

Brigham Young University Journal of Public Law

Volume 32 | Issue 1


Article 3

11-30-2017

Sexual Orientation Change Efforts, Professional Psychology, and the Law: A Brief History and Analysis of a Therapeutic Prohibition

Christopher H. Rosik

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>

 Part of the [Lesbian, Gay, Bisexual, and Transgender Studies Commons](#), [Psychology Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Christopher H. Rosik, *Sexual Orientation Change Efforts, Professional Psychology, and the Law: A Brief History and Analysis of a Therapeutic Prohibition*, 32 BYU J. Pub. L. 47 (2017).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol32/iss1/3>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Sexual Orientation Change Efforts, Professional Psychology, and the Law: A Brief History and Analysis of a Therapeutic Prohibition

Christopher H. Rosik

I. INTRODUCTION

On June 30, 2014, the United States Supreme Court declined to review a Ninth Circuit Court of Appeals decision concerning the constitutionality of California Senate Bill 1172. With this decision, California became the first state in the nation to enact a ban on sexual orientation change efforts (SOCE) by licensed therapists. The legislative and judicial process surrounding this law provides important insights regarding the intersection of political advocacy, professional psychology, and cultural change. In what follows, I will briefly describe the history of SB 1172 and analyze some of the likely factors that led to the pursuit of a statutory solution to a professional practice concern. I will also outline several recommendations for improving how controversial issues are addressed, not only by the profession of psychology, but also by politicians and judges. By examining these concerns through the lens of SB 1172, I hope to highlight the perils of resolving matters of professional practice through legislative action.

II. A HISTORICAL OVERVIEW OF SB 1172

A. Legislative Process

SB 1172 was introduced into the California Senate on February 22, 2012. The bill had been crafted by Equality California, a non-profit civil rights organization that advocates on behalf of sexual minorities in California, and was introduced into the state senate by Senator Ted Lieu (D-Torrance). The initial version of the bill stipulated mandatory language of informed consent that had to occur before engagement in any SOCE with adults. It also required the mandatory reporting of SOCE engagement by the therapist to the state. The report was to include the diagnosis, frequency of SOCE, any occurrence of complications, payment method, and the names of insurance companies billed. Finally, SB 1172 as originally written invited legal action by clients or former clients within two years of termination against any therapist who engaged in SOCE with any minor or who engaged in SOCE with an adult through “therapeutic deception” or without providing the mandated informed consent.¹ Therapists in breach of the law were to be subject to liability of civil damages and attorney fees of up to \$5,000.

As SB 1172 wove its way through the California legislature, it received significant attention from professional organizations and advocacy groups, which ultimately resulted in a major overhaul of the bill. All of the major professional organizations opposed the initial form of the bill, including the National Association of Social Workers (NASW), the California Association of Marriage and Family Therapists (CAMFT), and the California Psychological Association (CPA), all of which expressed concerns about the intrusion of the legislature into clinical practice and foresaw problems with an

¹ S.B. 1172, 2011-2012, Reg. Sess. (Cal. 2012).

overly broad definition of SOCE.² However, by the fall of 2012, changes to the bill had been negotiated among the stakeholders that led CPA and NASW to support the bill, while CAMFT dropped its opposition but remained neutral.³ The American Psychological Association (APA) did not specifically weigh in on the Bill, with spokeswoman Rhea Farberman only indicating that the APA “does not approve or ban” therapies and had not designated the practice of SOCE as an ethical violation.⁴

The bill moved forward mainly due to the almost unanimous support from majority Democrats, while Republicans generally opposed the bill on the grounds of parental rights and the perceived impropriety of the legislature regulating therapy.⁵ During the debates over SB 1172, the *LA Times* described the legislation as “bill overkill” while the *Orange County Register* consulted three experts who could recall no precedent for the state legislature ever outlawing a specific kind of therapeutic practice.⁶ CAMFT officials similarly acknowledged that, “[a] ban on a particular form of therapy is unprecedented and may have un-intended consequences yet unknown, inadvertently affecting legitimate

² Ben Caldwell, *California May Become First State to Limit “Reparative Therapy”*, PSYCHOTHERAPY NOTES (Sept. 24, 2012), <http://www.psychotherapynotes.com/california-may-become-first-state-to-limit-reparative-therapy>.

³ *Id.*

⁴ Kim Reyes, *Controversy Follows Effort to Ban Gay Conversion Therapy*, THE ORANGE COUNTY REGISTER (Jul. 27, 2012, 3:25 PM), <http://www.ocregister.com/2012/07/27/controversy-follows-effort-to-ban-gay-conversion-therapy>.

⁵ *Id.*

⁶ *Bill Overkill in Sacramento*, LOS ANGELES TIMES (May 11, 2012), <http://articles.latimes.com/2012/may/11/opinion/la-ed-0511-therapy-20120511>; Reyes, *supra* note 4.

practice.”⁷ Senator Lieu stirred particular controversy among conservatives when he was quoted saying the following:

The attack on parental rights is exactly the whole point of the bill because we don’t want to let parents harm their children. . . . For example, the government will not allow parents to let their kids . . . smoke cigarettes. We also won’t have parents let[ting] their children consume alcohol at a bar or restaurant.⁸

⁷ Catherine Atkins, *Legislative Update*, THE THERAPIST, September/October 2012, 42. A number of potential unintended consequences from SOCE bans such as SB 1172 have been suggested. These included; (1) the choice of celibacy might fall under the definition of SOCE; (2) vulnerable LGB youth could be driven into the shadows of unregulated and unprofessional SOCE, with accompanying increased safety and health concerns; (3) erosion of the mature minor doctrine, and; (4) establishing such a weak standard of scientific support for harm could also be used against liberal causes. Caitlin Sandley, *Repairing the Therapist? Banning Reparative Therapy for LGB Minor*, 24 HEALTH MATRIX, 247 (2014). For example, future laws might mandate abortion seekers to be told of the risk of suicide and suicidal ideation despite the lack of clear evidence of a causal link. Sandley endorsed informed consent mandates as a preferable approach to SOCE prohibitions. *Id.* at 273–

76. M. B. Alexander observed the incongruity of banning SOCE for minors while allowing minors to obtain elective cosmetic breast augmentation surgery (4,830 minors in 2011), when 40% of augmentation patients have at least one serious complication within three years and such patients are four times more likely to commit suicide compared to women the same age. M. B. Alexander, *Autonomy and Accountability: Why Informed Consent, Consumer Protection, and Defunding May Beat Conversion Therapy Bans*, 55(3) LOUISVILLE L. REV., 283, 307–08. She opined, “. . . the irony of stripping autonomy to avoid coercion is profound. It makes no sense for one concerned that parents might unduly influence minors—contrary to their autonomy—to seek a solution that unconditionally strips minors of their autonomy”. *Id.* at 307.

⁸ Reyes, *supra* note 4. Opponents were quick to respond Lieu's statement. They reported that key word searches in primary psychological and medical databases located thousands of research articles concerning yout

A few therapists and conservative legal groups testified in opposition to the bill, but they were not included in the key conversations among designated stakeholders.

These negotiations eventually resulted in major changes reflected in the final version of SB 1172.⁹ The informed consent requirement mandated by the state was dropped. The liability for monetary penalties was removed in favor of language that subjected licensed therapists to discipline by their respective state boards, with the none-too-subtle implied threat to their professional licenses. This final version of the bill ensured that its scope would only include licensed mental health professionals who might practice SOCE with minors. Approximately three-fourths of the final bill consisted of formal statements opposing SOCE from a wide variety of mental health associations, including the APA. Both houses of the California legislature voted along party lines to approve the amended Bill by the end of August 2012 (with the Senate voting 23-to-13 and the Assembly voting 52-to-22). On September 30, 2013, Governor Jerry Brown signed SB 1172 into law and the activity surrounding the bill quickly moved into the judicial arena.

h/minors/adolescent/children and alcohol/cigarette use, but only four articles on minors/adolescent/children and SOCE/conversion therapy/reorientation therapy/reparative therapy. See *Alliance Analysis of SOCE Ban Legislation*, <https://www.therapeuticchoice.com/analysis-of-anti-soce-legislation>. Three of the four were case studies, one of which appeared to be supportive of the practice. *Id.* The only research article somewhat related to the issue was that of Shidlo and Schroeder in 2002. *Id.*

⁹ *California Moves Closer to Banning 'Gay Cure' Therapy for Teens*, U.S. NEWS (Aug. 29, 2012), <https://usnews.newsvine.com/news/2012/08/29/13548649-california-moves-closer-to-banning-gay-cure-therapy-for-teens?lite>.

B. Judicial Process

On October 1, 2012 and October 4, 2012, two separate lawsuits were filed in the Eastern District Court of California, both of which requested a temporary injunction of the law while its constitutionality could be determined. Judge William B. Shubb adjudicated *Welch v. Brown*, and determined that SB 1172 attempted to regulate speech, was not viewpoint neutral, qualified for a strict scrutiny standard, served no compelling state interests, and was not likely to be constitutional.¹⁰ He consequently granted the temporary injunction on December 3, 2012, but applied it narrowly to just the three plaintiffs, two of whom were licensed mental health professionals.¹¹ *Pickup v.*

¹⁰ See *Welch v. Brown*, 907 F. Supp. 2d 1102, 1121–22 (E.D. Cal. 2012), rev'd sub nom.

¹¹ *Id.* at 1122–23. *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), and rev'd sub nom. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Of central importance in the legal arguments surrounding *Pickup v. Brown* was determining which standard of judicial review should apply to the case. Plaintiff's attorneys contended that the standards of strict scrutiny should be applied. This is the highest standard of review and applies only when a fundamental constitutional right is infringed upon or when a government action applies to a "suspected classification" such as race or religion. To qualify for strict scrutiny, the law has to be justified by a compelling governmental interest, narrowly tailored to achieve its goal, and be the least restrictive means for achieving that goal. Plaintiffs offered arguments suggesting SB 1172 failed to satisfy these three tests. Whereas laws deemed to fall under strict scrutiny standards are the least likely to be upheld by the courts, application of a rational basis judicial review standard is the default standard of review for constitutional questions and laws reviewed under this standard have a much greater probability of being upheld by the courts. Defendants' attorneys argued for the applicability of the rational basis review standard wherein they had merely to demonstrate to the court that SB 1172 was "rationally related" to a "legitimate" government interest and that no fundamental rights of the plaintiffs were being violated. The Ninth Circuit's majority opinion here clearly affirmed the rational basis standard in rendering its decision.

*Brown*¹² was heard by Judge Kimberly J. Mueller who determined that SB 1172 regulated conduct and not speech,¹³ did not violate parental rights,¹⁴ should be subject to the less restrictive rational basis review¹⁵ and therefore likely to uphold the legislature's findings about SOCE safety and efficacy,¹⁶ and consequently the constitutionality of the law was likely to be upheld.¹⁷ On December 4, 2012, Judge Mueller denied the preliminary injunction, which in this case had been requested by four licensed therapists, two sets of parents, the National Association of Research and Therapy of Homosexuality (NARTH), and the 50,000 member American Association of Christian Counselors.¹⁸

The losing parties of these legal actions quickly appealed the district court's decision to the Ninth Circuit Court of Appeals. On January 17, 2013, the two appeals were calendared together and subsequently adjudicated as one legal action. Only two mental health associations filed amicus briefs during this appeal process—the American Association of Marriage and Family Therapy (“AAMFT”) in support of the law, and the American College of Pediatricians in opposition. On August 29, 2013, a three judge panel of the Ninth Circuit upheld the constitutionality of SB 1172.¹⁹ Plaintiffs petitioned for their case to be heard by the full Ninth Circuit court, and this request was granted. On January 29, 2014, in a split decision, the Ninth Circuit's majority issued a final opinion upholding

¹² Pickup v. Brown, (2:12-cv-02497-KJM-EFB).

¹³ *Id.* at 16.

¹⁴ *Id.* at 31–39

¹⁵ *Id.* at 21, 42, 44.

¹⁶ *Id.*

¹⁷ *Id.* at 44.

¹⁸ Order at 2, Pickup v. Brown, 44.

¹⁹ Pickup v. Brown, 728 F.3d 1042, U.S. App. LEXIS, 18068 (9th Cir. Cal., 2013).

the law's constitutionality.²⁰ Judge Graber, writing for the majority, summarized the court's rationale for their decision in the following manner:

Without a doubt, protecting the well-being of minors is a legitimate state interest. And we need not decide whether SOCE actually causes "serious harms;" it is enough that it could "reasonably be conceived to be true by the governmental decision maker." . . . The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using SOCE on persons under 18. The legislature relied on the report of the Task Force of the American Psychological Association, which concluded that SOCE has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse. The legislature also relied on the opinions of many other professional organizations. . . . On this record, we have no trouble concluding that the legislature acted rationally by relying on that consensus.²¹

²⁰ *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. January 29, 2014).

²¹ *Id.* at 1231–32 (citations omitted). Judge Graber parsed the specific speech versus conduct question by observing, "Thus, the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than contribute to public debate." Judge Graber later noted, "As we have explained, SB 1172 regulates only (1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting within the confines of the counselor-client relationship. The statute does not restrain Plaintiffs from

In a scathing rebuke of the majority's decision, Judge O'Scannlain outlined the minority's concern over free speech issues:

The [9th Circuit's majority opinion] provides no principled doctrinal basis for its dichotomy: by what criteria do we distinguish between utterances that are truly "speech," on the one hand, and those that are, on the other hand, somehow "treatment" or "conduct"? The panel, contrary to common sense and without legal authority, simply asserts that some spoken words—those prohibited by SB 1172—are not speech. . . . Empowered by this ruling of our court, government will have a new and powerful tool to silence expression based on a political or moral judgment about the content and purpose of the communications. The First Amendment precisely forbids government from punishing speech on such grounds.²²

imparting information or disseminating opinions; the regulated activities are therapeutic, not symbolic." *Id.*

²² *Id.* at 10–11 (O'Scannlain, J., dissenting). O'Scannlain further expressed great concern with the majority's apparent expansive definition of the bill's focus on psychotherapeutic regulation by employing medical language and case law for its rationale. "The panel emphasizes the 'medical' nature of the regulation at issue. It describes change efforts as 'therapeutic treatment' and 'activities [that] are therapeutic,' and classifies change efforts as analogous for relevant purposes alongside medical procedures. Although the panel expressly invokes the statutory language when arguing that SB 1172 regulates conduct, it does not attend as closely to the legislative text in attempting to characterize change efforts as 'medicine' . . . It strains credulity to depict the counseling services—socially invaluable as they are—provided by marriage counselors and social workers as 'medicine' or 'treatment'."

The Ninth Circuit's decision was then appealed to the Supreme Court of the United States of America. Finally, on June 30, 2014, the Supreme Court declined to hear the appeal and SB 1172 officially became law in California.²³

C. Subsequent Legal Efforts

Emboldened by the success of SB 1172, copycat legislation was introduced into several state legislatures in fairly rapid-fire succession beginning in 2012. Through July of 2017, 26 state legislatures had introduced laws to ban SOCE for minors, although to date these statutory prohibitions have only been enacted into law in California, Connecticut, Illinois, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, and Vermont.²⁴ Not fully satisfied with these results, ban advocates have also encouraged local municipalities to pass similar laws. While many of these efforts have similarly failed, bans have been enacted in a handful of cities including Cincinnati, Miami Beach, Seattle, Tampa Bay, and Washington, D.C.²⁵ In all of these state or local jurisdictions to date, there is no record of any licensed mental health professional having been charged with a violation of these laws.

While no psychologist or other mental health worker has lost their license on the grounds of anti-SOCE legislation, this does not mean that these laws are not impacting professionals. The saga surrounding psychologist Kenneth Zucker is perhaps the prime example.²⁶ Publicity leading up to

²³ *Id.*, cert. denied, 134 S.Ct. 2871 (2014).

²⁴ *List of U.S. Jurisdictions Banning Conversion Therapy for Minors*, https://en.wikipedia.org/wiki/List_of_U.S._jurisdictions_banning_conversion_therapy_for_minors (last visited Nov. 7, 2017).

²⁵ *Id.*

²⁶ Erin Anderssen, *Gender Identity Debate Swirls Over CAMH Psychologist, Transgender Program*, GLOBE AND MAIL (Feb. 14, 2016)

the passage of a ban on SOCE for minors in the province of Ontario, Canada, in the summer of 2015 helped fuel allegations against Zucker and his highly respected Child and Youth Gender Identity Clinic in Toronto.²⁷ Zucker and his clinic received this scrutiny in large part due to their openness to helping young gender dysphoric children attempt to feel more comfortable in their own biological bodies.²⁸ In response to years of pressure by activists—intensified by the professional climate fomented by the SOCE ban—a review was instigated by the hospital that housed Zucker’s clinic.²⁹ This external review was commissioned in February of 2015 and the subsequent document included claims that Zucker provided “conversion” or “reparative” therapy and linked the clinic’s approach to youth suicide.³⁰ Though Zucker denied these claims, none of the accusations appear to have been fact checked by the hospital’s reviewers.³¹ Finally, on December 15, 2015, Zucker was unceremoniously fired and his clinic closed down.³²

A more recent approach to achieving anti-SOCE prohibitions is that of using Section 5 of the Federal Trade Commission Act (as well as state-level consumer protection laws), which prohibits unfair and deceptive practices.³³

<https://beta.theglobeandmail.com/news/toronto/gender-identity-debate-swirls-over-camh-psychologist-transgender-program/article28758828/>; Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, N.Y. MAGAZINE (Feb. 7, 2016 7:30P.M.) <http://nymag.com/scienceofus/2016/02/fight-over-trans-kids-got-a-researcher-fired.html>.

²⁷ Singal, *supra* note 26.

²⁸ Singal, *supra* note 26.; Anderssen, *supra* note 26.

²⁹ Singal, *supra* note 26.

³⁰ Singal, *supra* note 26; Anderssen, *supra* note 26.

³¹ Singal, *supra* note 26; Anderssen, *supra* note 26.

³² Singal, *supra* note 26; Anderssen, *supra* note 26.

³³ See generally John M. Satira, *Determining the Deception of Sexual Orientation Change Efforts*, 58 WM. & MARY L. REV. 641 (2016).

Opponents of SOCE view this federal approach as potentially being very attractive and preferable to the laborious process of state-by-state or city-by-city bans.³⁴ If successfully utilized, consumer fraud protections could be employed against all varieties of SOCE that involve a financial transaction facilitated by any type of provider (e.g., licensed therapist, life coach, religious or pastoral counselor) for any age client across the entire country. Not only would the FTC be the enforcement agency, but private citizens would also be emboldened to bring civil lawsuits against practitioners.

This legal strategy has already successfully used New Jersey consumer protection laws to shut down one religiously-oriented Jewish organization in December 2015.³⁵ Additionally, the Southern Poverty Law Center is in the process of trying to shut down a second organization—the non-religious Brothers on a Road Less Traveled (formerly “People Can Change”)—using consumer fraud protections. However, neither of these organizations involved licensed mental health professionals.³⁶ To date, only a few states have attempted to pass anti-SOCE legislation based on consumer fraud protections, with minimal success.³⁷ Illinois is one state where such an effort was successful, and now licensed therapists who provide SOCE for minors in the state face the same legal peril as fraudulent automotive technicians, home remodelers, cemetery salespersons, payday loan operators, and phone solicitors, to name just a few.³⁸

³⁴ Satira, *supra* note 33; Alexander, *supra* note 7, at 283–322.

³⁵ See generally Peter R. Dubrowski, *The Ferguson v. Jonah Verdict and a Path Towards National Cessation of Gay-to-Straight “Conversion Therapy,”* 110 NW. UNIV. L. REV. 77 (2015).

³⁶ *Id.*; see BROTHERS ON A ROAD LESS TRAVELED, <http://www.brothersroad.org/about/whoweare/> (last visited Nov. 8, 2017).

³⁷ Dubrowski, *supra* note 35; Alexander, *supra* note 7.

³⁸ H.B. 217, 99th Gen. Assemb., Reg. Sess. (Ill. 2015)

Subsequent to his success with California SB 1172, Ted Lieu (D-CA 33rd District) was elected to the U.S. Congress. On May 19, 2015, Congressman Lieu introduced the Therapeutic Fraud Prevention Act (H.R. 2450), with the intent of banning any “conversion” therapy for adults or minors that involves payment for services.³⁹ Similar bills (S. 2880 in 2016 and S. 928 in 2017) have been introduced into the Senate by Patty Murray (D-WA).⁴⁰ The Senate bills have stipulated enforcement mechanisms through both state and Federal Trade Commission action.⁴¹ To date, these bills have languished in committee. Certainly it is an open question as to the wisdom of having the FTC become the arbitrator of what is acceptable in professional psychology or counseling and whether the FTC Act even grants it any jurisdiction to determine what constitutes sound psychotherapeutic practice. Whatever the case may be, it should be noted that the promise of this approach to prohibiting SOCE may have been substantially undercut by the 2016 federal elections, and it appears unlikely that such legislation at the federal level will gain much traction under a Republican dominated legislature and the Trump administration.

³⁹ Therapeutic Fraud Prevention Act, H.R. 2450, 114th Cong. (2015).

⁴⁰ Therapeutic Fraud Prevention Act, S. 2880, 114th Cong. (2016); Therapeutic Fraud Prevention Act, S. 928, 115th Con. (2017).

⁴¹ Therapeutic Fraud Prevention Act, S. 928, 115th Con. §4(b) (2017); Therapeutic Fraud Prevention Act, S. 2880, 114th Cong. §3(c) (2016).

III. UNDERSTANDING THE TIMING AND TARGETING OF SOCE BANS

There is value in trying to comprehend the growing popularity of SOCE bans, in terms of what it may tell us about the current profession of psychology and the broader cultural dynamics in which public policy debates now occur. In this context it is historically worth remembering that in the mid 1990s efforts were made within the APA to formally discourage psychologists from engaging in SOCE (referred to at that time as “Sexual Orientation Conversion Therapy”).⁴² The APA eventually dropped these efforts, apparently due to concerns regarding both a lack of supporting scientific evidence and legal vulnerability, including potential claims against the APA by both professionals and clients should the APA have promulgated a formal resolution.⁴³

While the APA has not revisited this issue since that time and, as noted earlier, has maintained a stance that the association does not approve or ban therapies, there appears to be renewed interest in changing the APA’s current neutral stance toward SOCE bans.⁴⁴ Regardless of how this development progresses, changes occurring within the broader culture have created an environment where anti-SOCE

⁴² See *Proceedings of the American Psychological Association, Inc., for the year 1995*, 51 AM. PSYCHOLOGIST, Aug. 1996, at 805, 846; see also *Proceedings of the American Psychological Association, Inc., for the year 1996*, 52 AM. PSYCHOLOGIST, Aug. 1997, at 813, 865; see also *Proceedings of the American Psychological Association, Inc., for the Legislative Year 1997*, 53 AM. PSYCHOLOGIST, Aug 1998, at 882, 937.

⁴³ See *Proceedings of the American Psychological Association, Inc., for the Legislative Year 1997*, 53 AM. PSYCHOLOGIST, Aug 1998, at 882, 937.

⁴⁴ *APA Convention Highlights*, AM. PSYCHOLOGICAL ASSN., <http://www.apa.org/about/division/officers/dialogue/2016/07/convention-highlights.aspx>.

advocates within mental health associations can work through statutory prohibition efforts, enabling their associations to avoid the potential liabilities connected to formal actions aimed at curtailing the practice of SOCE. Arguably, the most important shift in the cultural landscape that has enabled SOCE bans centers on the moral appraisal of same-sex behavior.

A. Moral Foundations and Cultural Evolution

That attitudes toward sexual orientation and same-sex behavior are changing within the West in general and America in particular is undeniable. In 1973 only 11% of American adults believed that same-sex sexual activity was morally acceptable and this remained relatively stable through 1990 when 13% of respondents made such an endorsement.⁴⁵ However, by 2014 49% of American adults morally endorsed same-sex sexual behavior, creating an environment (particularly in “blue” states) where legal bans of SOCE became politically feasible for elected officials to propose.⁴⁶ The most succinct and insightful understanding of this evolution in moral outlook may be obtained through the lens of Moral Foundations Theory (MoFT).⁴⁷

MoFT is built upon insights from evolutionary psychology and cultural anthropology to identify the evolved psychological mechanisms underlying how individuals and the cultures they inhabit intuitively construct their moral frameworks in an effort to balance the needs of individuals and

⁴⁵ Jean M. Twenge et al., *Changes in American Adults’ Reported Same-Sex Sexual Experiences and Attitude, 1973-2014*, 45 ARCHIVES OF SEXUAL BEHAVIOR, 1713, 1713–30 (2016).

⁴⁶ Twenge, *supra* note 45, at 1713.

⁴⁷ See generally JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 1 (2012) [hereinafter RIGHTEOUS MIND].

groups.⁴⁸ Utilizing an impressive database collected online, these researchers have identified six universal foundations of the world's many moral matrices. These foundations of morality are:

- (1) Harm/Care (comprising virtues related to compassion and concern for the suffering of others),
- (2) Fairness/Reciprocity (comprising virtues related to justice and equality),
- (3) Liberty/Oppression (comprising virtues related to a sensitivity to and disapproval of those seen to dominate and restrict liberty),
- (4) In-group/Loyalty (comprising virtues related to allegiance, constancy, conformity, and self-sacrifice),
- (5) Authority/Respect (comprising virtues related to social order, adherence to class structure, respect, obedience, and role fulfillment), and
- (6) Purity/Sanctity (comprising virtues related to chastity, wholesomeness, control of desires, and avoidance of physical and spiritual contamination).⁴⁹

⁴⁸ See generally RIGHTEOUS MIND, *supra* note 47; Jesse Graham et. al., *Mapping the Moral Domain*, 101 J. OF PERSONALITY & SOC. PSYCHOL. 366 (2011) [hereinafter *Mapping the Moral Domain*]; Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May not Recognize*, 20 SOC. JUST. RES., 98 (2007); Spassena P. Koleva et. al., *Tracing the Threads: How Five Moral Concerns (Especially Purity) Help Explain Culture War Attitudes*, 46 J. OF RES. & PERSONALITY 184 (2012); Jesse Graham et. al., *Moral Foundations Theory: The Pragmatic Validity of Moral Pluralism*, 47 Advances in Experimental Soc. Psychol. 55–130 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184440.

⁴⁹ RIGHTEOUS MIND, *supra* note 47; Jonathan Haidt et. al., *Above and Below Left-Right: Ideological Narratives and Moral Foundations*, 20

In broad terms, Harm/Care, Fairness/Reciprocity, and Liberty/Oppression constitute *individualizing* foundations as they locate the focus of moral concern on individual well-being and consequently emphasize the rights and welfare of individuals. By contrast, In-group/Loyalty, Authority/Respect, and Purity/Sanctity represent *binding* foundations because they emphasize the moral primacy of virtues and institutions that bind people into roles, duties, and mutual obligations for the well-being of groups.⁵⁰ While none of these foundations is inherently superior to the others and individuals across the sociopolitical spectrum can utilize all of the foundations in their moral judgments, these foundations do appear to be differently weighted for different groups of people.

MoFT has amassed a wealth of empirical data to suggest that although conservative and liberal individuals share some similar moral concerns (relative to the rights and welfare of individuals), conservatives also are motivated by moral concerns that liberals may not recognize and that emphasize the virtues and institutions that bind people into roles, duties, and mutual obligations.⁵¹ Self-identified liberals tend to place a stronger emphasis on the individualizing foundations, particularly Harm/Care and Liberty/Oppression.⁵² Liberals, therefore, tend to justify moral rules in terms of their consequences for

PSYCH. INQUIRY 110, 111–12 (2009).

⁵⁰ *Mapping the Moral Domain*, *supra* note 48, at 371.

⁵¹ RIGHTEOUS MIND, *supra* note 47

⁵² See generally RIGHTEOUS MIND, *supra* note 47; Jesse Graham et. al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. OF PERSONALITY & SOC. PSYCHOL. 1029 (2009); *Mapping the Moral Domain*, *supra* note 48; Jesse Graham et. al., *Moral Foundations Theory: The Pragmatic Validity of Moral Pluralism*, 47 Advances in Experimental Soc. Psychol. 55–130 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2184440.

individuals. The language of rights, equality (of outcomes), and justice tends to be the dominant parlance of moral argumentation among those on the left, and Haidt has postulated that the most sacred value among liberals is that of caring for victims of oppression.⁵³ The groups and institutions comprising society are broadly viewed by liberals as servants of individuals.⁵⁴

Self-described conservative persons, on the other hand, often sympathize with these concerns but are not always able to endorse the solutions proposed by liberals. This is due in part to conservatives experiencing a moral domain that extends beyond the individualizing foundations and weighs these foundations more equally with the binding moral foundations of In-group/Loyalty, Authority/Respect, and Purity/Sanctity.⁵⁵ Thus, conservatives balance their concerns for reducing harm, ensuring fairness, and extending liberty via challenging injustice with attention to social cohesion, social stability via institutional integrity, and group-enhancing self-control via the sacred.⁵⁶ They generally believe the institutions, norms, and traditions that have helped build civilizations contain the accumulated wisdom of human experience and should not be tinkered with apart from immense reflection and caution.⁵⁷ For conservatives, the most

⁵³ RIGHTEOUS MIND, *supra* note 47, at 295–300.

⁵⁴ *Id.*

⁵⁵ *Id.* at 305–09.

⁵⁶ David C. Dollahite et al., “*Something More*”: *The Meanings of Marriage for Religious Couples in America*, 48 MARRIAGE & FAM. REV. 339 (2012); Jesse Graham et. al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. OF PERSONALITY & SOC. PSYCHOL. 1029 (2009).

⁵⁷ See RIGHTEOUS MIND, *supra* note 47; Christopher H. Rosik, *Same-Sex Marriage and the Boundaries of Diversity: Will Marriage and Family Therapy Remain Inclusive of Religious and Social Conservatives?* 50 MARRIAGE & FAM. REV. 714 (2014).

sacred value is likely to be the preservation of the institutions and traditions that sustain a moral community. The needs of individuals tend to be subordinated to the needs of groups and institutions.

Finally, self-identified libertarians appear to emphasize the Fairness/Reciprocity and (especially) the Liberty/Oppression foundations as understood in economic terms.⁵⁸ While libertarians display the least endorsement of the Harm/Care and Sanctity/Purity foundations, their moral foundations profile more closely resembles that of liberals rather than conservatives, particularly as pertains to contested social issues such as those related to sexual orientation.⁵⁹

MoFT stipulates that as societies become more modern and individualistic, the Harm/Care and Liberty/Oppression foundations become increasingly dominant as the basis for moral appraisal within the culture.⁶⁰ The loss of ideological diversity and the ascendance of a liberal moral outlook within professional psychology, much of higher education, as well as the entertainment industry, both served to reflect and shape this moral shift within the cultural.⁶¹ These changes appear likely to be at the root of why the practice of SOCE is now a lightning rod that brings to the surface the conflict between these opposing moral matrices. The moral language found within the arguments of both pro- and anti-SOCE advocates makes this clear.

⁵⁸ RIGHTEOUS MIND, *supra* note 47; Ravi Iyer et al., *Understanding Libertarian Morality: The Psychological Dispositions of Self Identified Libertarians*, 7 PLOS ONE 1 (2012).

⁵⁹ Jesse Graham et. al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. OF PERSONALITY & SOC. PSYCHOL. 1029, 1037–38 (2009).

⁶⁰ RIGHTEOUS MIND, *supra* note 47; Haidt & Graham, *supra* note 48.

⁶¹ *Mapping the Moral Domain*, *supra* note 48.

Defenders of professional SOCE for minors, while questioning the allegations of widespread harm, tended to anchor their arguments on claims of the need to respect religious liberty, parental rights, cultural/religious identities, and constitutional freedom of speech. These concerns fit well into the binding foundations of conservative moral reasoning, emphasizing respect for authority, in-group religious values and traditions, and purity concerns inherent in religious identities. This is also consistent with and reflects typical conservative concerns with the well-being of families and society.

By contrast, much about SOCE and the moral reasoning used to justify its practice, even when professionally provided, may simply not register as valid moral reasoning to anti-SOCE advocates, for whom concerns with harm and oppression dominate.⁶² For example, Beckstead relied on moral language in his declaration supporting SB 1172 and implied that such non-affirming beliefs need to be corrected.⁶³ SOCE consumers and

⁶² Jesse Graham et. al., *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. OF PERSONALITY & SOC. PSYCHOL. 1029 (2009); Haidt & Graham, *supra* note 48.

⁶³ Opposition to Emergency Motion for Temporary Injunction Pending Appeal (Circuit Rule 27-3), *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), (No. 12-17681). Beckstead observed, "Rather than being contrary to a client's autonomy, interventions that affirm sexual and gender diversity actually serve client autonomy since informed decisions and true self-determination are accomplished when a client's false assumptions are corrected and when individuals have the ability to explore the many ways to live positively being a sexual or gender minority." He later noted, "Although some SOCE youth consumers may feel supported by their SOCE provider, at its core, SOCE reinforce a message that their sexual desires are wrong and something to extinguish." To the extent that Beckstead is limiting his analysis to the psychological domain where claims can be investigated scientifically, his intent to correct false assumptions has merit. However, when he envisions changing moral beliefs of clients, then he has left the domain of an expert psychologist and occupies no privileged position thereby to judge the truthfulness of the relevant moral claims, though he can certainly speak to the psychological effects of these beliefs.

providers typically presume an ideal standard of sexual expression that prioritizes opposite-sex sexual expression and is often based on traditional religious values and faith community standards.⁶⁴ Yet, heterosexuality and traditional religious institutions may often not be given favored status within a liberal moral palate that prioritizes caring for victims of oppression; rather, they may be viewed as dominant groups who are historically privileged and oppressive to disadvantaged sexualities. Hence liberals' great concern for and dominant focus on the well-being of SOCE consumers and especially underage consumers who are considered the most vulnerable to professional SOCE's putative harms.

In addition to the effects of moral intuitions on the rhetorical language of pro- and anti-SOCE advocates regarding SB 1172, Haidt also discussed the impact of moral sentiments on judges.⁶⁵ He observed that judges are not immune from relying upon their own intuitive sense of morality in shaping judicial opinions, particularly with cases that involve complex scientific knowledge far from their experience and expertise.⁶⁶ From this perspective, judges can be influenced by unrecognized moral intuitions and self-interest in rendering a decision and then look to the legal record to provide *post hoc*

⁶⁴ See Christopher H. Rosik & Paul Popper, *Clinical Approaches to Conflicts Between Religious Values and Same-Sex Attractions: Contrasting Gay-Affirmative, Sexual Identity, and Change-Oriented Models of Therapy*, COUNSELING AND VALUES, 59 (2014)

⁶⁵ Jonathan Haidt, *Moral Psychology and the Law: How Intuitions Drive Reasoning, Judgment, and the Search for Evidence*, 64 ALA. L. REV., 867, 868, 872 (2013).

⁶⁶ *Id.* See also Brandon L. Bartels et al., *Lawyers' Perceptions of the U.S. Supreme Court: Is the Court a "Political" Institution?* 49 L. & SOC. REV. 761 (2015); Daniel M. Rempala et al., *Articulating Ideology: How Liberals and Conservatives Justify Political Affiliations Using Morality-Based Explanations*, 40 MOTIVATION & EMOTION 703 (2016); Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?* 93 TEX. L. REV. 855 (2015).

justification for their conclusions. In the case of SB 1172, such influence is suggested by the fact that during the entirety of the judicial process judges appointed by a Democrat President uniformly supported the law while only Republican appointed judges offered opposition.

Haidt has critically observed the tendency for groups of people united by their sense of the sacred to often lose their ability to think clearly about it, summed up in his statement that “morality binds and blinds.”⁶⁷ Thus, conservative and liberal advocates of controversial policy matters are tempted to overstate an evidentiary narrative that is consistent with each of their own sacred moral values and underplay or ignore (be blind to) pertinent details that run counter to their sense of moral propriety.⁶⁸ This tendency suggests a risk for conservative SOCE proponents is to *not sufficiently recognize the welfare and rights of individuals* in their efforts to uphold traditions, social order, and religious values. Conversely, the danger for liberal SOCE opponents is to *underplay the importance and fragility of the institutions and groups*, e.g., church, family, marriage, upon which societies have been built, in their efforts to protect individuals from harm and extend justice and rights. There is danger when public policy relies too heavily on either the binding foundations, e.g., oppressive secular or theocratic state control, or the individualizing foundations, e.g., economic and social breakdown.

As for modern psychology, Haidt has characterized it as a “tribal-moral community” that is united by “sacred values.”⁶⁹ Modern psychology is increasingly defined in terms of the liberal moral emphasis on Harm/Care and Liberty/Oppression and functioning in many respects similarly to religiously-

⁶⁷ RIGHTEOUS MIND, *supra* note 47, at 187.

⁶⁸ *See Id.*

⁶⁹ *Id.*

identified moral communities.⁷⁰ Discussion of how the liabilities of this “binded and blinded” moral outlook appear to have been on display in the arguments over SB 1172 follows.

IV. WOZZLES IN THE SERVICE OF SOCE LEGAL ARGUMENTS

One inherent danger in any profession that is heavily dominated by one moral community is the risk of engaging or being complicit in woozling in order to achieve advocacy goals and policy objectives.⁷¹ The woozle effect is a concept that refers to the misrepresentation and misuse of research by advocacy groups for their own advocacy and political purposes.⁷² The term harkens back to the story of Winnie the Pooh, when the beloved bear dupes himself and his friends into believing they are being followed by a frightening beast that he calls a woozle. Although they never see the woozle, they are convinced it exists because they see footprints beside their own as they walk in circles around a tree.⁷³ Pooh and his friends are confident they are onto something very big, but their conclusions are based on faulty data. Woozling occurs when a claim or belief is asserted as definitive but is in fact based on data that is inaccurate or only partially accurate.⁷⁴ Since the

⁷⁰ John Tierney, *Social Scientist Sees Bias Within*, N.Y. TIMES (Feb. 7, 2011), http://www.nytimes.com/2011/02/08/science/08tier.html?_r=3.

⁷¹ Richard J. Gelles, *The Politics of Research: The Use, Abuse and Misuse of Social Science Data—The Cases of Intimate Partner Violence*, 45 FAM. CT. REV., 42 (2007) [hereinafter *The Politics of Research*].

⁷² Richard J. Gelles, *Violence in the Family: A Review of Research in the Seventies*, 42 J. OF MARRIAGE AND FAM., 873, 880 (1980) [hereinafter *Violence*]; See also Gelles, *The Politics of Research*, *supra* note 71.

⁷³ See A. A. MILNE, POOH GOES VISITING & PIGLET NEARLY CATCHES A WOZZLE, 1 (1990).

⁷⁴ See Gelles, *Violence*, *supra* note 72; See also Gelles, *The Politics*

assertion is repeatedly and authoritatively cited in misleading ways, the public and policy makers come to believe it is true.⁷⁵

While it is certainly true that woozles can be created in the service of both conservative and liberal policy aims, this analysis will focus mostly on the conduct of the professional and political forces that initiated and supported SB 1172 because it is almost certainly easier for professional psychology to identify woozling by conservative moral communities than to discern woozling to which it may contribute. Nielsen outlined several ways that woozles are created and nurtured, many of which appear to have broad applicability to the deliberations regarding SOCE.⁷⁶ Some of the more relevant factors include evidence by citation, generalizing from small or non-representative samples, differential emphases on the significance and limitations of findings, the use of dramatic portrayals, failing to contextualize research findings, and questionable research practices.

A. Evidence by Citation

This process can involve cherry-picking a few studies to support one position, which may be repeatedly cited and discussed as “the research” on a topic. Reviews of the research, particularly in the context of making policy recommendations, may be based primarily on the same few studies and may neglect other pertinent research. In the context of the debate over SOCE and SB 1172, Shidlo and Schroeder’s 2002 study of SOCE consumers was widely and definitively cited as the primary empirical evidence that such practice is harmful.⁷⁷

of Research, supra note 71.

⁷⁵ Gelles, *supra* note 72.

⁷⁶ Linda Nielsen, *Woozles: Their Role in Custody Law Reform, Parenting Plans, and Family Court*, 20 PSYCHOL. PUB. POL’Y & L. 164 (2014).

⁷⁷ Am. Psychol. Ass’n, *Report of the American Psychological*

Similarly, another study by Ryan, Huebner, Diaz, and Sanchez was the sole research article cited in the text of the California anti-SOCE law.⁷⁸ As indicated below, the relevance of both studies to the practice and policy questions addressed in SB 1172 is at best tenuous.

B. Generalizing from Small or Non-representative Samples

Shidlo and Schroeder and Ryan et al. have both been used in professional and political contexts as broad indicators of potential widespread SOCE harm, when they arguably should not have been generalized beyond their own samples. SB 1172 opponents noted that Shidlo and Schroeder's sample consisted of both professionals and unregulated non-professionals, such as religious counselors. The study obtained retrospective reports sometimes dating a decade or more in the past, and, in the former case, specifically recruited for SOCE consumers who felt they had been harmed.⁷⁹ As for Ryan et al., detractors of the law objected that this was not a study of SOCE at all, and thus did not assess SOCE-related rejection experiences among their sample. SOCE was simply assumed to signify parental rejection by definition.⁸⁰ Opponents contended that this appears to be an extremely low scientific threshold to hold when one is attempting to legally infringe upon professional practice.⁸¹ This tendency to generalize findings to groups with

Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation, (2009),

<http://www.apa.org/pi/lgbt/resources/therapeuticresponse.pdf>.

⁷⁸ Huebner C. Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS, 346–52 (2009).

⁷⁹ Ariel Shidlo & Michael Schroeder, *Changing Sexual Orientation: A Consumers' Report*, 33 PROF. PSYCHOL.: RES. & PRAC., 249–259 (2002).

⁸⁰ Ryan et al., *supra* note 78.

⁸¹ Caitlin Sandley, *Repairing the Therapist? Banning Reparative*

questionable ties to the sample at hand can serve the interests of woozling.

C. Differential Emphases on the Significance and Limitations of Findings

Often, very rigorous methodological standards were utilized to evaluate SOCE efficacy, but far lower standards were employed in discussing claims of harm.⁸² For example, conservatives were quick to point out that the APA's *Report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation* simply dismissed, on methodological grounds, the veridicality of findings reported in one high quality, longitudinal study of religiously-mediated change that suggested the possibility of varying degrees of change in the dimensions of sexual orientation for some individuals.⁸³ By contrast, a study by Hooker was cited uncritically by the Task Force as being groundbreaking research despite severe limitations that critics believed should disqualify it from scientific relevance for the topic of SOCE.⁸⁴ To their credit, Shidlo and Schroeder cautioned that, "[t]he data presented in this study do not provide information on the incidence and

Therapy for LGB Minors, 24 HEALTH MATRIX, 254–56 (2014); Alexander, *supra* note 7, at 283–322. See also S.L. Jones et al., *A Scientific, Conceptual, and Ethical Critique of the Report of the APA Task Force on Sexual Orientation*, 45(2) GEN. PSYCHOLOGIST, 7–18 (2010).

⁸² Stanton L. Jones et al., *A Scientific, Conceptual, and Ethical Critique of the Report of the APA Task Force on Sexual Orientation*, 45 THE GEN. PSYCHOLOGIST, 7 (2010); Caitlin Sandley, *Repairing the Therapist? Banning Reparative Therapy for LGB Minors*, 24 HEALTH MATRIX, 247 (2014).

⁸³ Am. Psychol. Assoc., *supra* note 8; Stanton L. Jones & Mark A. Yarhouse, *Ex-gays? A Longitudinal Study of Religiously Mediated Change in Sexual Orientation*, (2007).

⁸⁴ Walter R. Schumm, *Re-examining a Landmark Research Study: A Teaching Editorial*, 48 MARRIAGE & FAM. REV. 465 (2012).

prevalence of failure, success, harm, help, or ethical violations in conversion therapy.”⁸⁵ However, these clear limitations were rarely acknowledged when such research was cited in the professional, legal, and political efforts to prohibit SOCE. For example, Sen. Lieu described SOCE provided by licensed therapists as constituting “psychological abuse,” and asserted, “Some individuals perceived that they had benefited from sexual orientation change efforts, but the *vast majority* of participants perceived that they had been harmed.”⁸⁶ Cyphers won a legal award by confidently mischaracterizing the APA’s *Report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, claiming, “. . .according to the APA, suicide is a very real consequence of SOCE.”⁸⁷

In spite of the APA Taskforce Report’s expressed statement of agnosticism claiming, “Thus, we cannot conclude how likely it is that harm will occur from SOCE,” experts affiliated with the APA have asserted that the risk of harm is sufficient to justify legal prohibitions on the practice.⁸⁸ Such assertions appear to be at odds with the Leona Tyler Principle, which was adopted by the APA in 1973 and held, among other

⁸⁵ Shidlo & Schroeder, *supra* note 79, at 250.

⁸⁶ Ted W. Lieu, Senate Bill 1172 Sexual Orientation Change Therapy Fact Sheet, http://www.southbaycities.org/sites/default/files/legislative_staff/HANDO_UT_Senator%20Ted%20Lieu%20Bill%20Summary%20.pdf.

⁸⁷ Christian S. Cyphers, *Banning Sexual Orientation Therapy: Constitutionally Supported and Socially Necessary*, 35 J. OF LEGAL MED., 539, 550 (2014).

⁸⁸ Am. Psychol. Assoc., *supra* note 8 at 42; *See Declaration of Douglas C. Haldeman in opposition to 9 motion for preliminary injunction, Welch v. Brown, E.D. Cal. Case no. 2:12-cv-02484 WBS-KJN (2012, November 19). Retrieved from <https://ecf.njd.uscourts.gov/doc1/11918162710>, Declaration of Gregory M. Herek in support of defendant’s opposition to plaintiffs’ motion for preliminary injunction, Pickup v. Brown, E.D. Cal. Case no. 12-02497-KJM-EFB (2012, November 9). Retrieved from <https://ecf.njd.uscourts.gov/doc1/11918162712>.*

tenets, that psychologists' public policy advocacy be firmly grounded in a clear scientific foundation.⁸⁹ Cummings has noted that “. . . with the growth of political correctness, somehow the Leona Tyler principle, which was never repealed, was increasingly ignored and allowed to fade in everyone's memory.”⁹⁰ The tendency in the debates over SB 1172 for SOCE opponents to magnify what little is empirically established regarding SOCE harms and to downplay or ignore the few recent studies that hint at SOCE efficacy for some suggests a woozling process at work.

D. The Use of Dramatic Portrayals

In legislative hearings and judicial arguments, claims of harm from SOCE were often presented in dramatic ways that include anecdotal stories, case studies, or emotionally laden images or graphics. Sen. Lieu implied that SOCE provided by licensed therapists was “. . . dangerous in that it often causes severe mental trauma—and even death—for some children,” (Lieu, 2013) despite a lack of any prior record in California of therapists having their licenses revoked for engaging in SOCE leading to client fatalities. Similarly, descriptions of SOCE provided by contemporary mental health professionals were often conflated with the worst aversive practices of mid-20th century behavioral psychology, such as applying electric shocks to genitals, inducing nausea, vomiting, and paralysis in association with homoerotic stimuli, and even castration.⁹¹ Those challenging SB 1172 observed that its

⁸⁹ See Leona Tyler, *An Approach to Public Affairs: Report of the Ad Hoc Committee on Public Affairs*, 24 AMER. PSYCHOL. 1 (1969).

⁹⁰ Nicholas A. Cummings, *Sexual Orientation, Faith Tradition, and the Disappearance of the Leona Tyler Principle*, 45 THE GEN. PSYCHOLOGIST, 44, 47 (2010).

⁹¹ Christian S. Cyphers, *Banning Sexual Orientation Therapy: Constitutionally Supported and Socially Necessary*, 35 J. OF LEGAL MED.,

supporters rarely noted that such methods, once common in behavioral psychology generally, have for decades been eschewed as unethical and inefficacious as SOCE interventions, even by licensed SOCE practitioners. On the occasions when SOCE opponents acknowledged this context, proponents complained that such aversive practices were none-the-less regularly cited in a guilt-by-association manner.⁹²

The use of dramatic stories of harm are effective methods of woozling as they activate people's Harm/Care moral intuition and thereby arouse their emotions, increasing the likelihood that the accounts will be remembered by politicians and judges but also potentially contributing to emotional responses that override critical thinking and empirical data, especially on controversial issues such as SOCE.⁹³ Testimony by supporters of the statutory bans in California and New Jersey were often dramatic, though accounts of harm often referenced nonprofessional, religious forms of counseling from SOCE providers outside the jurisdiction of these laws. Particularly noteworthy to detractors of SOCE bans in this regard was one individual's account of horrendous abuses from SOCE offered in hearings to New Jersey state legislators that appeared to be fabricated and taken directly from the RuPaul movie, *But I'm a Cheerleader*.⁹⁴ Although professional psychological associations may not have originated such portrayals, SOCE supporters complained that neither did these associations seem inclined to make any

539 (2014); H.R. 1172, 2012 Leg, Fact Sheet (Cal. 2012).

⁹² Opposition to Emer. Motion for Temp. Injunction Pending App., Pickup v. Brown, No. 12-17681 (9th Cir. Dec. 14, 2012).

⁹³ Nielsen, *supra* note 76, at 164.

⁹⁴ Anderssen, *supra* note 26. Robert Carle, *When Government Keeps Teens from Seeing the Therapist*, THE PUB. DISCOURSE (Nov. 14, 2013) <http://www.thepublicdiscourse.com/2013/11/11181/>.

attempt at correcting such scientifically unjustifiable distortions of contemporary SOCE.

E. Failing to Contextualize Research Findings

Harm attributed to SOCE was typically described as being “potential” or “sometimes” occurring, which SOCE advocates viewed as an acknowledgement that the data on which such claims are being made are far from definitive.⁹⁵ They frequently pointed out the assertions in legislative and judicial settings merely that SOCE has the potential for harm obscures the fact that all psychotherapies have this potential and the prevalence rate of reported harms from SOCE is currently unknown.⁹⁶ Anecdotal evidence, ban critics contended, cannot tell us if the prevalence of reported harm from SOCE provided by a licensed therapist is any greater than from psychotherapy in general, where research indicates 5–10% of adults and 14–24% of minors experience deterioration while up to 50% of minors experience no reliable change in their presenting concerns.⁹⁷ Thus, SOCE proponents argued that any ban should be grounded on research establishing a prevalence rate of harm for SOCE conducted by licensed therapists significantly higher than these percentages. Such research would also need to account for the many potential

⁹⁵ AM. PSYCHOL. ASSOC., *Report on the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, 2009; AM. PSYCHOL. ASSOC., *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, 67, 2012.

⁹⁶ AM. PSYCHOL. ASSOC., *supra* note 95.

⁹⁷ HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR, (Michael J. Lambert ed., 6th ed. 2013); Michael J. Lambert, *Outcome in Psychotherapy: The Past and Important Advances*, 50 PSYCHOTHERAPY 42, 44 (2013). Michael J. Lambert & Benjamin M. Ogles, *The Efficacy and Effectiveness of Psychotherapy*, in HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE (Michael J. Lambert ed., 5th ed. 2004);

non-SOCE factors that may mediate and/or moderate experiences of harm (e.g., coping or attachment styles, level of pre-therapy distress). Without such clarity surrounding SOCE outcomes, assertions of harm sufficient to justify a SOCE prohibition may be markers of the woozling process more than they represent sound scientific reasoning⁹⁸.

F. Questionable Research Practices

Particularly in research domains that are politically relevant, there is an elevated risk of researchers engaging in Questionable Research Practices (QRPs) to achieve results that support favored policy outcomes. Surveys of psychologists and medical researchers have found QRPs to be committed with alarming frequency.⁹⁹ QRPs may include collecting more data after seeing whether the results are significant, stopping data

⁹⁸ Nielsen, *supra* note 76; Caitlin Sandley, *Repairing the Therapist – Banning Reparative Therapy for LGB Minors*, 24 HEALTH MATRIX 247 (2014).

⁹⁹ F. Agnoli et al., *Questionable Research Practices Among Italian Research Psychologists*, 12 PLOS ONE (2017); Malena Braun & Andres Jorge Roussos, *Psychotherapy Researchers: Reported Misbehaviors and Opinions*, 7 J. OF EMPIRICAL RES. ON HUM. RES. ETHICS 24 (2012); Jamie DeCoster et al., *Opportunistic Biases: The Origins, Effects, and an Integrated Solution*, 70 AM. PSYCHOL. 499 (2015); Christopher J. Ferguson, *Everybody Knows Psychology is not a Real Science*, 70 AM. PSYCHOL. 527 (2015); Leslie K. John et al., *Measuring the Prevalence of Questionable Research Practices With Incentives for Truth Telling*, 23 PSYCHOL. SCI. 524 (2012); Brian A. Nosek & Yoav Bar-Anan, *Scientific Utopia: I. Opening Scientific Communication*, 23 PSYCHOL. INQUIRY 217 (2012); Brian A. Nosek et al., *Scientific Utopia: II Restructuring Incentives and Practices to Promote Truth Over Publishability*, 7 PERSPECTIVES IN PSYCHOL. SCI. 615 (2012); Walter R. Schumm & Duane W. Crawford, *Violations of Fairness in Social Science Research: The Case of Same-Sex Marriage and Parenting*, 6 INT'L J. JURIS. FAM. 67 (2015); J.K. Tjldink et al., *Publication Pressure and Scientific Misconduct in Medical Scientists*, 9 J. OF EMPIRICAL RES. ON HUM. RES. ETHICS 64 (2014).

collection only when statistical significance is achieved, running multiple independent experiments and/or several data analytic strategies but reporting only those that produce statistically significant results, failing to report all conditions or all dependent variables, and claiming to have predicted an unexpected finding. In addition, it is common for researchers to fail to provide their study data to other professionals upon request.¹⁰⁰ Nosek and colleagues lament that “it is surprising that there is so little transparency and accountability for the research process. Beyond the published reports, science operates as a ‘trust me’ model that would be seen as laughably quaint for ensuring responsibility and accountability in state or corporate governance.”¹⁰¹

Although the degree to which QRPs may have shaped the findings of the studies used to support prohibitions against SOCE with minors is unknown, the temptation for SOCE researchers across the sociopolitical spectrum to engage in such practices is surely palpable. Because QRPs can assist the woozling process by making it easier for researchers to interpret data in a manner that supports their desired conclusions, it seems imperative such practices be addressed directly to ensure through research and policy the integrity of research utilized by professional psychology in advocating for controversial laws such as SB 1172.

V. PSYCHOLOGY AND THE LAW: RECOMMENDATIONS WHEN ADDRESSING CONTROVERSY

¹⁰⁰ Klaas Sijtsma, *Playing with Data—Or How to Discourage Questionable Research Practices and Stimulate Researchers to Do Things Right*, 81 PSYCHOMETRIKA 1 (2015); Jelte M. Wicherts et al., *Willingness to Share Research Data is Related to the Strength of the Evidence and the Quality of Reporting of Statistical Results*, 6 PLOS ONE (2011); Jelte M. Wicherts et al., *The Poor Availability of Psychological Research Data for Reanalysis*, 61 AM. PSYCHOL. 726 (2006).

¹⁰¹ Nosek et al., *supra* note 99, at 625.

As events surrounding the journey of SB 1172 into law demonstrate, when clinical practices intersect with conflicting sacrosanct moral frameworks the temptation for ends to justify means in advocacy is substantial.¹⁰² Consequently, it is crucial to identify measures for promoting the integrity of the process wherein conflicts regarding professional practice are escalated into legislative and legal action. In what follows I note a few of the more salient recommendations for the practice of research, the process of legislative and judicial deliberation, and the functioning of professional psychology.

A. Research Practice

1. Reduce incentives for the occurrence of QRPs

QRPs remain highly understudied in the context of controversial subjects such as professional SOCE that are the focus of legal and policy advocacy. This is despite the plausibility that researchers' intuitive moral imperatives and advocacy sympathies might exert real pressure to achieve findings consistent with these motivations.¹⁰³ Combining these putative impetuses for QRPs with established incentives that

¹⁰² Schumm & Crawford, *supra* note 99.

¹⁰³ Ferguson, *supra* note 99. It is noteworthy that Ferguson's critique of past APA policy statements on social issues cites only one example favorably—the condemnation of therapies that allow for change in sexual orientation, which he contends is grounded in empirical data. However, as this account of SB 1172 suggests and recent research related to sexual orientation (and especially sexual attraction) fluidity indicates, even this position may prove in time to have been scientifically premature and significantly influenced by advocacy considerations. This may also be why proponents of professional SOCE practices appear to be moving away from traditional terms such as conversion therapy or SOCE and adopting the seemingly more defensible descriptor of Sexual Attraction Fluidity Exploration in Therapy (SAFE-T).

include the publication demands of academia suggest the prudence of measures that would counter these pressures and reduce the temptation for researchers to engage in questionable practices. A variety of solutions are currently being debated to reduce QRPs.¹⁰⁴ Perhaps the most effortless of these ideas would be the adoption by professional journals of a simple disclosure statement and checklist, wherein authors of research studies indicate to journal editors that they have not engaged in QRPs in the production of their data.¹⁰⁵ These authors astutely observe that:

Our solution turns inconsequential sins of omission (leaving out inconvenient facts) into consequential, potentially career-ending sins of commission (writing demonstrably false statements). Journals implementing our disclosure requirements will create a virtuous cycle of transparency and accountability that eliminates the disincentive problem [wherein researchers are enticed to engage in questionable practices].¹⁰⁶

Requiring this kind of standard disclosure for researchers who study SOCE and other controversial subjects would go a long way toward ensuring the integrity of findings

¹⁰⁴ DeCoster et al., *supra* note 99; Nosek & Bar-Anan, *supra* note 99; Brian A. Nosek & Daniel Lakens, *Registered Reports: A Method to Increase the Credibility of Published Results*, 45 SOC. PSYCHOL. 137 (2014); Nosek et al., *supra* note 99; Walter R. Schumm, *Navigating Treacherous Waters—One Researcher’s 40 Years of Experience with Controversial Scientific Research*, 4 COMPREHENSIVE PSYCHOL. 1 (2015).

¹⁰⁵ Joseph P. Simmons et al., *False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant*, 22 PSYCHOL. SCI. 1359, 1365 (2011).

¹⁰⁶ *Id.* at 1364.

utilized in legislative and legal contexts to outlaw disfavored forms of psychological practice and jeopardize professional careers.

2. Encourage the sharing of data among researchers from opposing sides of the controversy

Despite the APA ethical mandate for researchers to maintain their records for five years post-publication and make their data available to other professionals who request it (APA Ethics Code Standard 8.14a, Sharing Research Data for Verification), this practice does not appear to enjoy widespread support.¹⁰⁷ Most studies suggest that the compliance rate for data requests is generally low, perhaps in the 30% range. This apparent reluctance could be circumvented by having journals require authors to submit their datasets as a condition of publication and then making these available to other scholars for reanalysis.¹⁰⁸ Greater weight in legislative and judicial deliberations might be given for studies of controversial topics such as SOCE where it can be verified that the study's authors have made their data available to other scholars, including those from opposing viewpoints.

3. Full disclosure of research funding sources

Ferguson expressed concern that, “[c]lose associations with advocacy groups, particularly via research funding, may further reinforce ideological values and remove the scholars further from objective science.”¹⁰⁹ He recommended that psychological researchers refrain from having their work

¹⁰⁷ Ferguson, *supra* note 99; Nosek et al., *supra* note 99; Schumm, *supra* note 104.

¹⁰⁸ Ferguson, *supra* note 99; Sijtsma, *supra* note 100.

¹⁰⁹ Ferguson, *supra* note 99, at 533.

financially underwritten by advocacy groups that have a stake in the outcome of the study. While this may be an impossible standard to achieve in practice, particularly when the issues evoke a moral fervor that animates cultural debate, politicians and judges should give some prioritization to scholarship that affirms its freedom from such demand characteristics. This might have been useful information in the debates over SB 1172 and the reliance by proponents of the law upon Shildo and Schroeder's study, which was conducted in association with the National Lesbian and Gay Health Association and initially only recruited for participants who would report harm.¹¹⁰ More recent studies on SOCE either do not disclose their funding sources,¹¹¹ or have been financially supported by grants under the auspices of the APA,¹¹² which is on record as opposing the practice under study.¹¹³ Disclosure of funding sources, if any, by researchers serves to shed light on inherent conflicts of interest and provides important background context to officials tasked with evaluating the integrity of research claims in a highly contentious environment.

¹¹⁰ Shildo & Schroeder, *supra* note 79.

¹¹¹ Kate Bradshaw et al., *Sexual Orientation Change Efforts Through Psychotherapy for LGBQ Individuals Affiliated with the Church of Jesus Christ of Latter-day Saints*, 41 J. OF SEX & MARITAL THERAPY 391, 391–412 (2015); John P. Dehlin et al., *Sexual Orientation Change Efforts Among Current or Former LDS Church Members*, 62 J. OF COUNSELING. PSYCHOL. 95, 95–105 (2014); Elan Y. Karten & Jay C. Wade, *Sexual Orientation Change Efforts in Men: A Client Perspective*, 18 THE J. OF MEN'S STUD. 84, 84–102 (2010).

¹¹² Annesa Flentje et al., *Sexual Reorientation Therapy Interventions: Perspectives of Ex Ex Gay Individuals*, 17 J. OF GAY & LESBIAN MENTAL HEALTH 256, 256–77 (2013); See generally AMERICAN PSYCHOLOGICAL ASSOCIATION, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 1–140 (2009).

¹¹³ AM. PSYCHOL. ASSOC., *Publication Manual of the American Psychological Association*, 2009 (6th ed.).

*B. Legislative and Judicial Process**1. Establish criteria for research of adequate rigor to justify legislative intrusions into psychological practice*

While debates over the quality of research on controversial subjects are inevitable, professional psychology could develop standards for judging what research should be considered to have sufficient or special merit for justifying statutory policy and influencing judicial opinion. Schumm, for example, has suggested that judges limit their consideration of research to studies that: (1) have effect sizes of 0.20 or greater (even when results are not statistically significant); (2) use random samples from known populations (if the results are being generalized for policy or law purposes); and (3) employ reliable and valid independent variables.¹¹⁴ In the case of SOCE, even these minimum criteria would have virtually eliminated the pertinent literature from serious consideration and perhaps encouraged further reflection by the legislative and judicial decision-makers as to the scientific basis for S.B. 1172. Although the bar need not be set this high, some agreed upon, easily comprehended system for evaluating the quality of research (such as the letter grade classification often used in evidence based assessments of psychotherapy) could assist these decision-makers immensely in appraising research intended to sway their opinion.

2. Standardize the reporting of research

Short of agreed upon criteria for the valuation of research merit, standards could at least be developed for how research is to be conveyed to politicians and judges. The

¹¹⁴ Walter R. Schumm, *supra* note 104.

presentation of research being utilized to justify policy creation, especially in controversial arenas, should be based on specific data, include mandatory disclosure of limitations, and offer differing interpretations that reflect the perspectives of the stakeholders in the debate.¹¹⁵ Funding sources, as noted above, should also be clearly disclosed. Findings that run counter to the researcher's expectations and advocacy interests deserve particular attention and emphasis. For example, the surprise accounts of some positive SOCE experiences reported to Shidlo and Schroeder were rarely mentioned by proponents of S.B. 1172.¹¹⁶

3. Deemphasize anecdotal accounts

Anecdotal accounts and qualitative case study reports should be considered the least authoritative source of information on which to base policy, owing in part to the serious risk of such sources being selected for the purposes of emotional manipulation and woozling in highly charged political environments.¹¹⁷ Dramatic or fantastical stories should, where possible, be verified for authenticity or else be dismissed as unreliable evidence by legislative and judicial authorities. In the context of anti-SOCE legal debates, personal accounts of extreme harm as well as stories of miraculous success from professional SOCE should be treated with heightened scrutiny and skepticism in the absence of empirical corroboration.

C. Professional Psychology

1. Increase ideological diversity at all levels of the profession

¹¹⁵ Ferguson, *supra* note 99; Nielsen, *supra* note 76; Schumm, *supra* note 104.

¹¹⁶ See Shidlo & Schroeder, *supra* note 79.

¹¹⁷ See Nielsen, *supra* note 76.

Organized psychology is rapidly becoming less socio-politically diverse, with the potential to undermine the credibility of its pronouncements on scientific matters before politicians and the courts.¹¹⁸ This ideological homogeneity conceivably impacts the production and dissemination of social science at many levels—especially so with regard to controversial subjects. It can be evidenced as bias in research citation, task force selection, peer review, and hiring practices.¹¹⁹ More generally, Duarte and colleagues argue that the lack of diversity embeds left-of-center values in psychological theory and method, concentrates the profession on topics that validate progressive narratives rather than contest them, and risks producing a psychological science that mischaracterizes the traits, attributes, and motivations of conservatives. In this sense, psychology risks winning selected near term battles regarding certain advocacy concerns while losing the long term war of public opinion and trust, especially among conservatives.¹²⁰ In the debates over SOCE bans, while

¹¹⁸ Jose L. Duarte et al., *Political Diversity Will Improve Social Psychological Science*, 38 BEHAV. & BRAIN SCI. 1, (2015); Ferguson, *supra* note 99.

¹¹⁹ See Ferguson, *supra* note 99; Nathan Honeycutt & Laura Freberg, *The Liberal and Conservative Experience Across Academic Disciplines: An Extension of Inbar and Lammers*, 8 SOC. PSYCHOL. & PERSONALITY SCI. 115, (2017); Schumm, *supra* note 104; Stanton L. Jones et al., *A Scientific, Conceptual, and Ethical Critique of the Report of the APA Task Force on Sexual Orientation*, 45 THE GEN. PSYCHOL. 7, 8–12 (2010) (The one and only formal reviewer of this manuscript for an APA journal described it as a “. . . diatribe against psychology, simply because psychology tends to be critical of a certain kind of practice.” Further, this reviewer characterized the recommendations as “grandiose” and believed they were “likely coming from lawyers.” The reader can decide as to the reasonableness and objectivity of these comments.

¹²⁰ See Gordon Gauchat, *Politicization of Science in the Public Sphere: A Study of Public Trust in the United States, 1974 to 2010*, 77 AM.

proponents were wont to cite official resolutions on the subject by APA and several psychological and medical associations, opponents sought to undermine the credibility of these pronouncements by pointing out somewhat dramatic examples of ideological uniformity within these professional organizations.¹²¹ While there is no quick fix to this diversity problem within organized psychology, acknowledging the problem, enhancing opportunities for non-liberals to participate in the apparatuses of psychological science, and

SOC. REV. 167, (2012); Gordon Gauchat, *The Political Context of Science in the United States Public Acceptance of Evidence-Based Policy and Science Funding*, 94 SOC. FORCES 723, (2015).

¹²¹ For example, ban opponents frequently noted that the APA's Report from 2009 was developed by a committee devoid of any professionals that had experience providing SOCE or were even sympathetic to it, since the nominations of several qualified conservative psychologists were all rejected. The director of the APA's Lesbian, Gay and Bisexual Concerns Office, Clinton Anderson, offered the following defense at the time: "We cannot take into account what are fundamentally negative religious perceptions of homosexuality—they don't fit into our world view." Mark A. Yarhouse, *The Battle Regarding Sexuality, in PSYCHOLOGY'S WAR ON RELIGION* 63, 74 (Nicolas Cummings et al. eds., 2009). More broadly, opponents of SOCE bans highlighted the 157-to-0 vote by the APA's Counsel of Representative in August of 2011 in favor of a resolution supporting marriage equality as well as the National Association of Social Workers (NASW) uniform endorsement of only Democrat candidates (339 out of 339) to federal offices in recent elections. Such numbers have been described as representing a "statistically impossible lack of diversity" and raised suspicion among conservative groups. See Tierney, *supra* note 70. They appear to give credence to Haidt's concerns: "In the same way, each individual reasoner is really good at one thing: finding evidence to support the position he or she already holds, usually for intuitive reasons . . . This is why it's so important to have intellectual and ideological diversity within any group or institution whose goal is to find truth (such as an intelligence agency or a community of scientists) or to produce good public policy (such as a legislature or advisor board)." RIGHTEOUS MIND, *supra* note 47, at 99.

adding sociopolitical diversity to the profession's diversity aspirations would constitute a productive starting point.¹²²

2. Restore the Leona Tyler Principle to prominence

In 1973 the APA adopted the Leona Tyler Principle as a means to protect the veracity of psychological science and the integrity of psychological practice.¹²³ This principle essentially asserts that when speaking as psychologists, any advocacy in support of legislation must be based on a large quantity of sound scientific studies directly relevant to the issues being contested. The principle was never repealed but seems to have been largely neglected as a guiding standard for advocacy by the APA and professional associations in general. In this regard, the lack of rigorous and replicated data directly germane to professional SOCE in general and to minors specifically would seem to have justified greater restraint in psychology's advocacy had the principle been followed. At a minimum, the APA should expect researchers to adhere to the minimal standards that are being disseminated widely.¹²⁴

¹²² Duarte, *supra* note 83; William N. Robiner et al., *Bowling Alone: The Decline of Social Engagement and Other Challenges for the American Psychological Association and Its Divisions*, 22 CLINICAL PSYCHOL. SCI. AND PRAC. 366, (2015).

¹²³ Nicholas A. Cummings, *Sexual Orientation, Faith Tradition, and the Disappearance of the Leona Tyler Principle*, 45 THE GEN. PSYCHOLOGIST 44, 47 (2010); Leona Tyler, *An Approach to Public Affairs: Report of the Ad Hoc Committee on Public Affairs*, 24 AM. PSYCHOLOGIST 1, 2 (1969).

¹²⁴ AM. PSYCHOL. ASSOC., *Publication Manual of the American Psychological Association*, 2009 (6th ed.).

VI. CONCLUSION

SOCE continues to be a radioactive subject in professional psychology. The professional, political, and judicial dynamics that accompanied the journey of SB 1172 into California law give sufficient testimony to this fact. By examining the history of this legislation, my intent is not to justify SOCE interventions that run afoul of good psychotherapy practice. Rather, I hope to have pointed out some of the ways an advocacy movement, particularly one that has the moral and cultural wind at its back, may compromise the objectivity of professional psychology and the legal process and thereby damage the public's perception of both fields. When the significance of evolving moral frameworks within the culture is not well understood, fierce proxy conflicts between competing sacred values often occur, leading to pressures that may fuel the creation of wozzles and the restriction of viewpoint diversity within psychology and beyond. Ultimately, this harms the deliberative process and risks establishing policy that fails to adequately reflect what empirically-based science can and cannot say about a controversial subject. Professional associations such as the APA need to protect the integrity of their important contribution to professional and public policy development from pressure to adopt an increasingly partisan orientation, particularly where controversial issues such as professional SOCE bans are involved. The cautionary story of S.B. 1172 serves to underscore the importance of implementing measures that can encourage enhanced self-discipline within the discipline of professional psychology.