conduct and should instead be considered speech for First Amendment purposes.<sup>187</sup> Section B shows that classification as speech would require courts to apply strict scrutiny to this type of regulation.<sup>188</sup> Finally, Section C argues that other factors, such as recipients' ability to avoid such communications and the chilling effect a regulation might have on counseling, are additional reasons courts should apply strict scrutiny to such regulations.<sup>189</sup>

### *A. Oral Communication: Clearly Containing an Expressive Element*

Application of the most recent Supreme Court reasoning on the issue of speech versus conduct demonstrates that counseling should not be considered mere conduct.<sup>190</sup> In 2010, in *Holder v. Humanitarian Law Project*, the U.S. Supreme Court held that providing legal training and advising certain groups on advocacy could not be considered conduct and that heightened scrutiny applied.<sup>191</sup> Likewise, counseling that takes the form of speech cannot be recharacterized as conduct to avoid scrutiny under the First Amendment.<sup>192</sup> Just like

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*sub nom.*, *Welch v. Brown*, 134 S. Ct. 2881 (2014); *Welch v. Brown*, 907 F. Supp. 2d 1102, 1105, 1112 (E.D. Cal. 2012) (determining that counseling communications were speech and deserving of First Amendment protection), *rev'd sub nom.*, *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013); *see also* *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (establishing that doctor communications with patients are entitled to full constitutional protection); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology (NAAP)*, 228 F.3d 1043, 1054 (9th Cir. 2000) (concluding that, although psychoanalysis is not entitled to "special First Amendment protection," it is entitled to First Amendment protection).

<sup>186</sup> *See infra* notes 190–243 and accompanying text.

<sup>187</sup> *See infra* notes 190–207 and accompanying text.

<sup>188</sup> *See infra* notes 208–218 and accompanying text.

<sup>189</sup> *See infra* notes 219–243 and accompanying text.

<sup>190</sup> *See Humanitarian Law Project*, 561 U.S. at 26–28; *see also* *King v. Governor of N.J. (King II)*, 767 F.3d 216, 225–26 (3d Cir. 2014) (determining that "*Humanitarian Law Project* makes clear that verbal or written communications, even those that function as vehicles for delivering professional services, are 'speech' for purposes of the First Amendment"); *Pickup III*, 740 F.3d at 1216 (O'Scannlain, J., dissenting) (observing that "the Supreme Court, in its most recent relevant case, flatly refused to countenance the government's purported distinction between 'conduct' and 'speech' for constitutional purposes when the activity at issue consisted of talking and writing").

<sup>191</sup> *See Humanitarian Law Project*, 561 U.S. at 26–28.

<sup>192</sup> *See Pickup III*, 740 F.3d at 1218. The Court determined that despite the government's argument that the restriction on "material support" only impacted conduct because material support most often does not take the form of speech and, when it does, the statute was drawn to include only a narrow category of speech. *Id.*; *see also* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1347 (2005) (arguing that "[w]hen the law restricts speech because of what the speech communicates—because the speech causes harms by persuading, informing, or offending—we shouldn't deny that the law is a speech restriction, and requires some serious justification").

the statute at issue in *Humanitarian Law Project*, regulations of communication that occur during counseling restrict speech based on its content.<sup>193</sup> For instance, the plaintiffs in the 2013 decision by the U.S. Court of Appeals for the Ninth Circuit in *Pickup v. Brown (Pickup II)* were permitted to speak freely during counseling sessions except for any speech that could be construed as sexual orientation change efforts (“SOCE”) therapy.<sup>194</sup> Due to the similar nature of the activity and regulation, the court should have followed the Supreme Court precedent and concluded that protected expression was restricted by the regulation, and therefore, heightened scrutiny applied.<sup>195</sup>

The *Pickup II* panel attempted to distinguish *Humanitarian Law Project* because it viewed the plaintiffs in that case as ordinary citizens as opposed to professionals, when in fact the plaintiffs included a human-rights organization that had consultative status to the United Nations.<sup>196</sup> The *Pickup II* court viewed the regulation at issue in *Humanitarian Law Project* as restricting political speech, failing to recognize that the holding was based on the “material support” provision.<sup>197</sup>

In addition to *Humanitarian Law Project*, the 1974 U.S. Supreme Court decision in *Spence v. Washington* also supports the conclusion that counseling should be determined to be sufficiently expressive so as to be protected under the First Amendment.<sup>198</sup> In *Spence*, the Court determined that when there was “[a]n intent to convey a particularized message” and the message was likely to be understood, the activity in question was expressive conduct.<sup>199</sup> Similarly, therapists intend to convey a message to their clients through the communication that occurs while they are engaging in SOCE therapy.<sup>200</sup> Additionally, cli-

<sup>193</sup> See *Pickup III*, 740 F.3d at 1217 (O’Scannlain, J., dissenting).

<sup>194</sup> *Pickup v. Brown (Pickup II)*, 728 F.3d 1042, 1048–50 (9th Cir. 2013), *abrogated and superseded by Pickup III*, 740 F.3d 1208 (9th Cir. 2014).

<sup>195</sup> See *Pickup III*, 740 F.3d at 1217–18 (O’Scannlain, J., dissenting).

<sup>196</sup> See *id.* at 1216–17 (arguing that the panel had mischaracterized the plaintiffs in *Humanitarian Law Project*). In *Welch v. Brown*, the district court reasoned that the plaintiffs were similar in nature to the plaintiffs in *Humanitarian Law Project* because the plaintiffs in that case intended to provide prohibited “material support” by means of speech. See *Welch*, 907 F. Supp. 2d at 1113. The *Welch* court used that determination as support for concluding that the speech involved in counseling ought to receive First Amendment protection as did the speech involved in providing material support. *Id.* The district court in *Pickup v. Brown (Pickup I)* did not consider the holding in *Humanitarian Law Project* in reaching the conclusion that section 865 regulated only conduct. *Pickup v. Brown (Pickup I)*, 42 F. Supp. 3d 1347, 1358 (E.D. Cal. Dec. 4, 2012), *aff’d*, 740 F.3d 1208 (9th Cir. 2014).

<sup>197</sup> *Pickup III*, 740 F.3d at 1217.

<sup>198</sup> See *Spence v. Washington*, 418 U.S. 405, 410–11 (1974).

<sup>199</sup> See *id.*

<sup>200</sup> See *Welch*, 907 F. Supp. 2d at 1116. For example, one therapist, who is Catholic, discussed the beliefs of that faith with patients of the same religion. *Id.* The court determined that it is nearly impossible to view the performance of SOCE therapy as not being “integrally intertwined with viewpoints, messages, and expression about homosexuality.” *Id.* Plaintiffs claimed to be conveying a message of disapproval of homosexuality. See *id.*

ents are likely to understand a counselor's message if the counselor begins using SOCE therapy techniques, especially since clients must consent to such techniques before they can be administered.<sup>201</sup>

Finally, a comparison to activities that the Supreme Court has previously determined to be expressive conduct supports the determination that counseling should not be considered mere conduct.<sup>202</sup> For example, the burning of an American flag and the placement of a peace sign on an American flag have both been recognized as forms of expressive conduct by the Court.<sup>203</sup> These activities communicated a message less directly than a counselor's speech, but were considered to contain sufficient expressive elements to implicate the First Amendment.<sup>204</sup> Therefore, speech that occurs in the context of counseling should also be protected because counselors intend to convey a message to the client through their speech and it is likely to be understood by the client.<sup>205</sup> Conversely, activities that have been determined to be solely conduct generally intend a goal besides communication, such as prostitution and physical assault.<sup>206</sup> Counseling can be distinguished from those activities because the counselor's speech is meant to convey a message to the client and the client is

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<sup>201</sup> See *id.* (reasoning that SOCE therapy involves communication of a message about homosexuality). See generally AM. MENTAL HEALTH COUNSELORS ASS'N, CODE OF ETHICS (2000), available at <http://www.nymhca.org/AMHCACodeofEthics.pdf>, archived at <http://perma.cc/R2R8-WEY4> (providing that, under professional ethical standards, clients must agree on the objectives of treatment and consent to treatment before counseling begins).

<sup>202</sup> See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) (holding that physical assault was not expressive conduct and not protected under the First Amendment); *Texas v. Johnson*, 491 U.S. 397, 405–06 (1989) (determining that burning an American flag as part of a political demonstration was sufficiently expressive to warrant First Amendment protection); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (holding that prostitution was not expressive conduct because such sexual activity did not have the “least semblance of expressive activity”); *Spence*, 418 U.S. at 410–11 (holding that displaying an American flag with a peace symbol attached to it was sufficiently expressive to be protected under the First Amendment).

<sup>203</sup> See *Johnson*, 491 U.S. at 405–06 (concluding that burning an American flag was protected under the First Amendment because of its expressive nature); *Spence*, 418 U.S. at 410–11 (determining that displaying an American flag with a peace sign attached warranted First Amendment protection).

<sup>204</sup> See *Johnson*, 491 U.S. at 405–06 (examining whether burning an American flag was sufficiently expressive); *Spence*, 418 U.S. at 410–11 (analyzing the level of expression involved in the activity of flying an American flag with a peace symbol attached to it).

<sup>205</sup> See *Johnson*, 491 U.S. at 405–06 (determining that the speaker intended to convey a message by burning the American flag that was likely to be understood by others); *Spence*, 418 U.S. at 410–11 (holding that the plaintiff intended to communicate a message by flying the American flag with a peace symbol attached and others would understand that message).

<sup>206</sup> See *Mitchell*, 508 U.S. at 484 (holding that physical assault was not protected under the First Amendment); *Arcara*, 478 U.S. at 705 (concluding that prostitution was not sufficiently expressive to warrant First Amendment protection).

able to reasonably understand that message, whereas it would be difficult to understand the message being conveyed by a physical assault or prostitution.<sup>207</sup>

*B. Different Analysis, Same Outcome: State Regulations Restricting SOCE Are Likely to be Upheld Under Heightened Scrutiny*

Assuming that counseling was determined to contain sufficient elements of speech to implicate the First Amendment, restrictions on speech during counseling would be subject to a heightened standard of review.<sup>208</sup> Strict scrutiny should apply to the regulation at issue because it restricts the speech of counselors on the basis of the message being conveyed, and is therefore content-based.<sup>209</sup> The strict scrutiny standard requires that a statute be held unconstitutional unless it is “necessary” and “narrowly tailored” to “serve a compelling government interest.”<sup>210</sup>

When subjected to a strict scrutiny, statutes that regulate the administration of SOCE therapy to minors would likely be upheld as constitutional.<sup>211</sup> Nevertheless, it is important that the government not be allowed to bypass First Amendment protection by manipulating the classification of an activity because that could result in the inability to properly review an unconstitutional regulation.<sup>212</sup> In *Pickup II*, the legislature relied on multiple reports from high-

<sup>207</sup> See *Mitchell*, 508 U.S. at 484 (reasoning that physical assault was not expressive in nature); *Arcara*, 478 U.S. at 705 (reasoning that prostitution was an activity that lacked an expressive element).

<sup>208</sup> See *Pickup III*, 740 F.3d at 1221 (O’Scannlain, J., dissenting) (“Subjecting regulations of professionals’ speech to *some* degree of scrutiny under the First Amendment indeed does not necessarily call their legitimacy into question.”); see also *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657, 659 (1990) (applying strict scrutiny and upholding a regulation prohibiting corporations from supporting candidates using general treasury funds); *Buckley v. Valeo*, 424 U.S. 1, 24–28 (1976) (applying the “closest scrutiny” standard and upholding a regulation on speech in the form of campaign contribution limits due to the government’s compelling interest in the integrity of electoral process).

<sup>209</sup> See *Welch*, 907 F. Supp. 2d at 1117. When a regulation is unrelated to expression, the intermediate scrutiny test regulating “noncommunicative conduct” applies. *Johnson*, 491 U.S. at 403. Conversely, if the regulation is related to expression, then a more demanding standard must be applied. *Id.*; see also Haggerty, *supra* note 16, at 1125–26.

<sup>210</sup> Fallon, *supra* note 85, at 1273.

<sup>211</sup> See *Pickup III*, 740 F.3d at 1221 (O’Scannlain, J., dissenting); see also Sherman & McNamara, *supra* note 102 (arguing that strict scrutiny is not “insurmountable” and that it is “possible, maybe even likely” that the California regulation of SOCE counseling could withstand strict scrutiny).

<sup>212</sup> See *Pickup III*, 740 F.3d at 1216, 1218 (O’Scannlain, J., dissenting); see also Sherman & McNamara, *supra* note 102 (arguing that permitting regulation of an activity to avoid First Amendment analysis because the activity is labeled conduct undermines First Amendment protections entirely). Essentially, the government could engage in a “labeling game” by drafting a regulation that appears to regulate conduct with the result that speech involved in that conduct is prohibited without the regulation receiving any meaningful review. See *Pickup III*, 740 F.3d at 1218 (O’Scannlain, J., dissenting).

ly reputable organizations that had concluded that SOCE therapy was dangerous and harmful to minors.<sup>213</sup> Additionally, SOCE has been found to expose gay, lesbian, and bisexual people to critical health risks.<sup>214</sup> SOCE has also been known to cause recipients to develop feelings of guilt and anxiety and has little potential to alter an individual's sexual orientation.<sup>215</sup> Thus, the regulation would likely satisfy the state interest requirement because protection of minors has previously been recognized as a compelling state interest.<sup>216</sup>

Furthermore, as the court in *Pickup II* recognized, mental health providers are not prevented from speaking publicly about SOCE, expressing their views about SOCE to patients, or applying SOCE techniques to a patient older than eighteen.<sup>217</sup> The regulation proscribes only the speech involved in administering SOCE therapy to minors and, therefore, is “necessary” and “narrowly tailored” to prevent minors from being harmed.<sup>218</sup>

### *C. Determining an Appropriate Level of Scrutiny: “Ability to Avoid” and the Potential Chilling Effect as Factors*

Free speech occupies a “preferred position” in the body of First Amendment law.<sup>219</sup> Along with the freedom of the press and freedom of religion,

<sup>213</sup> See *Pickup II*, 728 F.3d at 1050. The court relied particularly on a report from the American Psychological Association. JUDITH M. GLASSGOLD ET AL., REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION, AM. PSYCHOL. ASS'N 42 (2009), available at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>, archived at <http://perma.cc/P2LY-34ES> (providing that studies indicate that “attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts”).

<sup>214</sup> See *King v. Christie (King I)*, 981 F. Supp. 2d 296, 325–26 (D.N.J. 2013), *aff'd*, 767 F.3d 216 (3d Cir. 2014); GLASSGOLD ET AL., *supra* note 213, at 42 (concluding that sexual orientation change efforts can cause mental distress and harm to some patients).

<sup>215</sup> GLASSGOLD ET AL., *supra* note 213, at 42.

<sup>216</sup> See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 263 (2002) (noting that the U.S. Supreme Court has “long recognized” that the government has a compelling interest in protecting children); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 125 (1989) (holding that protection of minors is a compelling state interest in the context of strict scrutiny review); *New York v. Ferber*, 458 U.S. 747, 756 (1982) (providing that it is “beyond the need for elaboration” that a state has a compelling interest in the protection of minors).

<sup>217</sup> See *Pickup II*, 728 F.3d at 1049–50.

<sup>218</sup> See *id.*; see also CAL BUS. & PROF. CODE § 865.1 (West 2012 & Supp. 2015) (providing that mental health providers are prohibited from administering SOCE therapy to minors); N.J. STAT. ANN. § 45:1-55 (West 2004 & Supp. 2014) (providing that mental health providers cannot engage in SOCE therapy with minors); *Mich. Chamber of Commerce*, 494 U.S. at 657, 659 (applying strict scrutiny and upholding a regulation prohibiting corporations from supporting candidates using general treasury funds); *Buckley*, 424 U.S. at 24–28 (1976) (applying “closest scrutiny” and upholding a regulation on speech in the form of campaign contribution limits due to the government’s compelling interest in maintaining the integrity of the electoral process).

<sup>219</sup> See *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (describing freedom of speech as occupying a “preferred position” in our society); see also *Henderson*, *supra* note 21, at 542.



freedom of speech is so vital that it requires more active judicial protection.<sup>220</sup> Conversely, the prohibition or restriction of free speech has a direct and negative effect on the democratic process.<sup>221</sup> Subsection 1 reasons that an application of strict scrutiny is supported by the fact that SOCE therapy can be avoided without substantial difficulty.<sup>222</sup> Subsection 2 then argues that counseling should not be classified as conduct because it would have a chilling effect on counseling communications.<sup>223</sup>

### 1. Ability to Avoid a Message

The U.S. Supreme Court has noted the ability of individuals to “effectively avoid further bombardment of their sensibilities simply by averting their eyes” when determining whether expression by a speaker should be constitutionally prohibited.<sup>224</sup> When individuals are able to avoid an offensive message by simply looking in another direction, it seems less necessary to prevent the communication of the message in the first place.<sup>225</sup> Nevertheless, where it is more difficult for an individual to avoid “further bombardment,” prohibiting the conveyance of the message in the first place might be more important.<sup>226</sup>

Counseling can be distinguished from other activities that have been considered expressive conduct because the message the counselor is conveying

<sup>220</sup> See Henderson, *supra* note 21, at 542. The rationale for such vigorous protection of freedom of speech is the important role that it plays in our democratic form of government. *See id.* See generally Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. Rev. 1156 (1986) (discussing the historical background of the First Amendment and exploring the development of the First Amendment doctrine over time).

<sup>221</sup> See Henderson, *supra* note 21, at 542. Under the political process theory, “core function” of free speech is “the protection of the democratic political process from the abusive censorship of political debate by the transient majority who has democratically achieved political power.” See David A.J. Richards, *Public and Private in the Discourse of the First Amendment*, 12 CARDOZO STUD. L. & LITERATURE 61, 64 (2000). Restrictions on speech imposed by a majority would inhibit political debate, which would have an adverse effect on the democratic process. *See id.*

<sup>222</sup> See *infra* notes 224–238 and accompanying text.

<sup>223</sup> See *infra* notes 239–243 and accompanying text.

<sup>224</sup> See *Cohen v. California*, 403 U.S. 15, 21 (1971) (noting that individuals who observed the plaintiff’s jacket—that had profanity written on it—could choose not to look at the jacket if they were offended by it).

<sup>225</sup> See *id.* (considering an observer’s ability to look away from a jacket with profanity written on it as a factor in determining that the state could not punish the expression because it was protected under the First Amendment).

<sup>226</sup> See *id.* A captive audience is one that is unable to escape a message that they do not wish to receive. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (concluding that passengers in a streetcar were a captive audience and distinguishing streetcar signs from the radio because they cannot be turned off). If an audience is not captive, individuals would likely be able to avoid a message that they do not wish to receive. *See id.*

typically only reaches the client in his or her office.<sup>227</sup> Other activities considered by the courts took place in public where others could observe the act.<sup>228</sup> For example, one plaintiff wore a jacket with profanity written on the back of it in public and another displayed an American flag with a peace symbol attached to it.<sup>229</sup> Anyone who was also in the same public space at the same time would have had the ability to avoid the activities of those plaintiffs and the message being conveyed by those activities.<sup>230</sup> On the other hand, counseling typically takes place in the therapist's office, so there is no concern that the offensive message will reach a broad audience.<sup>231</sup> Additionally, in most cases, a therapist's patients meet with them out of their own free will and are not forced or coerced into undergoing counseling.<sup>232</sup>

In addition to considering whether a regulation is content-based or content-neutral when determining the appropriate level of scrutiny, courts should consider whether the message restricted by a regulation can be avoided without significant hardship.<sup>233</sup> If a message is avoidable without hardship, strict scrutiny should be applied so that there is a greater likelihood that the regulation will not be upheld because the loss of the speaker's free expression is greater than the harm caused by conveyance of a message that can be avoided.<sup>234</sup>

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<sup>227</sup> See *Pickup II*, 728 F.3d at 1049–50. But see *Psychotherapy: Understanding Group Therapy*, AM. PSYCHOL. ASS'N, <http://www.apa.org/helpcenter/group-therapy.aspx>, archived at <http://perma.cc/LX44-NQWM> (last visited Mar. 18, 2015) (explaining that counseling can also occur in group settings, in which case the message may reach a larger audience).

<sup>228</sup> See *Spence*, 418 U.S. at 406; *Cohen*, 403 U.S. at 16.

<sup>229</sup> See *Spence*, 418 U.S. at 406; *Cohen*, 403 U.S. at 16.

<sup>230</sup> See *Spence*, 418 U.S. at 406; *Cohen*, 403 U.S. at 16. Although it may seem simple enough to avoid messages you don't want to see, the U.S. Supreme Court has recognized that we are captive audiences for many purposes. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). Although the Court has recognized that much of what we encounter “offends our esthetic, if not our political and moral, sensibilities,” the Court has concluded that the “Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.” *Id.* Rather, the burden is on the observer to avoid the message by “averting (his) eyes.” *Id.* at 210–11 (citation omitted).

<sup>231</sup> See *Pickup II*, 728 F.3d at 1049–50.

<sup>232</sup> See *id.* Similarly, an individual reading the newspaper or browsing the internet has the freedom to decide not to read any article or advice column they come upon. See *Cooksey v. Futrell*, 721 F.3d 226, 230 (4th Cir. 2013). This may be less true for a minor, who, for instance, may be coerced into meeting with the counselor by a family member. See *Pickup II*, 728 F.3d at 1049–50. But see AM. MENTAL HEALTH COUNSELORS ASS'N, *supra* note 201, at 1, 2 (providing that patients must be given the freedom to choose whether to enter into counseling or which professional will provide counseling).

<sup>233</sup> See *Cohen*, 403 U.S. at 21 (noting that recipients of the plaintiff's message could effectively avoid that message simply by looking away).

<sup>234</sup> See *id.*

Entering into a counseling relationship with a counselor who practices particular techniques can be avoided without significant hardship.<sup>235</sup> Before engaging in counseling, counselors must fully inform clients of the purpose and nature of treatment pursuant to the American Mental Health Counselors Association's Code of Ethics.<sup>236</sup> In the case of SOCE therapy, if a patient does not wish to receive that kind of treatment, the patient could simply decline to receive counseling from that professional entirely, or, if the patient is unable to decline, the patient could decline that form of treatment at the outset when the treatment plan was determined.<sup>237</sup> These options are available to the patient because, according to the Code of Ethics, a counselor cannot begin performing SOCE therapy during a counseling session without the client's prior approval.<sup>238</sup>

## 2. Potential Chilling Effect

It cannot be ignored that the regulation of communication in the context of counseling would have a chilling effect on the free speech of those who provide counseling services.<sup>239</sup> This occurs when "individuals seeking to engage in activity protected by the [F]irst [A]mendment are deterred from doing so by governmental regulation not specifically directed at that protected activity."<sup>240</sup> Regulations that chill free expression are of constitutional concern because free expression is a preferred value, which means that it is given extra weight compared with other values.<sup>241</sup> The deterrence of a protected activity

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<sup>235</sup> See generally AM. MENTAL HEALTH COUNSELORS ASS'N, *supra* note 201 (outlining numerous client options, rights, and freedoms, and ultimately giving clients control of the process).

<sup>236</sup> See *id.* at 1.

<sup>237</sup> See generally *id.* (highlighting the high level of autonomy the patient has in making therapy decisions). Similarly, individuals who come across advice online, especially advice by an author who indicates that he has no training or certification in the subject matter area, are free to move on from the website or take the advice with a grain of salt. See *Cooksey*, 721 F.3d at 230.

<sup>238</sup> See AM. MENTAL HEALTH COUNSELORS ASS'N, *supra* note 201, at 3.

<sup>239</sup> See *Sherman & McNamara*, *supra* note 102 (arguing that permitting First Amendment analysis to be circumvented by labeling expression as conduct would silence speakers attempting to engage in protected speech).

<sup>240</sup> See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 693 (1978). Scholars have argued that the right to free speech is an "affirmative value" and that the First Amendment is "based on the assumption, perhaps unprovable, that the uninhibited exchange of information [and] the active search for truth . . . are positive virtues." See *id.* at 691, 693. Additionally, protected expression is a "particularly valuable activity toward which legal rules must show special solicitude." See Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1650 (2013) (discussing why the chilling effect matters).

<sup>241</sup> See Kendrick, *supra* note 240, at 1650 ("The chilling effect is of constitutional moment because protected expression is a particularly valuable activity toward which legal rules must show special solicitude."); see also Schauer, *supra* note 240, at 705 (arguing that chilling effect is of concern to courts only because freedom of speech is a "preferred value").

should not be allowed without the restriction being subjected to a higher level of scrutiny than deferential rational basis.<sup>242</sup> Classifying counseling communications as conduct and, thus, permitting such communications to be regulated with greater ease, would result in a less diverse marketplace of treatment options.<sup>243</sup>

### CONCLUSION

The importance of protecting free expression suggests that regulations of expression, especially content-based regulations, should be subject to a higher standard of review rather than the deferential rational basis review. It is consistent with the notion that freedom of speech should be carefully guarded. As such, the state should bear the burden of demonstrating that a regulation burdening counseling communications is necessary to further a compelling state interest before that regulation can be upheld. An additional factor, which might be helpful in discerning whether a regulation should be upheld or whether it is an overly prohibitive restriction, is the ability of individuals who might receive the message to avoid it. Allowing activities as closely tied to speech as counseling communications to be regulated without a challenging standard of review makes it too simple for other activities to be similarly characterized as conduct and prohibited without substantial judicial review. If it looks like speech, acts like speech, and sounds like speech, it should be considered speech, not conduct.

DIAHANN DASILVA

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<sup>242</sup> See Kendrick, *supra* note 240, at 1650.

<sup>243</sup> See Paul Sherman & Jeff Rows, Op-Ed., *Psychological Warfare (Licensed) in Kentucky*, WALL ST. J., Jul. 17, 2013, at A17 (arguing that counseling communications should be recognized as speech that is protected under the First Amendment).

