

THE RIGHT TO “CURE” A CHILD’S HOMOSEXUALITY?: A
CONSTITUTIONAL ANALYSIS OF STATE LAWS BANNING
SEXUAL ORIENTATION CHANGE EFFORTS ON MINORS

*Daniel Greene**

Abstract

In an effort to protect LGBT youth, in 2012 and 2013 respectively, California and New Jersey became the first two states to pass laws banning medical providers from practicing sexual orientation change efforts (SOCE) on minors. Parents and practitioners alike immediately challenged both laws as violative of a myriad of constitutional doctrines. As of this writing, every court to hear challenges to anti-SOCE laws has upheld them as valid. Furthermore, since 2013, four additional jurisdictions have enacted anti-SOCE laws, and at least six more states are currently proposing similar legislation.

This Note is the first to review anti-SOCE laws under the Free Exercise, Establishment, and Due Process Clauses. After concluding that anti-SOCE laws likely stand up to such challenges, this Note compares anti-SOCE laws to compulsory vaccination laws. While vaccination laws have also been deemed constitutional under the Free Exercise, Establishment, and Due Process Clauses, most state legislatures have nonetheless provided religious exemptions for parents who wish to forgo vaccination for their children. This Note explores whether similar exemptions would be appropriate for anti-SOCE laws, and concludes that such exemptions are inapplicable. Accordingly, state legislatures should continue to enact anti-SOCE laws as modeled after California and New Jersey.

Part I of this Note explains the methods and motivations behind SOCE. Part II subjects current anti-SOCE laws to constitutional scrutiny under the Free Exercise, Establishment, and Due Process Clauses. Part III introduces the comparison to compulsory vaccination laws and establishes the inapplicability of religious exemptions to anti-SOCE laws.

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* J.D. Candidate 2017, University of Florida Levin College of Law; B.A. 2014, Bowdoin College.

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INTRODUCTION

In 1973, the American Psychiatric Association removed homosexuality from its list of mental disorders.¹ In 2015, the Supreme Court held all state laws banning gay marriage unconstitutional.² Acknowledgement of same-sex attraction as a normal and positive variant of human sexuality is becoming more widespread.³ Nonetheless, there remain medical professionals in the United States who claim to be able to “cure” individuals of their homosexuality.⁴ Such attempts are known by a variety of terms, including sexual orientation change efforts

1. See JUDITH M. GLASSGOLD ET AL., AM. PSYCHOLOGICAL ASS’N, APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 11 (2009), <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

2. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

3. See GLASSGOLD, *supra* note 1, at 2.

4. See *infra* notes 38–42 and accompanying text.

(SOCE), reparative therapy, and conversion therapy.⁵ Much of the focus of these “therapies” has been on minors.⁶

While in the past, SOCE practitioners often utilized several aversive methods, today SOCE usually involve some form of conventional talk therapy.⁷ Research into the effectiveness of the therapies tends to show SOCE are incapable of changing one’s sexual orientation.⁸ Further, preliminary studies show that SOCE have the potential to cause serious harms to patients.⁹ Nevertheless, parents across America, often motivated by sincere religious beliefs, continue to subject their LGBT children to conversion efforts.¹⁰

Beginning in 2012, in an effort to severely restrict the practice of reparative therapy, six jurisdictions have passed laws banning mental health providers from practicing SOCE on minors.¹¹ These jurisdictions include California, New Jersey, the District of Columbia, Oregon, Illinois, and the City of Cincinnati.¹² Several states, including Massachusetts,¹³ New York,¹⁴ Ohio,¹⁵ Pennsylvania,¹⁶ Colorado,¹⁷ and

5. *See id.* This Note will use the terms sexual orientation change efforts (SOCE), reparative therapy, and conversion therapy interchangeably.

6. *Cf. The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy> (last visited May 9, 2016).

7. *See infra* note 37 and accompanying text.

8. *See infra* Section I.B.

9. *See infra* Section I.C.

10. *See infra* Section I.D.

11. CAL. BUS. & PROF. CODE §§ 865–865.2 (West 2016); N.J. STAT. ANN. § 45:1-55 (West 2015); D.C. CODE ANN. § 7-1231.14a (West 2016); OR. REV. STAT. ANN. § 675.850 (West 2016); 405 ILL. COMP. STAT. ANN. 48/20 (West 2016); CINCINNATI, OHIO, ORDINANCES tit. VII, ch. 769 (2015).

12. *See supra* note 11.

13. H.B. 97, 189th Gen. Court, Reg. Sess. (Mass. 2015), <https://legiscan.com/MA/text/H97/2015>.

14. Assemb. B. 4958, 2015 Leg., Reg. Sess. (N.Y. 2015), http://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A04958&term=2015&Summary=Y&Text=Y. As of May 2016, New York’s law remains stalled in the Republican-controlled Senate. *See id.* However, in February 2016, Governor Andrew Cuomo of New York instituted executive action that will severely reduce the practice of SOCE within the State of New York. The regulations include banning insurance agencies within the state from covering conversion therapy for minors. *See Lucas Grindley, With NY Lawmakers Stalled, Governor Moves to Stop ‘Conversion Therapy’*, ADVOCATE (Feb. 6, 2016), <http://www.advocate.com/politics/2016/2/06/ny-lawmakers-stalled-governor-moves-stop-conversion-therapy>.

15. H.B. 247, 131st Gen. Assemb., Reg. Sess. (Ohio 2015), <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA131-HB-247>.

16. H.B. 2691, 2012 Leg., Reg. Sess. (Pa. 2012), <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=H&billTyp=B&billNbr=2691&pn=4268>.

Florida¹⁸ have introduced anti-SOCE legislation.¹⁹ Furthermore, in May 2015, Congressman Ted Lieu of California introduced federal legislation that would prohibit *any* person from practicing SOCE on *any* individual for monetary compensation.²⁰

After passage in California (2012) and New Jersey (2013), mental health professionals and parents immediately challenged anti-SOCE laws as violative of a wide variety of constitutional doctrines, including free speech, freedom of association, free exercise, establishment clause, parents' rights to raise their children, and patients' rights to receive information.²¹ In a series of opinions, the Third Circuit, Ninth Circuit, and Eastern District Court of California upheld the laws against the myriad of constitutional challenges.²²

This Note will focus on religious challenges to anti-SOCE laws, particularly those falling under the Free Exercise, Establishment, and Due Process Clauses. Given the laws have withstood constitutional scrutiny in the Third and Ninth Circuits, new challenges by SOCE advocates are likely to bring novel arguments. One such argument comes in the form of a comparison of anti-SOCE laws to compulsory vaccination laws.²³ Presuming the constitutionality of anti-SOCE laws

17. H.B. 16–1210, 17th Gen. Assemb., 2d Reg. Sess. (Colo. 2016), [http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont2/1872966F7BFD26D687257F2400644ED9/\\$FILE/1210_01.pdf](http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont2/1872966F7BFD26D687257F2400644ED9/$FILE/1210_01.pdf). The Colorado bill recently died in the State Senate. See Peter Marcus, *Gay Conversion therapy bill dies in Legislature*, THE DURANGO HERALD (April 11, 2016), <http://www.durangoherald.com/article/20160411/NEWS01/160419950/Gay-conversion-therapy-bill-dies-in-Legislature>.

18. H.B. 137, 2016 Leg., Reg. Sess. (Fla. 2016), <https://www.flsenate.gov/Session/Bill/2016/0137/ByVersion>. Florida's proposed bill recently died in subcommittee, however the City of Miami Beach is expected to pass a citywide ban on SOCE in June of 2016. See Devin Cordero, *Miami Beach moves quickly to outlaw conversion therapy*, SAVE (May 12, 2016), http://www.save.lgbt/miami_beach_moves_quickly_to_outlaw_conversion_therapy.

19. Throughout this Note, laws like those of California, New Jersey, Oregon, Illinois, the District of Columbia, and Cincinnati banning SOCE will be referred to as "anti-SOCE" laws.

20. See Therapeutic Fraud Prevention Act (TFPA), H.R. 2450, 114th Cong. (2015). The TFPA was sent to the Subcommittee on Commerce, Manufacturing, and Trade shortly after introduction, and laid dormant there since. See *All Actions: H.R. 2450 — 114th Congress (2015-2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/2450/all-actions>; see also Press Release, Congressman Ted Lieu, Congressman Lieu Announces Therapeutic Fraud Prevention Act (May 19, 2015), <https://lieu.house.gov/media-center/press-releases/congressman-lieu-announces-therapeutic-fraud-prevention-act>.

21. See *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015); *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *Welch v. Brown*, 58 F. Supp. 3d 1079 (E.D. Cal. 2014).

22. See *supra* note 21.

23. See *infra* Part III.

under the religion and due process clauses,²⁴ it follows that the Constitution does not *require* religious exemptions from the laws.²⁵ In a similar fashion, despite repeated challenges, courts have held compulsory vaccination laws violate neither the religion clauses nor parents' fundamental right to raise their children.²⁶ However, the overwhelming majority of state legislatures provide for religious exemptions to compulsory vaccination laws.²⁷ Accordingly, proponents of SOCE may look to religious exemptions from vaccination laws and call for similar treatment. This Note argues that religious exemptions are inappropriate in the context of anti-SOCE laws.

Part I of this Note explains the methods and motivations behind SOCE. Part II subjects current anti-SOCE laws to constitutional scrutiny under the Free Exercise, Establishment, and Due Process Clauses. Part III introduces the comparison to compulsory vaccination laws and establishes the inapplicability of religious exemptions to anti-SOCE laws.

I. SEXUAL ORIENTATION CHANGE EFFORTS EXPLAINED

A. *What are SOCE?*

The American Psychiatric Association eliminated homosexuality from its list of mental disorders in 1973.²⁸ Nonetheless, over forty years later, up to a third of LGBT individuals are still subject to some form of SOCE.²⁹ Further, the practice of SOCE is not limited to those unlicensed in the medical field. Despite the American Psychological Association's (APA) call on psychologists to lead the way in removing "the stigma of mental illness that has long been associated with lesbian, gay, and bisexual orientations,"³⁰ licensed medical professionals continue to practice reparative therapy today.³¹

So, what are sexual orientation change efforts? Put succinctly, SOCE are an "attempt to 'cure' homosexuals by turning them into

24. *See infra* Part II.

25. *See infra* note 138 and accompanying text.

26. *See infra* note 141.

27. *See infra* note 143 and accompanying text.

28. *See* GLASSGOLD *supra* note 1, at 11.

29. Samantha Ames, *Coming Out Against 'Conversion Therapy,'* HUFFINGTON POST (Oct. 11, 2014), http://www.huffingtonpost.com/samantha-ames/coming-out-against-conversiontherapy_b_5966542.html.

30. GLASSGOLD *supra* note 1, at 23–24.

31. The plaintiffs in several of the challenges in New Jersey and California were licensed professionals who either practiced SOCE, or were planning to practice SOCE. *See* King v. Governor of New Jersey, 767 F.3d 216, 220 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015); Pickup v. Brown, 740 F.3d 1208, 1224 (9th Cir. 2014); Welch v. Brown, 58 F. Supp. 3d 1079, 1082 (E.D. Cal. 2014).

heterosexuals.”³² The origin of SOCE lay in a time “when homosexuality was viewed as a mental illness and a criminal act.”³³ The methods used to practice SOCE have varied over the years. As early as 1935 and through the 1970s (when the APA declassified homosexuality as an illness), SOCE utilized several aversive treatments.³⁴ Examples of these extreme, sometimes graphic methods included “inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around their wrists when aroused by same-sex erotic images or thoughts.”³⁵ While for the most part these aversive “therapies” are no longer employed, SOCE persist today, albeit with less extreme treatment methods.³⁶

Today, the most common method used for SOCE is traditional talk therapy.³⁷ Religiously motivated therapy (the main focus of this Note) focuses on the “correction . . . of the homosexual character through prayer and religious reflection.”³⁸ For example, at JONAH, Jews Offering New Alternatives for Healing, rabbis utilize psychological and spiritual counseling.³⁹ These religious methods are often known as “conversion therapy.”⁴⁰ SOCE practitioners, however, are not limited to religious groups. The National Association for Research & Therapy of Homosexuality (NARTH) is one of the largest secular organizations still advocating reparative therapy.⁴¹ NARTH’s modern methods include “hypnosis, behavior and cognitive therapies, sex therapies, and

32. Sanam Assil, Note, *Can You Work It? Or Flip It and Reverse It?: Protecting LGBT Youth from Sexual Orientation Change Efforts*, 21 CARDOZO J.L. & GENDER 551, 559 (2015).

33. *Id.*

34. See A. Dean Byrd & James E. Phelan, *Facts and Myths on Early Aversion Techniques in the Treatment of Unwanted Homosexual Attractions*, NARTH INSTITUTE, <http://www.narth.com/#!/aversion-techniques-/c4tb> (“Beginning as early as 1935, aversive techniques were among many behavioral therapies used in the treatment of unwanted sexual attractions . . .”).

35. See *Pickup*, 740 F.3d at 1222.

36. See Assil, *supra* note 32, at 560; see also Christopher H. Rosik, *Sexual Orientation as a Conditioned Response to Childhood Sexual Abuse: A Rarely Discussed Factor in the Scientific Literature*, NARTH INSTITUTE, <http://www.narth.com/#!/reincarnation-of-shidlo--/c1tch> (“[C]ontemporary SOCE practitioners have long eschewed the use of aversive techniques . . .”).

37. See Arcangelo S. Cella, Note, *A Voice in the Room: The Function of State Legislative Bans on Sexual Orientation Change Efforts for Minors*, 40 AM. J.L. & MED. 113, 120 (2014) (citing Sean Young, *Does “Reparative” Therapy Really Constitute Child Abuse?: A Closer Look*, 6 YALE J. HEALTH POL’Y, L., & ETHICS 163, 168 (2006) (“As early as 1996, commentators noted that reparative therapy was most often conducted through conventional therapy, i.e., psychotherapy.”)).

38. Cella, *supra* note 37, at 120.

39. Assil, *supra* note 32, at 563.

40. Cella, *supra* note 37, at 120.

41. Assil, *supra* note 32, at 563 (“Today, NARTH is [one of] the main organization[s] advocating . . . conversion therapy.”).

psychotropic medication.”⁴² While on paper modern therapies appear preferable to the aversive methods of the mid-twentieth century described above, the effects can be just as harmful.⁴³ All major national mental health organizations, including the APA, have officially expressed concerns about even the modern forms of SOCE due to their potentially harmful effects.⁴⁴ Furthermore, scientific studies have failed to show SOCE can have any measurable effect on an individual’s sexual orientation in the first place.

B. *The Efficacy of SOCE*

Despite attempts to prove otherwise, proponents of reparative therapy have failed to establish the effectiveness of SOCE. In other words, there is no scientific evidence that SOCE can alter one’s sexual orientation. In its report on the appropriate therapeutic responses to sexual orientation, the APA discredited as scientifically unfounded any research asserting SOCE to be effective.⁴⁵ Additionally, the task force assigned to the report found that the only scientific studies on SOCE had been based on discredited psychoanalytic theories.⁴⁶ Over the last twenty years, “every major mental health organization has issued a statement impugning the scientific validity of SOCE and finding them to be ineffective.”⁴⁷

Furthermore, even proponents of SOCE acknowledge that long-term change in sexual orientation is rare,⁴⁸ and “most individuals who claim to have changed their sexual orientation and [] live as heterosexuals still experience and struggle with same-sex erotic feelings.”⁴⁹ SOCE practitioners nonetheless stand by their “therapies.” Reparative therapists argue their services assist individuals to manage unwanted same-sex desires while they lead “normal” heterosexual lives.⁵⁰ Even if this rationalization (not at all based in science) were sufficient to

42. *Id.* at 560 (citing #BornPerfect: *The Facts About Conversion Therapy*, NAT’L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy>).

43. *See infra* Section I.C.

44. *See* AM. PSYCHOL. ASS’N, ANSWERS TO YOUR QUESTIONS: FOR A BETTER UNDERSTANDING OF SEXUAL ORIENTATION & HOMOSEXUALITY 3 (2008), <http://www.apa.org/topics/lgbt/orientation.pdf>.

45. *See* GLASSGOLD, *supra* note 1, at 40. (“[R]esearch provides little support for the ability of interventions to develop other-sex sexual attraction . . .”).

46. *See* GLASSGOLD *supra* note 1, at 82.

47. Cella, *supra* note 37, at 121–22.

48. *Id.* at 122.

49. *Id.* (citing Douglas C. Haldeman, *Gay Rights, Patient Rights: The Implications of Sexual Orientation Conversion Therapy*, 33 PROF. PSYCHOL. RES. & PRAC. 260, 261 (2002) (“Typically, conversion therapists expect that patients’ homoerotic fantasies may continue [even as they] function in a heterosexual relationship.”)).

50. Cella, *supra* note 37, at 122.

constitute a genuine “benefit,” it is still questionable whether any “gain” from SOCE outweighs the potential harms associated with reparative therapy, especially in the case of minors.⁵¹

C. *The Effects of SOCE*

Opinions regarding the effects of reparative therapy on the patient are becoming more and more aligned: SOCE are harmful. While formal studies establishing the type and degree of harm are lacking, an abundance of patient testimonials and informal studies show a clear pattern of harm resulting from SOCE.⁵² This holds especially true for minors.⁵³ In its report on appropriate therapeutic responses to sexual orientation, the APA Task Force found that despite the lack of definitive scientific studies, “attempts to change sexual orientation may cause or exacerbate distress and poor mental health . . . including depression and suicidal thoughts.”⁵⁴

Some of the most detailed findings regarding the harmful effects of SOCE have come from the legislatures that have passed laws banning the practice.⁵⁵ For example, New Jersey’s published legislative findings state:

[S]exual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.⁵⁶

With regard to minors, the California legislature found that:

Minors who experience family rejection based on their

51. *See id.* at 122–23.

52. *Id.* at 123.

53. “[S]o-called reparative therapy, conversion therapy or reorientation therapy is scientifically ineffective and has resulted in much harm, including a number of lesbian, gay, bisexual and transgender youth committing suicide.” Assil, *supra* note 32, at 564. (quoting Ted. W. Lieu, *Senate Bill 1172: Sexual Orientation Change ‘Therapy’ Fact Sheet*, CAL. STATE SENATE, <http://sd28.senate.ca.gov/sites/sd28.senate.ca.gov/files/SB%201172%C20Fact%20Sheet.pdf>.)

54. GLASSGOLD, *supra* note 1, at 42.

55. *See, e.g.*, N.J. STAT. ANN. § 45:1-54 (West 2015).

56. *Id.* (referencing GLASSGOLD, *supra* note 1).

sexual orientation face especially serious health risks. In one study, lesbian, gay, and bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse compared with peers from families that reported no or low levels of family rejection.⁵⁷

Findings of harm are not restricted to the APA and state legislatures. Around the world, health organizations have acknowledged the harmful effects of SOCE: “In 2012, both the Pan American Health Organization (part of the World Health Organization) and the British Association for Counseling and Psychotherapy issued statements opposing the practice of SOCE, labeling them ‘a severe threat’ to the health of patients.”⁵⁸ Even the American Association of Christian Counselors (AACC), a former SOCE advocate, has recognized that SOCE are often harmful.⁵⁹ In 2014, the AACC proceeded to remove language in its Code of Ethics that promoted SOCE.⁶⁰ Thus, regardless of alleged efficacy, SOCE appear at a minimum to constitute a dangerous method of therapy posing significant risks to the patients’ health.⁶¹

D. *Religious Motivation for Seeking Out SOCE*

Despite the evidence showing SOCE to be ineffective and possibly harmful,⁶² many parents and individuals nonetheless seek out reparative therapy due to sincere religious beliefs. World religions have a wide spectrum of viewpoints on homosexuality.⁶³ Notably, “some religious denominations’ beliefs and practices have changed over time, reflecting evolving scientific and civil rights perspectives on homosexuality and sexual orientation.”⁶⁴ Today, several religious groups accept the LGBT community within both their congregations and clergy.⁶⁵ These groups

57. Assil, *supra* note 32, at 565.

58. Cella, *supra* note 37, at 124.

59. *Id.*

60. *Id.*

61. See Assil, *supra* note 32, at 566.

62. See Karolyn Ann Hicks, Comment, “Reparative” Therapy: Whether Parental Attempts to Change a Child’s Sexual Orientation Can Legally Constitute Child Abuse, 49 AM. U.L. REV. 505, 513–14 (1999) (discussing major mental health organizations’ agreement that SOCE are ineffective); GLASSGOLD, *supra* note 1 at 40 (“[T]he balance of the evidence suggests that SOCE is unlikely to increase other-sex sexual behavior.”).

63. GLASSGOLD *supra* note 1, at 17.

64. *Id.*

65. *Id.*

include “Reconstructionist Judaism, Reform Judaism, Conservative Judaism, Buddhist Peace Fellowship, Buddhist Churches of America, Episcopal Church of America, Friends General Conference, Unitarian Society, [and] United Church of Christ Congregational.”⁶⁶ On the other hand, several religious groups still view homosexuality and/or homosexual acts as sinful and immoral.⁶⁷ These groups include “Christian Reformed Church of North America, Church of Jesus Christ of Latter-Day Saints, Eastern Orthodox Christianity, Orthodox Judaism, Presbyterian Church in American [sic], Roman Catholicism, Southern Baptist Convention, [and the] United Methodist Church.”⁶⁸

Religious views are often a major factor in the choice of an individual to seek out reparative therapy.⁶⁹ For minors, it is often the parent’s strong religious convictions that lead to the child being subjected to SOCE.⁷⁰ Theoretically, reparative therapy provides an avenue for parents to ease the tension between their beliefs and their child’s sexual and affectional needs and desires.⁷¹ If a parent were able to “cure” their child’s homosexuality, the conflict between the child’s sexual lifestyle and parent’s religious beliefs would cease to exist. Regardless of the potential harms to the child, parents may be blinded by deep and sincere religious convictions; the idea that someone can provide a “solution” or “cure” through SOCE is often too good for a parent to pass up.

II. THE CONSTITUTIONALITY OF STATE LAWS BANNING SEXUAL ORIENTATION CHANGE EFFORTS

A. *State Laws Banning SOCE: How Far Do They Reach?*

In the interest of curbing those professionals (and parents) who continue to use SOCE, in 2012 and 2013 respectively, California and New Jersey became the first states to pass laws banning medical providers from practicing SOCE on minors.⁷² Since then, four additional jurisdictions—the District of Columbia, Oregon, Illinois, and

66. *Id.*

67. *Id.* at 17–18.

68. *Id.*

69. *Cf.* Cella, *supra* note 37, at 126 (“Regarding participation in SOCE specifically . . . the feelings and beliefs of parents, not the children’s own distress over their sexual orientation, more often lead to the enrollment of children in SOCE.”).

70. *Cf. id.*

71. *See* GLASSGOLD *supra* note 1, at 18.

72. CAL BUS. & PROF. CODE § 865.1 (West 2016); N.J. STAT. ANN. § 45:1-55 (West 2013).

the City of Cincinnati—have passed similar legislation.⁷³ While the language of these statutes differs to some degree, the overall scheme is consistent. The prohibitory language is usually rather simple. For example, the District of Columbia’s code reads: “A provider shall not engage in sexual orientation change efforts with a consumer who is a minor.”⁷⁴

The “pith” of the statutes appears in the definitions sections. Again, while the language differs slightly from jurisdiction to jurisdiction, all of the laws similarly define mental health providers. For example, California’s statute defines a mental health provider as

[A] physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any other person designated as a mental health professional under California law or regulation.⁷⁵

All of the statutes also similarly define what constitutes SOCE.⁷⁶ Oregon’s statute uses the term “conversion therapy,” and defines it as “providing professional services for the purpose of attempting to change a person’s sexual orientation or gender identity, including attempting to change behaviors or expressions of self or to reduce sexual or romantic attractions or feelings toward individuals of the same gender.”⁷⁷ Oregon’s law then goes on to define conversion therapy in the negative as well:

“Conversion therapy” does not mean:

- (i) Counseling that assists a client who is seeking to undergo a gender transition or who is in the process of undergoing a gender transition; or
- (ii) Counseling that provides a client with acceptance, support and understanding, or counseling that

73. D.C. CODE ANN. § 7-1231.14a (West 2016); OR. REV. STAT. ANN. § 675.850 (West 2016); 405 ILL. COMP. STAT. ANN. 48/20 (West 2016); CINCINNATI, OHIO, ORDINANCES tit. VII, ch. 769 (2015).

74. D.C. CODE ANN. § 7-1231.14a (West 2016).

75. CAL BUS. & PROF. CODE § 865 (West 2016).

76. Some jurisdictions use the term “sexual orientation change efforts,” while others use “conversion therapy.” Within the context of the anti-SOCE statutes, these terms are interchangeable.

77. OR. REV. STAT. ANN. § 675.850 (West 2016).

facilitates a client's coping, social support and identity exploration or development, including counseling in the form of sexual orientation-neutral or gender identity-neutral interventions provided for the purpose of preventing or addressing unlawful conduct or unsafe sexual practices, as long as the counseling is not provided for the purpose of attempting to change the client's sexual orientation or gender identity.⁷⁸

Taken together, the laws in these six jurisdictions all achieve the same result: They prevent state-licensed professionals from attempting to change a minor's sexual orientation.⁷⁹

The following constitutional assessments of anti-SOCE laws are primarily based on three courts' interpretations of the California and New Jersey laws.⁸⁰ However, because the language of all present and presently proposed anti-SOCE laws is largely the same, the analysis will apply equally to any challenges in jurisdictions where the laws have yet to come under constitutional scrutiny.

B. *Free Exercise Challenge*

Free Exercise challenges to anti-SOCE laws come in two forms. First, challengers allege a violation of the mental health provider's free exercise rights. Second, they allege a violation of the parent or child's free exercise rights.⁸¹ However, for purposes of determining the constitutionality of the law under the Free Exercise Clause, the analysis remains the same regardless of the alleged violation.⁸²

The First Amendment, applicable to the states through the

78. *Id.*

79. Notably, the laws do not prevent parents and minors to seek help directly from religious leaders, such as priests, rabbis, or imams, as long as those leaders are not also health professionals under the statute. For a further discussion of this point, see *infra* Section III.A.

80. *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015); *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *Welch v. Brown*, 58 F. Supp. 3d 1079 (E.D. Cal. 2014). As of this writing, these are the only courts to have heard constitutional challenges to anti-SOCE laws.

81. Interestingly, the plaintiffs in both cases that reviewed the anti-SOCE laws for violations of the Free Exercise Clause were practitioners of SOCE, not parents seeking SOCE for their children. In terms of free exercise analysis however, this is an irrelevant point, as the constitutional analysis of the anti-SOCE law remains the same whether the petitioner is a practitioner or parent. For a discussion of the parents' right to raise their child, see *infra* Section II.D.

82. *See Emp't Div, Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1989) (outlining two-part test for assessing all alleged free exercise violations).

Fourteenth Amendment,⁸³ states that no law shall prohibit the free exercise of religion.⁸⁴ Of course, as with most rights, there are limitations.⁸⁵ Prior to 1990, the Supreme Court interpreted the protection afforded by the Free Exercise Clause broadly.⁸⁶ Subjecting alleged violations to very high scrutiny, the Court utilized a balancing test.⁸⁷ This test “balanced the government interest in adopting a facially neutral law that burdened religion against the severity of the burden imposed on the religious individuals who were forced to choose between complying with the law and sacrificing their religious beliefs.”⁸⁸ Applying this test in two circumstances in the 1960s and 1970s, the Court stated that the Constitution required religious exemptions/accommodation from otherwise neutral and generally applicable laws regarding unemployment benefits and compulsory education laws.⁸⁹

The Supreme Court made a dramatic shift in its free exercise jurisprudence in 1990 in *Employment Division, Department of Human Resources of Oregon v. Smith*.⁹⁰ In *Smith*, the Court held it would no longer subject all laws alleged to have interfered with free exercise to strict scrutiny.⁹¹ The new test stated if a law is neutral and generally applicable, then it will survive a free exercise challenge as “long as it is ‘rationally related to a legitimate government objective.’”⁹² This new standard considerably reduced the protection afforded to religious beliefs under the Free Exercise Clause.⁹³ The religious exemptions once granted for neutral and generally applicable laws were no longer available.⁹⁴ The Court largely attributed the sweeping change to the idea

83. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

84. U.S. CONST. amend. I. (“Congress shall make no law . . . prohibiting the free exercise [of religion] . . .”).

85. *King*, 767 F.3d at 241 (citing *McTernan v. City of York*, 577 F.3d 521, 532 (3d Cir. 2009)).

86. See Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 1015, 1016 (2013).

87. See *id.*

88. *Id.* at 1015.

89. See *id.* at 1015–16 (discussing *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

90. See Calabresi & Salander, *supra* note 86, at 1016.

91. See *Emp’t Div, Dep’t of Human Res. v. Smith*, 494 U.S. 872, 888–89 (1989); see also Linda E. LeFever, Comment, *Religious Exemptions From School Immunization: A Sincere Belief or a Legal Loophole?*, 110 PENN. ST. L. REV. 1047, 1061 (2006).

92. *King*, 767 F.3d at 242 (quoting *Brown v. City of Pittsburgh*, 586 F. 3d 263, 284 (3d Cir. 2009)).

93. See Calabresi & Salander, *supra* note 86, at 1016 (“The Court declared that facially neutral laws . . . do not violate the Free Exercise Clause, as long as they do not target a specific religious group, even though specific religious groups or religious people in general might face a significant burden on their religious beliefs or practices.”).

94. See *supra* note 89 and accompanying text.

that allowing religious exemptions from neutral and generally applicable laws, “would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”⁹⁵ This was the jurisprudential climate when parents and practitioners brought free exercise challenges to anti-SOCE laws in both New Jersey and California.⁹⁶

Under the Supreme Court’s current free exercise test as articulated in *Smith*, a law must be both neutral and of general applicability to withstand a free exercise challenge.⁹⁷ A law is neutral under the Free Exercise Clause “if it does not target religiously motivated conduct either on its face or as applied in practice.”⁹⁸ A law is *not* generally applicable “if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.”⁹⁹

Applying this test, both the Third Circuit and Eastern District Court of California upheld New Jersey and California’s anti-SOCE laws.¹⁰⁰ On their face, anti-SOCE laws are clearly neutral, as they in no way single out religiously motivated conduct.¹⁰¹ However, the challengers argued the laws were not neutral as applied,¹⁰² claiming that while the text of anti-SOCE laws does not indicate hostility toward religious conduct, enforcement of the laws targets such protected conduct. Rejecting this argument, the District Court held that an incidental effect on religious conduct does not indicate a lack of neutrality.¹⁰³ Rather, as

95. See *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1878)).

96. See *King* 767 F.3d at 241; *Welch v. Brown*, 58 F. Supp. 3d 1079, 1084 (E.D. Cal. 2014). The Ninth Circuit declined to rule on the plaintiff’s free exercise claims in the consolidated case of *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Thus, in California, courts did not rule on the free exercise claims until the District Court for the Eastern District of California ruled in *Welch*. See *Pickup*, 740 F.3d at 1224–25, n.3.

97. See *Welch*, 58 F. Supp. 3d at 1085 (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009)).

98. *King*, 767 F.3d at 242 (quoting *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004)).

99. *Id.*

100. See *King*, 767 F.3d at 243; *Welch*, 58 F. Supp. 3d at 1092.

101. See CAL BUS. & PROF. CODE §§ 865–865.2 (West 2016); N.J. STAT. ANN. § 45:1-55 (West 2015).

102. For the origins of “as applied” challenges, see *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (“Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”).

103. See *Welch*, 58 F. Supp. 3d at 1087.

with other neutral laws affecting religious conduct, anti-SOCE laws “punish[] conduct for the harm it causes, not because the conduct is religiously motivated.”¹⁰⁴ In other words, anti-SOCE laws ban SOCE because the practices do harm to minors, not because SOCE are motivated by religious beliefs.

Further, both courts held the anti-SOCE laws as generally applicable.¹⁰⁵ While the laws do not outlaw certain types of SOCE, such as efforts by unlicensed practitioners or SOCE performed on individuals over the age of eighteen, these “exemptions” in no way “demonstrate that [anti-SOCE laws] covertly target[] religiously motivated conduct.”¹⁰⁶ Finding the laws both neutral and generally applicable, the courts subjected the laws to only rational basis review.¹⁰⁷ The lowest scrutiny standard applied to legislative action, rational basis review requires “only that a regulation is rationally related to a legitimate government purpose.”¹⁰⁸ Since the stated legislative purpose to prevent harm to minors is a legitimate state interest, the laws did not violate the Free Exercise Clause.¹⁰⁹

C. Establishment Clause Challenge

Practitioners and parents have also challenged anti-SOCE laws as a violation of the Establishment Clause.¹¹⁰ The Establishment Clause states that the government shall make no law establishing religion.¹¹¹ In other words, governments cannot serve as the sponsor of one religion over another or show official disapproval or hostility toward a particular religion.¹¹² Similar to the Free Exercise Clause, the Establishment Clause is applicable to the states through the Fourteenth Amendment. Alleged violations of the Establishment Clause are subject to the *Lemon* test.¹¹³ To survive an Establishment Clause challenge, the three-part *Lemon* test requires a statute to: (1) have a secular legislative purpose, (2) have its primary effect neither advance nor inhibit religion, and (3) not foster excessive government entanglement with religion.¹¹⁴

104. *Id.* (quoting *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995)).

105. *See King*, 767 F.3d at 243; *Welch*, 58 F. Supp. 3d at 1088.

106. *King*, 767 F.3d at 242.

107. *See id.* at 243; *Welch*, F. Supp. 3d at 1088.

108. Marla Spector Bowman, Note, *Docs v. Glocks: Speech, Guns, Discrimination, and Privacy—Is Anyone Winning?*, 67 FLA. L. REV. 1455, 1473 (2015).

109. *See Welch*, F. Supp. 3d at 1090–91.

110. *See id.* at 1088–90.

111. U.S. CONST. amend. I.

112. *See Am. Family Ass'n, Inc. v. City & Cty. of San Francisco*, 277 F.3d 1114, 1120–21 (9th Cir. 2002) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993)).

113. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

114. *Id.*

With regard to the first two prongs, anti-SOCE laws likely do not run afoul of the *Lemon* test. As noted above, the stated purpose of anti-SOCE laws is to protect children.¹¹⁵ Protection of minors is well within the police powers of the states, and certainly a legitimate secular purpose. Furthermore, if anti-SOCE laws are neutral and generally applicable laws,¹¹⁶ it indicates that their "primary" effect does not inhibit religion. Consistent with this assessment, in the single Establishment Clause challenge to anti-SOCE laws to reach the courts, the plaintiffs limited their challenge to the third prong of the *Lemon* test: fostering excessive government entanglement with religion.¹¹⁷

A statute fosters excessive entanglement with religion if its enforcement "requires 'sustained and detailed' interaction between church and State."¹¹⁸ Court bans on clergy malpractice claims exemplify such improper entanglement. Courts have repeatedly held that the Establishment Clause bars malpractice claims against clergy members for negligent counseling.¹¹⁹ Such claims would "require the courts to review and interpret church law, policies, [and] practices,"¹²⁰ an impermissible entanglement with religion.

Advocates for reparative therapy argue that anti-SOCE laws result in excessive entanglement in the same way clergy malpractice claims result in such entanglement.¹²¹ The proposed comparison is improper. Anti-SOCE laws neither contemplate nor require examination of religious doctrine.¹²² The motives behind a mental health provider's practice of SOCE are irrelevant. Even if sincere religious beliefs serve as the justification for reparative therapy, it does not change the fact that these efforts can result in serious harm to patients.¹²³ Defining what constitutes SOCE does not require any examination of religious teachings. SOCE are an illegitimate form of medical therapy subject to regulation regardless of motives.¹²⁴

Accordingly, anti-SOCE laws do not foster excessive entanglement with religion, and likely do not run afoul of the Establishment Clause.

115. See N.J. STAT. ANN. § 45:1-54(n) (West 2015).

116. See *supra* Section II.B.

117. *Welch v. Brown*, 58 F. Supp. 3d 1079, 1089 (E.D. Cal. 2014).

118. *Williams v. California*, 764 F.3d 1002, 1015 (9th Cir. 2014) (quoting *Lemon*, 403 U.S. at 621).

119. See, e.g., *Franco v. The Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 201 (Utah 2001) (dismissing a malpractice claim based on a clergyman's advice to a minor claiming sexual abuse to forgive and forget.).

120. See *Welch*, F. Supp. 3d at 1089 (quoting *Franco*, 21 P.3d at 203).

121. See *Welch*, F. Supp. 3d at 1089.

122. The statutory definitions of SOCE make no mention of religious doctrine. See *supra* notes 77–78 and accompanying text (defining SOCE for purposes of anti-SOCE statutes).

123. See *supra* Section I.C.

124. See *Welch*, F. Supp. 3d at 1090.

D. Parents' Rights Under the Due Process Clause

Finally, challengers have also argued that state laws banning mental health professionals from practicing SOCE are a violation of parents' rights to direct the upbringing of their children.¹²⁵ The Supreme Court has repeatedly held that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."¹²⁶ In the context of laws banning SOCE, parents argue that the laws inhibit their right to access (for their children) SOCE therapy from state-licensed mental health professionals.¹²⁷ Accordingly, the constitutionality of the laws depends on whether parents' fundamental rights to direct the upbringing of their children include "the right to choose for their children a particular type of provider for a particular medical or mental health treatment that the state has deemed harmful."¹²⁸

As of this writing, the only courts to address the issue (the Third and Ninth Circuits) have appropriately held this right is not included in parents' substantive due process rights.¹²⁹ These courts have cited two main reasons supporting their holdings. First, multiple jurisdictions have held that adults themselves do not have the right to choose and obtain a particular treatment or provider if the government has reasonably prohibited that type of treatment or provider.¹³⁰ Accordingly, it would not make sense to allow parents to dictate the treatment of their children when they cannot lawfully dictate their own treatment.¹³¹

Second, while parents have wide discretion in determining how to raise their children, "state[s] [are] not without constitutional control . . . when [the child's] physical or mental health is jeopardized."¹³² In the context of anti-SOCE laws, legislatures agree that practicing SOCE on

125. *See Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150, 156; *Pickup v. Brown*, 740 F.3d 1208, 1235 (9th Cir. 2014).

126. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

127. *Pickup*, 740 F.3d at 1235.

128. *Id.* In *Pickup*, the Ninth Circuit very narrowly defines the parents' alleged substantive due process right. By precisely defining the right, the court is better able to restrain the otherwise wide range of rights available through substantive due process. A right is less likely to be deemed violated if construed narrowly. In fact, the Supreme Court directs courts to narrowly construe alleged substantive due process rights for this very reason. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

129. *See Doe*, 783 F.3d at 156; *Pickup* 740 F.3d at 1236;.

130. *See NAAP v. Cal. Bd. of Psychol.*, 228 F.3d 1043, 1050 (9th Cir. 2000) ("[T]here is no fundamental right to choose a mental health professional with specific training."); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) ("[A] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider.").

131. *See Doe*, 783 F.3d at 156; *Pickup*, 740 F.3d at 1236.

132. *Doe*, 783 F.3d at 156 (quoting *Parham v. J.R.*, 442 U.S. 584, 603 (1979)).

minors has sufficient potential to cause harm to the child.¹³³ As outlined by the New Jersey State Legislature, the potential harms include depression, substance abuse, and sexual dysfunction.¹³⁴ These harms pose a significant threat to the child's physical and/or mental health, and the Supreme Court has repeatedly treated laws impacting the well-being of children with special care.¹³⁵ Accordingly, parents' substantive due process rights to raise their children do not include a right to have a state-licensed mental health professional practice SOCE on their minor child.¹³⁶

III. A COMPARISON: ANTI-SOCE LAWS AND COMPULSORY VACCINATION LAWS

The discussion in Part II indicates that anti-SOCE laws do not violate the religion clauses or parents' rights to raise their children under the Due Process Clause. Furthermore, though it is a small sample size, all three courts to hear constitutional challenges to the laws have upheld anti-SOCE laws.¹³⁷ It thus follows that religious exemptions to these laws are likely not required under these provisions of the Constitution.¹³⁸

Given SOCE advocates' lack of success thus far in defeating anti-SOCE laws, future challenges to the laws will likely bring novel arguments.¹³⁹ One such argument comes in the form of a comparison between anti-SOCE laws and compulsory vaccination laws.¹⁴⁰

In a similar vein to the recent challenges to anti-SOCE laws, courts have repeatedly held compulsory vaccination laws violate neither the religion clauses nor parents' fundamental right to raise their children.¹⁴¹ In so ruling, these courts have stated that vaccination laws do not

133. See, e.g., N.J. STAT. ANN. § 45:1-54(n) (West 2015).

134. See N.J. STAT. ANN. § 45:1-54(b) (West 2015).

135. See LeFever, *supra* note 91, at 1064.

136. See *Doe* 783 F.3d at 156; *Pickup*, 740 F.3d at 1236.

137. See *supra* notes 21–22 and accompanying text.

138. If the laws do not violate any constitutional provisions or doctrines, an individual cannot claim a right to an exemption based on a violation of her rights.

139. For example, the plaintiffs in the California cases did not allege violations of the Free Exercise and Establishment Clauses in their first appeal to the Ninth Circuit. Only after their initial free speech challenge failed did they argue the religiously-based violations on remand. See *Pickup*, 740 F.3d at 1224–25 n.3; *Welch v. Brown*, 58 F. Supp. 3d 1079, 1082 (E.D. Cal. 2014).

140. See Symposium, *Challenge It, Choose It, or Change It: Ethics of Sexual Orientation Conversion Therapy for Minors*, 21 CARDOZO J.L. & GENDER 729, 753 (2015) (proposing a comparison between anti-SOCE laws and vaccination laws).

141. For a detailed discussion of challenges to vaccination laws, see LeFever, *supra* note 91 at 1057–63; see also *Prince v. Massachusetts*, 321 U.S. 158, 166, 167 (1944); *Jacobsen v. Massachusetts*, 197 U.S. 11, 26, 27 (1905).

require religious exemptions.¹⁴² Yet, the overwhelming majority of state legislatures nonetheless provide for religious exemptions to compulsory vaccination laws.¹⁴³ Accordingly, proponents of SOCE will look to these statutory exemptions and call for similar treatment. This Note argues that regardless of any comparison between anti-SOCE laws and compulsory vaccination laws, both recent legislative trends and public policy dictate that state legislatures should not grant religious exemptions from anti-SOCE laws.

A. Clarifying the “Religious Exemption”

Before addressing the comparison between anti-SOCE laws and compulsory vaccination laws, it should be noted that anti-SOCE laws already contain a form of religious exemption. In their current form,¹⁴⁴ anti-SOCE laws still allow religious leaders (who are not also health professionals under the statutes)¹⁴⁵ to practice SOCE, and parents are free to seek “help” from the leaders of their respective churches, synagogues, mosques, etc.¹⁴⁶ The religious exemptions at issue in the following discussion refer to those exemptions sought by parents seeking “professional help” for their child’s homosexuality.

B. States With “Conflicts” Between Anti-SOCE and Compulsory Vaccination Laws

As of this writing, four states have passed anti-SOCE laws: California, New Jersey, Oregon, and Illinois.¹⁴⁷ All of these states also have compulsory vaccination laws, but only the latter three have religious exemptions to these laws.¹⁴⁸ Interestingly, when California

142. *See, e.g.*, *Cude v. State*, 377 S.W. 2d 816, 819 (Ark. 1964) (upholding Arkansas’ compulsory smallpox vaccination law, stating the vaccination requirement “does not violate the constitutional rights of anyone, on religious grounds or otherwise. In fact, this principle is so firmly settled that no extensive discussion is required.”).

143. *See States With Religious and Philosophical Exemptions From School Immunization Requirements*, NAT’L CONFERENCE OF STATE LEGISLATURES (NCSL) (Jan. 16, 2016), <http://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [hereinafter NCSL Survey]; Aleksandra Sandstrom, *Nearly All States Allow Religious Exemptions for Vaccinations*, PEW RESEARCH CTR. (July 16, 2016), <http://www.pewresearch.org/fact-tank/2015/07/16/nearly-all-states-allow-religious-exemptions-for-vaccinations/> (showing forty-six states with religious exemptions).

144. By current form, I mean the laws currently in place in California, New Jersey, D.C., Oregon, Illinois, and Cincinnati. *See supra* Section II.A.

145. *See supra* note 75 and accompanying text (defining health providers under anti-SOCE laws).

146. *See supra* Section II.A (analyzing the language of current anti-SOCE laws).

147. CAL BUS. & PROF. CODE §§ 865–865.2 (West 2016); N.J. STAT. ANN. § 45:1-55 (West 2015); OR. REV. STAT. ANN. § 675.850 (West 2016); 405 ILL. COMP. STAT. ANN. 48/20 (West 2015).

148. *See* NCSL Survey, *supra* note 143.

passed its anti-SOCE law in 2012, its vaccination law still had a personal belief exemption available.¹⁴⁹ However, in 2015 the legislature amended the compulsory vaccination law to eliminate the personal belief exemption.¹⁵⁰ Thus, as of July 2016, when the amended vaccination law goes into effect,¹⁵¹ there will be no inconsistency between California's vaccination and anti-SOCE laws. In other words, the legislature will not be granting exemptions to one group of religious parents (those objecting to vaccinations) and not the other (those seeking SOCE for their child).

New Jersey, Oregon, and Illinois are a different story. As of this writing, all three of these states' vaccination laws still provide for a religious exemption from compulsory vaccination laws.¹⁵² This statutory scheme is not uncommon. Forty-seven states currently provide religious exemptions from compulsory vaccination laws.¹⁵³ Thus, while New Jersey, Oregon, and Illinois are currently the only states with inconsistencies between their vaccination and anti-SOCE laws, many more states will contain similar inconsistencies as anti-SOCE laws become more popular.¹⁵⁴ SOCE advocates may thus argue they are deserving of similar treatment when asserting their religious beliefs in SOCE therapy as parents who object to vaccinations based on religious beliefs.

C. *Is a Comparison Between Anti-SOCE Laws and Compulsory Vaccination Laws Appropriate?*

If proponents of reparative therapy are to argue anti-SOCE laws deserve similar treatment to compulsory vaccination laws, they first must establish that comparing the two laws is appropriate. Several similarities between the laws suggest the appropriateness of such a comparison.

First, legislatures enacted both types of legislation in order to further the same state interest: promoting the health of minors.¹⁵⁵ Second, and

149. When California repealed its personal belief exemption in 2015, it did not have a separate religious exemption. Rather, the personal belief exemption encompassed any religious objection to vaccination. *See id.* ("With the passage of Senate Bill No. 277, California removed exemptions based on personal beliefs, which are defined in that state as also including religious objections.").

150. *See* CAL. HEALTH & SAFETY CODE § 120365 (West 2015).

151. *See id.*

152. *See* N.J. STAT. ANN. § 26:1A-9.1 (West 2016); 105 ILL. COMP. STAT. § 5/27-8.1 (West 2015). Oregon's compulsory vaccination law further provides for a personal belief exemption in addition to the religious exemption. *See* OR. REV. STAT. § 433.267 (West 2016).

153. *See* NCSL Survey, *supra* note 143.

154. *See supra* notes 13–18 and accompanying text (listing current states with proposed anti-SOCE laws.)

155. *See supra* note 133 and accompanying text.

most important for the purpose of this discussion, the risks involved in granting exemptions to these laws are quite comparable. The risks of not vaccinating include both increased risk of illness for non-vaccinated children, as well as increased risks for the national community by eliminating “herd immunity.”¹⁵⁶ The risks associated with practicing SOCE are outlined in detail in Part I, but a small sample of these harms includes depression, stress, self-blame, and increased risk of suicide.¹⁵⁷ The potential harms resulting from exemptions from either type of legislation are grave. One can even argue the risks of not vaccinating are more severe: An exemption from vaccination not only exposes the risk to the exempted individual, but also to the general population through loss of herd immunity.¹⁵⁸ Nonetheless, in the context of compulsory vaccination laws, most legislatures have chosen to allow religious exemptions.¹⁵⁹

While the granting of these exemptions is only a matter of legislative grace,¹⁶⁰ based on these similarities, SOCE advocates could argue that legislatures should provide similar exemptions for anti-SOCE laws in the name of consistency. However, as the following section illustrates, such exemptions should not be granted.

D. *The (In)applicability of Religious Exemptions to Anti-SOCE Laws*

Regardless of any validity of the comparison of anti-SOCE laws to compulsory vaccination laws, state legislatures should not grant religious exemptions from anti-SOCE laws. Recent legislative trends and public policy dictate this conclusion. First, recent disease outbreaks have caused multiple state legislatures to question the policies behind exemptions in the first place. Second, and most importantly, religious exemptions are wholly inapplicable to anti-SOCE laws due to their severe undermining effect. Accordingly, state legislatures should not grant religious exemptions from anti-SOCE laws.

156. See LeFever, *supra* note 91, at 1048 (“Studies show that unvaccinated children may be twenty-two times more likely to suffer from measles than their vaccinated peers. In addition, unvaccinated children increase the risk of disease exposure and transmission to the national community by causing a decline in the overall immunization levels in the United States. Because high immunization levels indirectly protect the community through a process know [sic] as ‘herd immunity,’ a decline in vaccinated children may lead to disease resurgence. This is particularly dangerous for individuals who are susceptible to infection such as the elderly, newborns and pregnant women.” (footnotes omitted)).

157. See N.J. STAT. ANN. § 45:1-54(b) (West 2015) (referencing GLASSGOLD, *supra* note 1).

158. Too many exemptions from vaccination laws may result in a loss of “herd immunity,” thus exposing the national community to increased risk. See *supra* note 156.

159. See *supra* note 143.

160. See *Diana H. v. Rubin*, 171 P.3d 200, 214 (Ariz. Ct. App. 2007) (Espinosa, J., dissenting).

1. Legislatures Trending Away From Exemptions

Recent trends in multiple state legislatures indicate a move away from exemptions from compulsory vaccination laws. Such a trend would undercut SOCE advocates' arguments for similar treatment. Until recently, with the exception of Mississippi and West Virginia, every state had a religious exemption from vaccination laws.¹⁶¹ However, the recent measles outbreaks in both California and Ohio have prompted legislatures to reassess these exemptions.¹⁶² As briefly noted above, in 2015, California amended its vaccination law to remove all non-medical exemptions.¹⁶³ Similarly, in May 2015, Vermont passed a law removing its philosophical exemption from compulsory vaccination laws.¹⁶⁴ Since then, several additional state legislatures have introduced bills that would eliminate exemptions from their vaccination laws.¹⁶⁵ Significantly, the removal of religious exemptions is not a partisan issue. Legislators on both sides of the aisle are proposing the amendments to vaccination laws.¹⁶⁶

Interestingly, Vermont's amendment to its vaccination law left the statute's religious exemption untouched.¹⁶⁷ As a result, proponents of

161. See NCSL Survey, *supra* note 143. Again, as discussed in note 149, *supra*, California did not have a separate religious exemption prior to repealing the personal belief exemption in 2015. Rather, the personal belief exemption encompassed parents who wished to object on religious grounds.

162. See Alicia Chang, *Disneyland Measles Outbreak Dwarfed By 2014's in Ohio's Amish Country*, L.A. DAILY NEWS, (Feb. 4, 2015), <http://www.dailynews.com/health/20150204/disneyland-measles-outbreak-dwarfed-by-2014s-in-ohios-amish-country> (discussing the measles outbreaks in California and Ohio).

163. See *supra* notes 149–150 and accompanying text.

164. See April Burbank, *Shumlin Signs Bill Removing Vaccine Exemption*, BURLINGTON FREE PRESS (May 28, 2015), <http://www.burlingtonfreepress.com/story/news/politics/2015/05/28/shumlin-vaccine-philosophical-exemption/28079499>.

165. See, e.g., Andrew Kitchenman, *Proposed Legislation Could Reduce Religious Exemptions for Vaccinations*, NJSPOTLIGHT (May 20, 2015), <http://www.njspotlight.com/stories/15/05/20/proposed-bill-could-reduce-religious-exemptions-for-vaccinations/#> (discussing New Jersey's proposed bill); *Oklahoma May Abandon Vaccination Exemptions*, CBS NEWS, (June 7, 2015), <http://www.cbsnews.com/news/oklahoma-may-abandon-vaccination-exemptions/> [hereinafter *Oklahoma Exemption*] (discussing Oklahoma's proposed law).

166. The lead sponsors of New Jersey's bill are members of the Democratic Party, while the lead sponsor of Oklahoma's bill is Republican. See S. 1147, 216th Leg., Reg. Sess. (N.J. 2014); *Oklahoma Exemption*, *supra* note 165.

167. See VT. STAT. ANN. tit. 18, § 1122(a)(3)(A) (West 2015). As of 2015, Vermont is the only state to have had a philosophical exemption to vaccination laws and subsequently repeal it, leaving only a religious exemption. See Paris Achen, *Parents Seek Way Around VT Vaccination Law*, BURLINGTON FREE PRESS (June 8, 2015), <http://www.burlingtonfreepress.com/story/news/politics/2015/06/08/vaccine-exemption->

religious exemptions for SOCE may likely point to Vermont as an example of religious exemptions' continuing vitality despite the general trend to remove exemptions. While at first glance the survival of Vermont's religious exemption could indicate deference for religious objectors, a closer analysis indicates that religious deference was not the legislature's motivating factor. After signing the bill into law, Governor Shumlin made clear that the purpose behind the amendment was to increase vaccination rates within the state.¹⁶⁸ Before the legislation was passed, approximately ninety-four percent of Vermont kindergartners were either vaccinated or in the process of being vaccinated upon entering the school system.¹⁶⁹ Of those kindergartners not vaccinated, approximately ninety-six percent utilized the philosophical exemption.¹⁷⁰ It is the Vermont government's hope that by eliminating the most used exemption, vaccination rates will increase.¹⁷¹ With so few parents utilizing the religious exemption, it was likely not worth the congressional fight to eliminate it.¹⁷² Accordingly, the new Vermont statutory scheme does not indicate a renewed sense of religious deference in state legislatures, but rather a pragmatic approach to accomplish the legislative goal of increasing vaccinations.

2. Exemptions' Undermining Effect on Anti-SOCE Laws

Religious exemptions are wholly inapplicable to anti-SOCE laws due to their severe undermining effect. Compulsory vaccination laws are positive laws compelling action by all citizens: Parents must inoculate their children before enrolling them in school. Anti-SOCE laws on the other hand, are negative laws that only affect a select few.¹⁷³

religious-philosophical/28568043/ ("In an effort to boost the [vaccination] rate, the Legislature in May made Vermont the first in the nation to repeal the philosophical exemption.").

168. See April Burbank, *Shumlin Signs Bill Removing Vaccine Exemption*, BURLINGTON FREE PRESS (May 28, 2015), <http://www.burlingtonfreepress.com/story/news/politics/2015/05/28/shumlin-vaccine-philosophical-exemption/28079499/> ("[W]e're not where we need to be to protect our kids from dangerous diseases, and I hope this legislation will have the effect of increasing vaccination rates." (quoting Gov. Shumlin)).

169. See *id.* ("Nearly 88 percent of Vermont students entering kindergarten last fall had the full set of required vaccines, according to the Health Department. About 6 percent of kindergartners were admitted provisionally as they completed their immunizations, while 5.8 percent used the philosophical exemption.").

170. See *id.*

171. See *id.* ("[T]he philosophical exemption is by far the most common way to opt out of vaccines . . .").

172. The debate surrounding the amendment eliminating the philosophical exemption was heated enough as it was. The public hearing drew large crowds, and the vote was closer than one might expect to see for legislation promoting public health. See *id.*

173. At first glance, this undermines the previous argument that anti-SOCE laws are generally applicable and constitutional under the Free Exercise Clause. However, the principles outlined in Section II.B remain true. Laws are not generally applicable under the Supreme

They prevent certain conduct: practicing reparative therapy on minors. This fundamental distinction makes statutory exemptions from otherwise constitutional laws inapplicable to anti-SOCE laws.

In the context of vaccinations, even with statutory exemptions available, the great majority of children are still inoculated in accordance with state laws.¹⁷⁴ This is because vaccination laws compel action from all citizens. On the other hand, the number of Americans who practice or subject their children to SOCE is relatively small. Thus, anti-SOCE laws have zero effect on the majority of citizens. If exemptions from anti-SOCE laws were allowed, it would fundamentally undermine the law. The following hypothetical is illustrative of this point.

Imagine New Jersey consists of one hundred parents, each with one child.¹⁷⁵ Assume that prior to implementation of a compulsory vaccination law, fifty parents fail to inoculate their children. After implementation of the law, ninety-nine parents inoculate their children (one parent receives a medical exemption due to the child's weak immune system). The legislative goal is accomplished: The law has successfully reduced the chances of disease outbreak in New Jersey to nearly zero. Now assume the legislature incorporates a religious exemption into the statutory scheme. Of the fifty parents who previously did not inoculate their children, seven exercise the exemption, thus reducing the number of inoculated children to ninety-two.¹⁷⁶ Even with this reduction, the legislative goal is still largely accomplished: The majority of children are still inoculated, possibly even creating herd immunity.

Now assume the same population of one hundred parents in the context of an anti-SOCE law. Assume that before implementation of an

Court's *Smith* test only if the law covertly targets religiously motivated conduct. The fact that a law happens to have a greater effect on religious persons is not per se evidence of unconstitutionality. Furthermore, not only do anti-SOCE laws expressly *not* target religiously motivated conduct, but the statutes' language specifically allows minors to seek counseling from unlicensed religious leaders. *See, e.g.,* Welch v. Brown, 58 F. Supp. 3d 1079, 1088 (E.D. Cal. 2014); *see also* Symposium, *Challenge It, Choose It, or Change It: Ethics of Sexual Orientation Conversion Therapy for Minors*, 21 CARDOZO J.L. & GENDER 729, 754 (2015) (discussing New York's proposed law, which would still allow counseling from religious leaders.)

174. *See* Tim Darragh, *Vaccine Exemption Rate in N.J. Kindergartners Creeps Up*, NJ.COM, (Aug. 27, 2015), http://www.nj.com/healthfit/index.ssf/2015/08/vaccine_exemption_rate_in_nj_kindergarteners_creep.html (stating the national median vaccination rate is ninety-four percent).

175. Unless otherwise indicated, the ratios of vaccinated and unvaccinated children is by no means meant to be representative of New Jersey in this hypothetical. It is strictly meant as illustrative.

176. Importantly, this number is actually representative of New Jersey's current vaccination rate with the religious exemption in place: ninety-two percent. *See* Darragh, *supra* note 174.

anti-SOCE law, five practiced or participated in SOCE.¹⁷⁷ After implementation of the law, zero children are subjected to SOCE. The legislative goal is accomplished: The law has saved those minors from all of the potential harms of SOCE. Now assume the legislature incorporates a religious exemption into the statutory scheme, similar to that found in its compulsory vaccination law. Those five individuals who previously practiced SOCE are very likely to have either personal or religious objections to the law.¹⁷⁸ Accordingly, they would apply for the newly implemented religious exemption (whether their asserted religious belief was genuine or not).¹⁷⁹ After receiving the exemptions, New Jersey is back to five minors subjected to SOCE. The exemptions completely nullify the anti-SOCE law. With an exemption available, the only people prevented from practicing SOCE are the ninety-five who never practiced SOCE in the first place. The law would essentially have no effect.

This illustrative example demonstrates how religious exemptions, even if constitutional, are inapplicable to anti-SOCE laws. Accordingly, state legislatures should continue to adopt anti-SOCE laws without religious exemptions. Further, those states with such laws already in place should not amend those laws to include exemptions.

CONCLUSION

As described in Part II, current forms of anti-SOCE laws only prevent medical health professionals from practicing SOCE on minors. In a sense, there already is a religious exemption from the laws in that religious leaders (who are not also health professionals under the statutes) are free to practice SOCE, and parents are free to seek “help” from the leaders of their churches, synagogues, mosques, etc. What the anti-SOCE laws do is ensure that the state is in no way sponsoring these harmful practices by allowing state-licensed professionals to practice a “therapy” that causes harm to patients. Precedent is clear that parents’

177. The ratio of SOCE users to non-SOCE users is by no means meant to be representative of the actual state of New Jersey in this hypothetical. It is strictly meant as illustrative.

178. Otherwise, why would these individuals have actively practiced or participated in SOCE in the first place?

179. Even in those states where only a religious exemption is allowed, many parents simply assert a religious conviction against vaccination, when in reality no such conviction exists. *See* Achen, *supra* note 167 (quoting a parent who plans to assert a religious exemption now that Vermont’s philosophical exemption is gone). Generally, these false religious assertions are not investigated, and the exemptions are granted. *See* LeFever, *supra* note 91, at 1053 (describing Colorado’s exemption process as only requiring objectors to “sign a card.”). *But see* Phillips v. City of New York, 775 F.3d 538, 541, 543–44 (2d. Cir. 2015) (affirming the denial of a religious exemption to the mother because her “refusal to immunize her child [was] based on medical considerations and not religious beliefs.”).

rights do not include the right to choose a particular medical treatment or provider for their children, even when the assertion to do so is based in a religious belief. Future anti-SOCE laws modeled after California and New Jersey laws will likely withstand Free Exercise, Establishment, and Due Process Clause challenges. In passing such laws, legislatures should not provide religious exemptions similar to those included in most compulsory vaccination laws. To do so would serve to completely undermine anti-SOCE laws.

States are taking a stand against the stigma attached to homosexuality. A person's sexual attraction to a member of the same sex is not a disease that needs curing. The world's understanding of sexuality is changing, and those parents and practitioners who desire to perpetuate outdated modes of thinking while harming minors in the process will not be able to do so under a veil of religion.