

Conversion Therapy on LGBTQ+ Children as a Form of Torture and the Rights of the Child in the Face of the United States Constitution’s Free Speech and Religious Free Exercise Clauses

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Abstract:

Conversion therapy is an attempt to change the sexual orientation or gender identity of an LGBTQ+ individual to conform to heteronormative, cisgender archetypes using practices such as aversion therapy and talk therapy. It denies the true identity of a person, and to allow its practice on minors constitutes child abuse. In fact, conversion therapy qualifies as torture in many international spaces. Multiple studies indicate that children who undergo these “treatments” are at higher risks of suicide, attempted suicide, depression, self-injury, substance abuse, and have difficulty forming interpersonal relationships as adults. Not only does the data show that conversion therapy is harmful, but it also shows that conversion therapy does not work. Nonetheless, proponents of conversion therapy claim that the right to its practice is protected under the First Amendment rights to free speech and free exercise of religion. The practice of conversion therapy continues even though it goes against medical evidence of the dangers of conversion therapy in both the long and short term, and against federal and state statutes prohibiting emotional and physical abuse of a child. This Article addresses the relationship between LGBTQ+ individuals and the Abrahamic religions, the history of conversion therapy and its practices, and the legal framework for finding conversion therapy an act of child abuse to argue that the practice of conversion therapy in the United States should therefore garner no Constitutional protections. Not only should courts uphold bans on conversion therapy, federal and state legislatures should enact laws that expressly prevent its use on minors in any circumstance.

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I. INTRODUCTION

Conversion therapy is an attempt to change the “sexual orientation, gender identity, or gender expression” of a person through pseudoscientific efforts.¹ States that have successfully passed bans on the practice of conversion therapy on minors have largely prevailed against challenges to those bans in circuit courts.² Those who support conversion therapy, however, are having some success in the courts and state legislatures. For example, in 2020 the Eleventh Circuit ruled that Sexual Orientation Change

¹ *What is Conversion Therapy?*, GLAAD, <https://www.glaad.org/conversiontherapy> [<https://perma.cc/KEX2-WFSK>]; *Conversion Therapy*, SECULAR COAL. FOR AM., <https://secular.org/issue/conversion-therapy> [<https://perma.cc/6T5R-33CK>]; Elizabeth Yuko, *Stop Conversion Therapy – It’s Based on Pseudoscience*, HUFFPOST (Oct. 16, 2016, 8:48 AM), https://www.huffpost.com/entry/stopping-pseudoscience-pr_b_8302912 [<https://perma.cc/68DZ-8UE>]; Avery Gott, *Pseudoscience Conversion Therapy Could Be Outlawed In Kansas City*, KCUR (Nov. 6, 2019, 9:03 PM), <https://www.kcur.org/news/2019-11-06/pseudoscience-conversion-therapy-could-be-outlawed-in-kansas-city> [<https://perma.cc/674S-9TWT>].

² Case Comment, *Otto v. City of Boca Raton: Eleventh Circuit Invalidates Minor Conversion Therapy Bans*, 123 HARV. L. REV. 2863, 2863 (2021).

Efforts (SOCE) are protected under the First Amendment right to free speech and that to inhibit a therapist's ability to speak freely with their patient using SOCE is unconstitutional.³ This resulted in the first successful challenge to a conversion therapy ban in a circuit court.⁴

Conflicting moral values and the right to free speech and free exercise of religion are not the only issues surrounding the legality of conversion therapy. An equally pressing concern asks whether state governments should sanction the imposition of unsound, dangerous non-medical practices on children under 18 by parents and practicing therapists. This Article argues that allowing licensed medical professionals to impose conversion therapy on children permits the practice of child abuse and torture, which cannot qualify as protected speech. This type of speech should be banned regardless of whether the ban is content-based, and therefore examined under strict scrutiny review, or content-neutral and examined under rational basis review because conversion therapy violates protections against children and human rights protections against torture.⁵ It is a form of child abuse that should not receive protections under the Constitution, even if it is treated as a type of protected speech that has restrictions subject to strict scrutiny.⁶ Not only should courts uphold bans on conversion therapy, federal and state legislatures should enact laws that prevent its use on minors in any circumstance, including religious reasons. As of March 2023, there are 21 states and 4 territories with no state law or policy banning conversion therapy, and 3 states that expressly protect conversion therapy: Alabama, Florida, and Georgia sit in a circuit with a preliminary injunction currently preventing enforcement of conversion therapy bans.⁷ The Free Exercise Clause similarly protects the practice of religion; however, conversion therapy does not satisfy the requirements that the practice of religion not violate an otherwise valid law.⁸ Conversion therapy is torture, a form of child abuse, and allowing the practice to continue undermines the governmental interests in keeping children free from harm.⁹

³ *Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020).

⁴ Case Comment, *supra* note 2, at 2870.

⁵ The Independent Forensic Group, *Statement on Conversion Therapy*, 72 J. FORENSIC & L. MED., Feb. 2020, at 3–4.

⁶ See *infra* Part VII.

⁷ *Equality Maps: Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT (Mar. 15, 2023), https://www.lgbtmap.org/equality-maps/conversion_therapy [<https://perma.cc/5UDM-H5GE>] (Alabama, Georgia, and Florida make up the Eleventh Circuit).

⁸ See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

⁹ *Id.*

Multiple studies indicate that children who undergo these “treatments” are at higher risks of suicide, attempted suicide, depression, self-injury, substance abuse, and have difficulty forming interpersonal relationships as adults.¹⁰ Not only does the data show that conversion therapy is harmful, but it also shows that conversion therapy does not work.¹¹ It is so ineffective that a number of former ex-gay therapists have either closed their practices¹² or abandoned and apologized for their former beliefs.¹³ Medical organizations such as the American Psychiatric Association, the American Medical Association, and the American Psychological Association condemn the use of conversion therapy on minors.¹⁴ Moreover, many politicians and political organizations agree that conversion therapy should be banned. In fact, in 2015, the Obama White House issued a statement denouncing the practice after the suicide of 17-year-old Leelah Alcorn.¹⁵ As of March 2023, the Biden Administration has issued multiple statements regarding the practice as dangerous and discriminatory towards LGBTQ+ individuals, and is “encouraging the Federal Trade Commission to consider whether the practice constitutes an unfair or deceptive act or practice, and whether to issue consumer warnings or notices.”¹⁶

This Article will look at a brief history of traditional and modern Abrahamic religious beliefs on homosexuality, which underpin proponents’ claims under the Free Exercise Clause; a brief history of conversion therapy; and state legislative bans on conversion therapy. Later, it will explain why

¹⁰ John R. Blosnich et al., *Sexual Orientation Change Efforts, Adverse Childhood Experiences, and Suicide Ideation and Attempt Among Sexual Minority Adults, United States, 2016–2018*, 110 AM. J. PUB. HEALTH 1024, 1024 (2020).

¹¹ *Id.*

¹² Michael Majchrowicz, *One of the Nation’s Largest Conversion Therapy Networks Is Disbanding*, NBC NEWS (June 19, 2020, 1:15 PM), <https://www.nbcnews.com/feature/nbc-out/one-nation-s-largest-conversion-therapy-networks-disbanding-n1231574> [<https://perma.cc/RSS4-EFN9>]; Alyssa Newcomb, *Exodus International: ‘Gay Cure’ Group Leader Shutting Down Ministry After Change of Heart*, ABC NEWS (June 20, 2013, 10:47 AM), <https://abcnews.go.com/US/exodus-international-gay-cure-group-leader-shutting-ministry/story?id=19446752> [<https://perma.cc/T7XW-H2ZB>].

¹³ Newcomb, *supra* note 12.

¹⁴ *See infra* Parts IV, V.

¹⁵ Valeri Jarrett, *Petition Response: On Conversion Therapy*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA (Apr. 8, 2015, 8:42 PM), <https://obamawhitehouse.archives.gov/blog/2015/04/08/petition-response-conversion-therapy> [<https://perma.cc/6XM2-RXKB>].

¹⁶ *Fact Sheet: President Biden to Sign Historic Executive Order Advancing LGBTQI+ Equality During Pride Month*, THE WHITE HOUSE (June 15, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-president-biden-to-sign-historic-executive-order-advancing-lgbtqi-equality-during-pride-month> [<https://perma.cc/X7MQ-QMZC>].

conversion therapy on minors should be banned regardless of First Amendment content-based speech protections. These sections articulate the flaws in the belief that religion depends on conversion therapy for survival, argue that conversion therapy is predicated on unsound medical practices that reflect prejudiced ways of thinking, and lastly argue that, due to the psychological risks of conversion therapy on children, conversion therapy qualifies as torture and should not receive First Amendment protections regardless of scrutiny analysis.

II. ABRAHAMIC RELIGION ON HOMOSEXUALITY

This section looks at the history of the three primary Abrahamic religions and their relationships with homosexuality, gender identity, and expression that underpin conversion therapy proponents' legal arguments under the Free Exercise Clause. This section articulates certain religious beliefs regarding LGBTQ+ identities and their reasons for either supporting or denouncing conversion therapy as a practice to articulate there is no foundation upon which conversion therapy as a fundamental element of each religion stands. It briefly discusses the positive and negative views on LGBTQ+ identities for Judaism, Christianity, and Islam. By showing these varying stances on LGBTQ+ individuals, this section articulates that no religion is dependent on the existence of conversion therapy to continue that religion's survival. It further articulates that many of the religious practices may have emerged out of falsehoods of antiquated cultural biases or mistakes that have further developed to reinforce the dangerous treatment of minors in the United States.

While many religions accept homosexuality to varying degrees, many followers of the Abrahamic religions, specifically Christianity, are prominent voices for the use of conversion therapy on minors.¹⁷ It is important to look at the development of religious beliefs toward homosexuality because proponents of conversion therapy have used the Free Exercise Clause as a shield against conversion therapy bans.

A. Judaism

All religions contain factions of differing beliefs and customs, as well as different interpretations of their religious texts and accepted behaviors. The Jewish community has both members who welcome LGBTQ+ individuals and those who do not. The Jewish Reform Movement is committed to inclusion and diversity, and members of Reform Judaism publicly welcome LGBTQ+ persons; LGBTQ+ individuals may be ordained as rabbis, same-sex marriages have a majority of support in the Jewish community, and

¹⁷ *Measuring Religion in Pew Research Center's American Trends Panel*, PEW RSCH. CTR. (Jan. 14, 2021), <https://www.pewforum.org/2021/01/14/measuring-religion-in-pew-research-centers-american-trends-panel> [<https://perma.cc/VT4Z-8GD6>] (focusing on the three main Abrahamic religions as they are the most prominent in the United States).

LGBTQ+ congregations are largely welcomed in the United States.¹⁸ Reform Judaism has been championing LGBTQ+ rights since 1977 and “Reconstructionist Judaism [holds] same-sex marriage . . . [as] a religious value.”¹⁹ “The Reform movement in 2015 issued a resolution expressing support for transgender rights, and months later the Conservative movement issued a similar one.”²⁰ Another resolution was issued by the Central Conference of American Rabbis who denounced conversion therapy, joining then-President Obama in his call to ban conversion therapy from all 50 states.²¹ They stated, “Judaism’s highest value is *pikuach nefesh*, *saving a life*. . . . Consigning teens to therapy intended to ‘convert’ them from the way in which God created them causes shame and lowered self-esteem, increasing the risk of suicide.”²² Modern Jewish organizations have also drawn attention to the fact that there are at least eight genders described in the Talmud, where “[t]he Mishnah describes half a dozen categories that are between male and female, such as *saris* or *ailonit*—the terms refer to a non-reproductive version of the male or female body, respectively—and categories that refer to ambiguous or indeterminate gender.”²³

While Jewish opinions on sexuality have become vocally more welcoming towards LGBTQ+ individuals in the last several decades, there remain communities that still see LGBTQ+ identities as inherently sinful or in need of correcting. Many Orthodox communities condemn homosexual acts as “abhorrent” sins, equating them to that of “the sin of remarrying a woman you had divorced after she had been married to another man.”²⁴ A common thread that runs through the Abrahamic religions regarding the sinful nature or wrongness of LGBTQ+ individuals posits that same-sex individuals are not inherently sinful, however, the act of engaging in sexual

¹⁸ *What is Reform Judaism*, UNION FOR REFORM JUDAISM (2023), <https://reformjudaism.org/what-is-reform-judaism> [<https://perma.cc/86ED-BVU7>]; JOSEPH TELUSHKIN, *JEWISH LITERACY: THE MOST IMPORTANT THINGS TO KNOW ABOUT THE JEWISH RELIGION, ITS PEOPLE, AND ITS HISTORY* 542 (1st ed. 1991).

¹⁹ *Jewish Views on Homosexuality*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/homosexuality-in-jewish-thought> [<https://perma.cc/R82U-WAC5>].

²⁰ *Id.*

²¹ *CCAR Resolution on “Conversion Therapy,”* CENT. CONF. OF AM. RABBIS (May 6, 2015), <https://www.ccarnet.org/ccar-resolutions/ccar-resolution-conversion-therapy> [<https://perma.cc/23U5-EZRE>].

²² *Id.* (emphasis added).

²³ Leah Falk, *The 8 Genders of the Talmud*, JEWNIVERSE (Nov. 9, 2015) (emphasis added), <https://www.jta.org/jewniverse/2015/the-6-genders-of-the-talmud> [<https://perma.cc/9J2P-27FP>].

²⁴ *Issues in Jewish Ethics: Homosexuality*, JEWISH VIRTUAL LIBR. (citations omitted), <https://www.jewishvirtuallibrary.org/homosexuality-in-judaism> [<https://perma.cc/37WH-2GNG>].

conduct between same-sex partners is sinful.²⁵ Similarly, there are a number of complex religious proscriptions regarding dress, body modification, and natal sex that different communities approach with varying degrees of acceptance.²⁶

The origin of anti-homosexual prejudice in Judaism may not be purely religious but instead may stem more from cultural biases of the time than from any one Abrahamic religion alone.²⁷ In fact, anti-homosexual beliefs may have arisen in part from anti-Greek sentiment from the sixth century B.C.E.,²⁸ reflecting less of a religious belief and more of a social bias against regional foreigners in what is now Israel and Palestine.²⁹ The prejudice may have stemmed from a distaste regarding Greek social practices, whereby same-sex relationships were seen as having a number of varying significances (from maintaining social order, to finding artistic beauty, to, indeed, a form of “mentorship” that involved a relationship between an older man and a boy between ages 12 and 18).³⁰ Antiquated social biases aside, Judaism’s focus on tempering homosexual behavior largely stems from the belief that sexual acts must be in furtherance of procreation alone and that any other sex act, like masturbation or oral sex, is sinful.³¹ This is also true for Christianity and Islam.³² There is, however, “no evidence that the Jews mounted a large-scale campaign against homosexuality. . . . Though it is possible that some forms of homosexual intercourse might have been punished by death, there is no record of this sentence ever having been carried out.”³³

²⁵ *Id.* (citing *Leviticus* 18:22, *Deuteronomy* 24:4, and *Leviticus* 20:13).

²⁶ *Orthodox Rabbi Addresses Transgender Issues*, JEWISH J. (Feb. 17, 2016), <https://jewishjournal.com/judaism/182578> [<https://perma.cc/EA8S-ZZAY>].

²⁷ VERN L. BULLOUGH, *HOMOSEXUALITY: A HISTORY (FROM ANCIENT GREECE TO GAY LIBERATION)* 17–22 (1st ed. 2008).

²⁸ *Id.* at 18–19.

²⁹ *Id.* at 18–20.

³⁰ Brigid Kelleher, *Acceptance Through Restriction: Male Homosexuality in Ancient Athens*, 16 *HIST. PERSP. SANTA CLARA U. UNDERGRADUATE J. HIST., SERIES II* 1, 13 (2011).

³¹ BULLOUGH, *supra* note 27, at 17–18.

³² *See id.*; *Homosexuality in the Light of Islam*, MADRASSAH IN’AAMIYYAH (Jan. 10, 2007), <http://web.archive.org/web/20080115124504/http://www.alinaam.org.za/library/homos.html> [<https://perma.cc/M4CP-RHYC>].

³³ BULLOUGH, *supra* note 27, at 22; *see also* *Leviticus* 20:14 (King James) (“And if a man take a wife and her mother, it is wickedness: they shall be burnt with fire, both he and they; that there be no wickedness among you.”); *Jewish Views on Homosexuality*, *supra* note 19 (discussing how the same scriptures are used as the basis for the Orthodox Jewish belief that homosexual acts are sinful).

B. Christianity

Conservative Christianity takes a similar stance to Orthodox Judaism, in that it cites certain scripture from the Bible to support the belief that homosexual acts between same-sex partners are sinful; these are largely found in the scriptures of Leviticus 18:22 (“Thou shalt not lie with mankind, as with womankind: it is abomination”³⁴); and Leviticus 20:13 (“If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.”³⁵). Certain interpretations of the Bible have led to anti-LGBTQ+ beliefs because “the prohibitions against same-sex intercourse occur in the context of other types of sexual activity that the church today still largely regards as illegitimate: incest, adultery and bestiality.”³⁶

Evangelical Christians have consistently denounced homosexuality. Both Roman Catholic and Protestant Christianity have a history of “live burning, drowning and torture of sexual and gender minorities in the name of God.”³⁷ Charles Fensham, professor of systemic theology at Knox College, University of Toronto, suggests this is because “conservative Christianity erroneously sees an affirming welcome of sexual and gender minorities as a moral failure.”³⁸ The Catholic Catechism describes “same-sex attraction as ‘objectively disordered’ and same-sex relations as ‘intrinsically disordered’”³⁹ and “contrary to natural law,”⁴⁰ suggesting that any non-procreative sexual act is wrong.⁴¹ A core principle of Christianity’s denouncement of same-sex attraction is the belief that homosexuality is not a natural occurrence in

³⁴ *Leviticus* 18:22 (King James).

³⁵ *Leviticus* 20:13 (King James).

³⁶ Robert A.J. Gagnon, *Scripture on Homosexuality (Part 1 and Part 2)*, CATH. CULTURE (Mar. 21, 2002), <https://www.catholicculture.org/culture/library/view.cfm?recnum=4175> [<https://perma.cc/9ATU-WHYL>].

³⁷ Michael Coren, *LGBTQ People and ‘The Harm Being Done by the Christian Religion’*, MACLEAN’S (Jan. 17, 2020), <https://www.macleans.ca/culture/books/lgbtq-people-and-the-harm-being-done-by-the-christian-religion> [<https://perma.cc/3AZG-4AZ8>].

³⁸ *Id.*

³⁹ *Catechism of the Catholic Church*, ¶¶ 2357–58, ST. CHARLES BORROMEO CATH. CHURCH, <https://scborromeo2.org/catechism-of-the-catholic-church> [<https://perma.cc/QL88-MZ77>]; see also Charles J. Reid, Jr., *Let’s Banish Talk About ‘Intrinsic Disorder’*, HUFFPOST (Jan. 23, 2014), https://www.huffpost.com/entry/lets-banish-talk-about-intrinsic-disorder_b_4174863 [<https://perma.cc/HMF3-RAUE>] (discussing the language and history of the Catechism of the Catholic Church).

⁴⁰ *Catechism of the Catholic Church*, *supra* note 39, ¶ 2357.

⁴¹ Reid, *supra* note 39.

humans, but rather an illness or profound confusion that can be cured.⁴² This understanding of homosexuality leads to the paternalistic and pejorative belief that homosexual people are merely sick and can be “cured” of their desire for the opposite sex through conversion therapy.

Though welcoming and inclusive Christian communities do exist, there remain a number of identified anti-gay groups dedicated to “their propagation of known falsehoods—claims about LGBT[Q+] people that have been thoroughly discredited by scientific authorities.”⁴³ Anti-LGBTQ+ advocacy has remained constant in recent years. In 2019, “[t]he United Methodist Church . . . strengthen[ed] its ban on same-sex marriage and LGBT[Q+] clergy,”⁴⁴ and in 2021, “the Vatican declared . . . that the Catholic Church won’t bless same-sex unions since God ‘cannot bless sin’”⁴⁵ despite Pope Francis’s supposed “endors[ment of] providing gay couples with legal protections in same-sex unions.”⁴⁶

Interestingly, the word “homosexual” may not have even appeared in the Bible until as late as 1946.⁴⁷ Theologian Ed Oxford suggests that the use of the word “homosexual” could have been a simple mistake, made and subsequently acknowledged by translator Luther Allan Weigle.⁴⁸ Weigle was the “head of the [Revised Standard Version] RSV translation team” at the time,⁴⁹ and the resulting mistake—where the use of the word “homosexual” was used in place of the more accurate “sexual perverts”—was left

⁴² Jack Volkers, *Homosexuality Can Be Cured*, BANNER OF TRUTH (Aug. 10, 2000), <https://banneroftruth.org/us/resources/articles/2000/homosexuality-can-be-cured> [<https://perma.cc/2CH4-CMGS>].

⁴³ Evelyn Schlatter, *18 Anti-Gay Groups and Their Propaganda*, S. POVERTY L. CTR. (Nov. 4, 2010), <https://www.splcenter.org/fighting-hate/intelligence-report/2010/18-anti-gay-groups-and-their-propaganda> [<https://perma.cc/Z3T7-FEZ6>].

⁴⁴ Katharine Jackson, *United Methodist Church Strengthens Ban on Same-Sex Marriage, LGBT Clergy*, REUTERS (Feb. 26, 2019, 6:32 PM), <https://www.reuters.com/article/us-religion-lgbt-united-methodist/united-methodist-church-strengthens-ban-on-same-sex-marriage-lgbt-clergy-idUSKCN1QG022> [<https://perma.cc/ZA3X-HB6T>].

⁴⁵ Nicole Winfield, *Vatican Bars Gay Union Blessing, Says God ‘Can’t Bless Sin’*, ASSOC. PRESS (Mar. 15, 2021), <https://apnews.com/article/vatican-decree-same-sex-unions-cannot-bless-sin-077944750c975313ad253328e4cf7443> [<https://perma.cc/QT8Y-E9YZ>].

⁴⁶ *Id.*

⁴⁷ The Forge Online, *Has ‘Homosexual’ Always Been in the Bible?*, UNITED METHODIST INSIGHT (Oct. 14, 2019, 8:14 AM), <https://um-insight.net/perspectives/has-‘homosexual’-always-been-in-the-bible/> [<https://perma.cc/KL2T-ZC72>]; Ed Oxford, *My Quest to Find the Word ‘Homosexual’ in the Bible*, BAPTIST NEWS GLOB. (Aug. 10, 2020), https://baptistnews.com/article/my-quest-to-find-the-word-homosexual-in-the-bible/#.YK_WQmZKifU [<https://perma.cc/A7DJ-KZRW>].

⁴⁸ Oxford, *supra* note 47.

⁴⁹ *Id.*

uncorrected due to a contract Weigle signed “stating that he would not make any changes in the RSV for 10 years”; this led to myriad copies of the incorrect translation.⁵⁰ “The RSV committee decided the word ‘homosexual’ was an inaccurate translation of *malakoi* and *arsenokoitai* in 1 Corinthians 6:9 and replaced it with ‘sexual perverts,’”⁵¹ and has, since the mistranslation occurred, worked to correct the mistake in subsequent editions.⁵² Sharon Roggio, director of the new documentary *1946: The Mistranslation That Shifted Culture*, even purports to “have tangible evidence, letters written from the [RSV] committee” acknowledging this correction.⁵³

Oxford suggests the change might have also stemmed from less innocent means, as Americans may have actually paid for the mistranslation to include the word “homosexual” in place of “child molester.”⁵⁴ The German translator may have been influenced by an American publishing company’s anti-homosexual instructions to mistranslate the words *arsenokoitai* and *knabensbander*.⁵⁵ The word *arsenokoitai* originally meant “sexual perverts,” in Greek, and *knabensbander* originally meant “boy molester,” in German, referencing acts of pedophilia and rape.⁵⁶ Thus, some of the foundation for Christianity’s belief that same-sex attraction is inherently sinful may have either been the result of a mistake, or perhaps a deliberate attempt at manipulating the text to reflect society’s cultural distaste for homosexuality as opposed to one that has religious origins.

Despite the number of anti-LGBTQ+ groups in the United States, many Christian Churches and organizations support LGBTQ+ communities. For example, in 2021, the United Church of Christ petitioned the General Synod of the United Church of Christ to put their support behind a ban on conversion therapy.⁵⁷ The United Church of Christ “urge[d] everyone in the church ‘to strengthen their efforts to reach their LGBTQ+ neighbors,

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Kevin Fallon, *The Word ‘Homosexual’ Is in the Bible by Mistake: The Explosive Documentary That is Under Attack*, DAILY BEAST (Nov. 7, 2022, 2:56 PM), <https://www.thedailybeast.com/documentary-1946-says-homosexual-is-in-the-bible-by-mistake-and-is-being-attacked-by-christians> [<https://perma.cc/L7AR-PFMA>] (the mistranslation was presumably corrected sometime after the 10-year limitation period ended).

⁵³ *Id.*

⁵⁴ The Forge Online, *supra* note 47.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Hans Holznagel, *Advocates Ask Synod to Back Ban on Conversion Therapy and its ‘Demonstrable Harm’*, UNITED CHURCH OF CHRIST (June 14, 2021), <https://www.ucc.org/advocates-ask-synod-to-back-ban-on-conversion-therapy-and-its-demonstrable-harm> [<https://perma.cc/4AUH-DAJP>].

especially youth, with the Good News that their sexual orientation or gender identity or expression are gifts from God.”⁵⁸ Since 2010, the Presbyterian Church has voted to allow the ordainment of LGBTQ+ persons, granted ministers the right to perform same-sex marriages,⁵⁹ and has issued the public statement that:

[R]eligious freedom is not a license for discrimination against any of God’s people, and cannot justify the denial of secular employment or benefits, healthcare, public or commercial services or goods, or parental rights to persons based on race, ethnicity, [sex,] gender, sexual orientation, gender identity, [religion,] or gender expression.⁶⁰

The Episcopal Church has, since as early as 1976, shown support for LGBTQ+ individuals, including same-sex partnerships, and transgender and nonbinary gender identities.⁶¹ Further, even though the Catholic Church has both pro-LGBTQ+ and anti-LGBTQ+ stances, the Pew Research Center notes that across Western Europe and the United States, Catholic support for same-sex marriage is in the majority, while in Central and Eastern Europe support for same-sex marriage is in the minority.⁶² Similarly, while some parishes within the Catholic Church have issued items like the Marquette policy (a policy that refuses LGBTQ+ persons the right to receive sacraments within the Michigan Upper Peninsula),⁶³ others have issued statements that:

[I]n the Gospels, Jesus Christ taught love, mercy and welcome for all people, especially for those who felt persecuted or marginalized in any way; and the *Catechism of the Catholic Church* teaches that LGBT[Q+] people are to be treated with ‘respect, compassion and sensitivity’ Know

⁵⁸ *Id.*

⁵⁹ *Stances of Faiths on LGBTQ Issues: Presbyterian Church (USA)*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-presbyterian-church-usa> [<https://perma.cc/TF8V-BG7R>].

⁶⁰ *On Clarifying the Position of the PC (USA) Regarding Appropriate Boundaries of Religious Liberty—From the Presbytery of Boise*, 223rd Gen. Assemb. for Presbyterian Church (U.S.A.) (2018), <https://www.pc-biz.org/#/search> [<https://perma.cc/45WB-G72R>].

⁶¹ *Stances of Faiths on LGBTQ Issues: Episcopal Church*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-episcopal-church> [<https://perma.cc/RZK7-A4B3>].

⁶² Jeff Diamant, *How Catholics Around the World See Same-sex Marriage, Homosexuality*, PEW RSCH. CTR. (Nov. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/11/02/how-catholics-around-the-world-see-same-sex-marriage-homosexuality/> [<https://perma.cc/5HBH-922Z>].

⁶³ David Crary, *Rejection or Welcome: Transgender Catholics Encounter Both*, ASSOC. PRESS (Feb. 26, 2022), <https://apnews.com/article/lifestyle-religion-united-states-gender-identity-marquette-368a622737d78df1f1f254a1e8e68aaf> [<https://perma.cc/8SGR-MLEM>].

that God created you, God loves you and God is on your side.⁶⁴

These varying stances show that not all Catholics hold purely negative views on same-sex relationships or gender identity, and indeed not all Christians seem to be able to reach a consensus on whether LGBTQ+ people or their actions are sinful, thus holding the suggestion that anti-LGBTQ+ Christian beliefs are a fundamental part of Christianity in conflict with the realities of the diversity of Christian belief.

C. Islam

Like Judaism and Christianity, some traditional Islamic beliefs deem homosexuality to be “a sexual deviation leading to a perverted act which goes against the natural order Allah intended for mankind.”⁶⁵ Sections of the Qur’an describe the “‘people of Lot’ (also known as the Sodomites) who were destroyed because they engaged in homosexual acts.”⁶⁶ Some Islamic traditionalists see heterosexuality as “designed by Allah to preserve the human race . . . [and believe that] [h]omosexuality is negatory of the natural role and aim of sexual activity.”⁶⁷ Others believe that the heterosexual focus in the Qur’an was to make sure children had the financial support of their fathers, as “men earned the most income and few women had substantial income of their own.”⁶⁸ There was also a prevailing view that heterosexuals were the majority and therefore deserved explicit focus in the text.⁶⁹ The same belief that homosexual acts are not equivalent to homosexual identity appears throughout all the Abrahamic religions, including Islam.⁷⁰

⁶⁴ *God is On Your Side: A Statement from Catholic Bishops on Protecting LGBT Youth*, TYLER CLEMENTI FOUND., <https://tylerclementi.org/catholicbishopsstatement/> [<https://perma.cc/TAJ6-6SCE>].

⁶⁵ *The Islamic Ruling on Homosexuality: Al Jumuah, Shaban 1416 AH*, THETRUE RELIGION.ORG (Mar. 30, 2004), <http://web.archive.org/web/20051231231720/http://thetrue religion.org/modules/wfsection/article.php?articleid=45> [<https://perma.cc/SCS2-LERB>].

⁶⁶ Gabriele Parks, *GLBT in World Religions*, THOMAS PAINE UNITARIAN UNIVERSALIST FELLOWSHIP (Aug. 3, 2008), <http://web.archive.org/web/20101123025839/http://www.tpuuf.org/2008/08/03/glbt-in-world-religions> [<https://perma.cc/GLP9-D6B8>].

⁶⁷ *Homosexuality in the Light of Islam*, *supra* note 32.

⁶⁸ Scott Siraj al-Haq Kugle, *Sexual Diversity in Islam: Is There Room in Islam for Lesbian, Gay, Bisexual and Transgender Muslims?*, MUSLIMS FOR PROGRESSIVE VALUES (2010), <https://www.mpvusa.org/sexual-diversity> [<https://perma.cc/8JUT-UN85>].

⁶⁹ *Id.*

⁷⁰ *Id.*

Modern Islamic views hold differing beliefs, certainly some reflective of conservative values, and others leaning towards more acceptance. One Modern Islamic view proposes:

The Qur'an celebrates diversity . . . even protect[ing] diversity of religion . . . We know that homosexuality exists, among human beings with free will. It also exists among animals—and the Qur'an says animals do not have free will, they are only obedient to God. In the Qur'an, Surat al-Rum (Qur'an 30:22) says God has created human beings with different *alwan*, a word that can mean both “colors” and “tastes” . . . It seems clear that sexual diversity must also be a type of human diversity that was created by God's divine wisdom.⁷¹

While these interpretations of the Qur'an suggest that LGBTQ+ identity is equal in its validity to that of heterosexual or cisgender individuals, it is likely that many Muslim LGBTQ+ people do not feel comfortable living openly in their identities for fear of retribution.⁷²

Still, acceptance of homosexuality is becoming more popular in Islam. A recent survey by the Public Religion Research Center found that 52% of American Muslims agree that “society should approve of homosexuality.”⁷³ Similarly, “[t]ransgender [individuals] are recognized and accepted in many Islamic cultures around the world.”⁷⁴ Members of the Islamic faith can become religious leaders regardless of sexual or gender orientation so long as they “complete[] extensive theological studies and have proven themselves strong leaders.”⁷⁵ In recent years, some Islamic organizations have incorporated more inclusive policies and initiatives. For example, in 2009, “Imam El-Farouk Khaki co-founded Toronto's first LGBTQ[+]-friendly mosque, Unity Mosque . . . [where] lesbian, gay, bisexual, transgender and queer Muslims [can] attend prayers without having to hide their sexual orientation or gender identity for fear of discrimination.”⁷⁶ Further, in 2019,

⁷¹ *Id.*

⁷² *Stances of Faiths on LGBTQ Issues: Islam – Sunni and Shi'a*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/stances-of-faiths-on-lgbt-issues-islam> [<https://perma.cc/Y4W7-8QZ2>].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Finbarr Toesland, *Affirming Mosques Help Gay Muslims Reconcile Faith, Sexuality*, NBC NEWS (Apr. 1, 2019, 11:11 AM), <https://www.nbcnews.com/feature/nbc-out/affirming-mosques-help-gay-muslims-reconcile-faith-sexuality-n988151> [<https://perma.cc/L43U-CD84>].

the London-based European LGBTQ+ Muslim group Imaan organized their first LGBTQ+ Pride Celebration.⁷⁷

D. Generally

Today, modern beliefs on homosexuality have drastically changed, in large part because some religious organizations acknowledge the danger of using conversion therapy on children and the harm that results from its use.⁷⁸ Recently, 400+ global religious leaders from over 35 different countries issued a public video apology that called for an end to conversion therapy and declared that LGBTQ+ people should be treated equally under the law.⁷⁹ There is no religious standard on LGBTQ+ individuals that holds true across any of the Abrahamic religions—there will very likely always be those who believe LGBTQ+ persons are sinful aberrations to the norm. There are, however, those who see LGBTQ+ individuals as human beings deserving of respect and whose identities are as equal reflections of holiness as any other. The history of these differences in beliefs emphasizes that each religion does not need conversion therapy to survive, that the origin of some of these prejudices may stem from non-religious means or may have been deliberately planted to further anti-LGBTQ+ propaganda. None of this lends credibility to legal argument that conversion therapy is a fundamental element of religious free speech, nor that it is protected under the Free Exercise Clause.

III. PSYCHOLOGY, PSYCHIATRY, AND MEDICINE ON HOMOSEXUALITY

This section gives a brief explanation of the pathology of homosexuality, the history of conversion therapy, and methods frequently used by practitioners to “cure” homosexuality. The pathology of homosexuality and gender identity is described to articulate the fact that LGBTQ+ identities are now recognized by the medical community at large as being a natural part of human sexuality and identity. This recognition comes after over a century of discrimination, human experimentation, and protest.

⁷⁷ Muri Assunção, *LGBTQ Muslims set to Celebrate First Pride in London, after Successful Fundraising Campaign*, DAILY NEWS (Oct. 29, 2019, 7:51 PM), <https://www.nydailynews.com/news/world/ny-lgbtq-muslims-pride-london-fundraiser-20191029-s45c43cosznh7hjbkdz3ffwy-story.html> [<https://perma.cc/A42Q-HSJS>].

⁷⁸ See Jayne Ozanne, *Declaring the Sanctity of Life & Dignity of All*, YOUTUBE (Dec. 15, 2020), https://www.youtube.com/watch?v=DIAVoeIAYM8&feature=emb_title [<https://perma.cc/6U54-D9MU>]; Christina Morales, *Hundreds of Religious Leaders Call for End to L.G.B.T.Q. Conversion Therapy*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/16/world/conversion-therapy-pledge.html> [<https://perma.cc/F84D-6UQN>]; 2020 Declaration, GLOB. INTERFAITH COMM'N ON LGBTQ+ LIVES (Dec. 16, 2020), <https://globalinterfaith.lgbt/declaration-2/> [<https://perma.cc/W42H-S3HA>].

⁷⁹ Ozanne, *supra* note 78; 2020 Declaration, *supra* note 78 (listing the religious leaders and countries that signed Global Interfaith Commission's Declaration calling for an end to the practice of conversion therapy).

A. The History and Pathology of Homosexuality and Gender Identity

Attempts to understand the origins of human sexuality has a long history. For the purposes of this article, a brief explanation of its medical pathology shows that LGBTQ+ identity, from the beginning of scientific attempts to pathologize it, has been considered a normal part of human sexuality. For the purposes of this Article, we focus on the Western pathology of homosexuality and gender identity and its influences on predominantly Western views of LGBTQ+ identities.

In 1862, German polymath Karl Heinrich Ulrichs, an early critic of German homosexual criminalization laws, “hypothesized that some men were born with a woman’s spirit trapped in their bodies and that these men constituted a *third sex* he named *urnings*. He also defined a woman [sexually attracted to another woman] . . . as *urningin*, a man’s spirit trapped in the body of a woman.”⁸⁰ Likewise, in 1919 Germany “sexologist and sexual-reformer” Dr. Magnus Hirschfeld founded what has been called “the first organization for homosexuals,”⁸¹ the Scientific Humanitarian Committee.⁸² He also founded the Institute for Sexual Science in Germany, which remained open from 1919 until 1933.⁸³ Historically, Hirschfeld has been called “the father of transgender[ism]”⁸⁴ and the “leader of the German homophile movement” in the nineteenth century.⁸⁵ Hirschfeld coined the term “transvestite” in 1918, using this now antiquated term “as a gateway” to provide gender-affirming care.⁸⁶ In fact, he was one of the first to offer his patients the ability to transition through hormone therapy and gender-affirming surgeries.⁸⁷ Hirschfeld also developed the revolutionary Adaption Theory, which

⁸⁰ Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCI. 565, 568 (2015); see also Liam Stack, *Overlooked No More: Karl Heinrich Ulrichs, Pioneering Gay Activist*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/obituaries/karl-heinrich-ulrichs-overlooked.html> [<https://perma.cc/3PVH-6HX3>].

⁸¹ *The First Institute for Sexual Science (1919-1933)*, MAGNUS HIRSCHFELD-GESELLSCHAFT E.V., <https://magnus-hirschfeld.de/ausstellungen/institute> [<https://perma.cc/98T8-S9ZY>].

⁸² Eric Marcus, *Magnus Hirschfeld*, MAKING GAY HIST., <https://makinggayhistory.com/podcast/magnus-hirschfeld> [<https://perma.cc/9JZK-GQ9Y>].

⁸³ *The First Institute for Sexual Science (1919-1933)*, *supra* note 81.

⁸⁴ Farah Naz Khan, *A History of Transgender Health Care*, SCI. AM. (Nov. 16, 2016), <https://blogs.scientificamerican.com/guest-blog/a-history-of-transgender-health-care> [<https://perma.cc/53MN-HC2M>].

⁸⁵ Drescher, *supra* note 80, at 568.

⁸⁶ Naz Khan, *supra* note 84.

⁸⁷ *Id.*

“supported those who wanted to live according to the gender they felt most aligned with.”⁸⁸

Then, in 1948 and 1953, American biologist and sex researcher Alfred Kinsey published *Sexual Behavior in the Human Female* and *Sexual Behavior in the Human Male* respectively.⁸⁹ Though his research showed somewhat skewed data,⁹⁰ his conclusion was that homosexuality is “found regularly in nature.”⁹¹ American psychologist Evelyn Hooker continued similar work in the 1950s. She published her study, *Adjustment of the Male Overt Homosexual*, comparing 30 homosexual men and 30 heterosexual men of the same age, education, and IQ scores, and deliberately removed any obviously “pathological” subjects before presenting the data to a panel of judges to see if they could differentiate between the groups.⁹² Ultimately, the judges could not tell the groups apart based on sexual orientation, leading to Hooker’s conclusion that “what is difficult to accept (for most clinicians) is that some homosexuals may be very ordinary individuals, indistinguishable, except in sexual pattern, from ordinary individuals who are heterosexual.”⁹³

In 1920, the Austrian Neurologist Sigmund Freud suggested homosexuality followed “the intersex hypothesis of homosexuality [that] maintains that the brains of homosexual individuals exhibit characteristics that would be considered more typical of the other sex.”⁹⁴ Here, he proposed part of his famous Oedipus complex, suggesting same-sex attraction could be cured through talk therapy.⁹⁵ Later however, Freud would write a letter in response to a mother concerning her son and note that homosexuality cannot be cured.⁹⁶ He explained that “homosexuality... is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness: we consider it to

⁸⁸ *Id.*

⁸⁹ See ALFRED C. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); ALFRED C. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948).

⁹⁰ Drescher, *supra* note 80, at 569 (“His now-famous ‘10%’ statistic is today believed to be closer to 1%–4%.”).

⁹¹ *Id.*

⁹² David Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1318 (1999) (quoting RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 50 (1981)); Jonathan Barrett, *Misusing Freud: Psychoanalysis and the Rise of Homosexual Conversion Therapy*, 8 PSI SIGMA SIREN 4, 13 (2014).

⁹³ Barrett, *supra* note 92, at 13 (quoting Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECH. 18, 29 (1957)).

⁹⁴ Drescher, *supra* note 80, at 567 (emphasis omitted); Sigmund Freud, *The Psychogenesis of a Case of Homosexuality in a Woman*, 1 INT’L J. PSYCHO-ANALYSIS 125 (1920).

⁹⁵ See EDWARD ERWIN, *THE FREUD ENCYCLOPEDIA: THEORY, THERAPY, AND CULTURE* 176 (2002).

⁹⁶ SIGMUND FREUD, *THE LETTERS OF SIGMUND FREUD* 423–24 (1992).

be a variation of the sexual function”⁹⁷ English physician and contemporary of Freud, Havelock Ellis, heavily criticized Freud’s early belief that homosexuality could and should be cured; Ellis saw homosexuality as natural, not something that needed curing.⁹⁸ He believed that homosexuality may even be something that “is curiously well suited to help develop the talents for which these men were celebrated,” as well as “congenital, probably genetic in origin, making the notion of change via talk seem preposterous.”⁹⁹

The logical conclusion to this cumulative research should have been that same-sex attraction and non-binary identity are normal variations within human behavior; instead, despite evidence to the contrary, the culmination of this and other sex research led to the designation of homosexuality and related behaviors as a mental disorder.¹⁰⁰ The American Psychiatric Association pathologized homosexuality in its first edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1952, adding “homosexuality” as a “sociopathic personality disturbance.”¹⁰¹ In 1968, the DSM-II reclassified homosexuality as a “sexual deviation”¹⁰² and divided it into three general groups: “pathology, immaturity, and normal variation.”¹⁰³ The pathology theory adhered to the notion that homosexual behavior and “atypical gender” were diseases or conditions that deviated from “‘normal,’ heterosexual development” produced by “internal defect or external pathogenic agent.”¹⁰⁴ The medical community often infantilized the LGBTQ+ community by reducing their desires to a phase that one outgrows (immaturity) or illness requiring treatment (pathology), and some pathology theorists openly believed that homosexuality was a moral “evil.”¹⁰⁵ The “normal” homosexual variant is more like the modern understanding, where homosexuality is “like left-handedness,” in that it is natural and should not be in a psychiatric diagnostic manual.¹⁰⁶

⁹⁷ *Id.*

⁹⁸ ERWIN, *supra* note 95, at 176.

⁹⁹ *Id.*

¹⁰⁰ Drescher, *supra* note 80, at 568–69; *DSM History*, AM. PSYCHIATRIC ASS’N, <https://www.psychiatry.org/psychiatrists/practice/dsm/history-of-the-dsm> [<https://perma.cc/ZX45-UC6W>].

¹⁰¹ AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 38–39 (1st ed. 1952) [hereinafter DSM-I].

¹⁰² AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 10 (2d ed. 1968) [hereinafter DSM-II].

¹⁰³ Drescher, *supra* note 80, at 566.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

“Homosexuality” was finally removed from the American Psychiatric Association’s second edition of the DSM (DSM-II) in 1973.¹⁰⁷ The DSM-III recognized homosexuality as a “normal” variant of sexuality.¹⁰⁸ This was in no small part due to gay rights groups and activists petitioning for the removal of homosexuality from the DSM.¹⁰⁹ Similarly, gender dysphoria, while still listed in the DSM-5 (formerly gender identity disorder or GID), is no longer considered a mental disorder but rather considered a condition.¹¹⁰ The term “GID” was phased out of practice when describing a medical diagnosis and reclassified to gender dysphoria in 2013 by the American Psychiatric Association, “to better characterize the experiences of affected children, adolescents, and adults.”¹¹¹ This change was in large part because individuals who were labeled with GID faced stigma and discrimination based on the use of the word “disorder.”¹¹² The term “gender dysphoria” was retained in the manual because “individuals need a diagnosis to receive insurance coverage of medical treatments.”¹¹³

Today, the American Psychological Association and other medical organizations expressly affirm that homosexuality is a normal variant of human sexuality.¹¹⁴ Moreover, society has begun to understand the complexity of identity and that the theory of the gender binary is a product of European colonization and forcible suppression of indigenous beliefs and

¹⁰⁷ *Id.* at 565; DSM-II, *supra* note 102 (7th printing 1974).

¹⁰⁸ Drescher, *supra* note 80, at 571.

¹⁰⁹ *Id.* at 570.

¹¹⁰ Jack Turban, *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (Aug. 2022), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [<https://perma.cc/LY29-4SD6>]; AM. PSYCHIATRIC ASS’N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [hereinafter DSM-5]; *see also Gender Dysphoria*, AM. PSYCHIATRIC ASS’N, 1 (2013), http://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Gender-Dysphoria.pdf [<https://perma.cc/7QMZ-AZT3>].

¹¹¹ *Gender Dysphoria*, *supra* note 110, at 1.

¹¹² *Id.* at 2.

¹¹³ *Id.*

¹¹⁴ *See Understanding Sexual Orientation & Homosexuality*, AM. PSYCHIATRIC ASS’N (Oct. 29, 2008), <https://www.apa.org/topics/lgbtq/orientation> [<https://perma.cc/7CY8-DFST>] (“[L]esbian, gay and bisexual orientations are not disorders . . . [S]everal decades of research and clinical experience have led all mainstream medical and mental health organizations in this country to conclude that these orientations represent normal forms of human experience.”); *WMA Statement on Natural Variations of Human Sexuality*, WORLD MED. ASS’N. (June 29, 2022), <https://www.wma.net/policies-post/wma-statement-on-natural-variations-of-human-sexuality> [<https://perma.cc/4ZGK-Y3QC>] (“The WMA strongly asserts that homosexuality does not represent a disease, but rather a natural variation within the range of human sexuality.”).

traditions.¹¹⁵ We now know there are myriad genders, gender expressions, and sexualities across the globe, all of which have diverse social structures within their respective cultural communities and complex relationships to those identities.¹¹⁶ Many ancient and modern societies have gender

¹¹⁵ Lucas Ballestín, *Gender as Colonial Object: The Spread of Western Gender Categories through European Colonization*, PUB. SEMINAR (July 26, 2018), <https://publicseminar.org/2018/07/gender-as-colonial-object/> [<https://perma.cc/P4SE-KXBC>]; see, e.g., *Gender Identity and Sexual Identity in the Pacific and Hawai'i: Introduction*, U. HAW. MĀNOA LIBR. (Jan. 23, 2023, 9:04 AM), <https://guides.library.manoa.hawaii.edu/c.php?g=105466&p=686754> [<https://perma.cc/EMA8-TTD3>] (providing resources on how colonization affected gender and sexual identity in the Pacific and Hawaii).

¹¹⁶ *Kathoey* in Thailand means that a person is born with two simultaneous genders and refers to both intersex and transgender people. See Janessa Ilada & Ry Mount, *The Third Gender in Thailand—Kathoey*, SERV. LEARNING IN THAI. (Apr. 27, 2015), <https://maytermthailand.org/2015/04/27/the-third-gender-in-thailand-kathoey> [<https://perma.cc/A27J-DG87>]. First Nation, Native, and Indigenous American tribes recognize “Two Spirit people.” *Two Spirit Persons*, NAT’L INDIAN COUNCIL ON AGING, INC., (May 20, 2016), <https://www.nicoa.org/two-spirit-persons/> [<https://perma.cc/VKN7-S2PE>]. “A Two Spirit person is a male-bodied or female-bodied person with a masculine or feminine essence. Two Spirits can cross social gender roles, gender expression, and sexual orientation Within most tribes there is a term, in their language, to describe a Two Spirit person.” *Id.* *Femminielli* were “a class of male-bodied individuals who compromised a kind of ‘third gender’ in 18th-century Italian Society thought to confer good luck onto the households in which they were raised.” Nico Lang, *This 18th-Century Italian Painting Proves Gender Nonconformity Is Far From a Modern Invention*, SLATE (July 11, 2016, 8:34 AM), <https://slate.com/human-interest/2016/07/il-femminiello-one-of-the-earliest-depictions-of-gender-nonconformity-in-art.html> [<https://perma.cc/MYW4-YY8Z>]. *Meti* in Nepal means “transgender person.” Charles Haviland, *Crossing Sexual Boundaries in Nepal*, BBC NEWS (Jan. 26, 2005), [news.bbc.co.uk/2/hi/south_asia/4202893.stm](https://www.bbc.com/news/asia/4202893.stm) [<https://perma.cc/5JJE-DUES>]. *Bakla* in the Philippines is “a Filipino person assigned male at birth but may have adopted mannerisms traditionally regarded as feminine. The term includes individuals who identify as trans, non-binary, bisexual, etc.” Ally Gonzalo, *There’s No Shame in Being Who You Are: Photographer Explores Filipino ‘Bakla’ Culture*, CBC NEWS (Oct. 2, 2019, 6:00 AM), <https://www.cbc.ca/news/canada/manitoba/filipino-winnipegger-bakla-portraits-explore-queer-culture-1.5268560> [<https://perma.cc/7LJC-AKTN>]. *Waria* in Indonesia are “often deemed as ‘a woman’s soul in a man’s body,’ a concept where aspects of both genders go-exist.” Henry Guyer, *Waria: The Lives of Indonesia’s Transgender Women*, CULTURE TRIP (Feb. 2, 2018), <https://theculturetrip.com/asia/indonesia/articles/waria-lives-indonesias-transgender-community> [<https://perma.cc/QAV8-52YV>]; see also Sharyn Graham Davies, *What We Can Learn From an Indonesian Ethnicity That Recognizes 5 Genders*, US NEWS (June 17, 2016), <https://www.usnews.com/news/best-countries/articles/2016-06-17/what-we-can-learn-from-an-indonesian-ethnicity-that-recognizes-5-genders#:~:text=Their> [<https://perma.cc/5ALL-24N7>]. The Bugis, “an ethnic group in South Sulawesi,” recognize five genders: *makkunaria* (‘female women’), *oroani* (‘male men’), *calalai* (‘female men’), *calabai* (‘male women’) and *bissu* (‘transgender priests’). *Id.* In New Zealand, *tangata ira tane*, is “a Māori term for someone assigned female at birth who lives as a man,” and *whakawabine* is “a Māori term for someone assigned male at birth but who lives as a woman.” *Gender Identity*, N.Z. FAM. PLAN, <https://www.familyplanning.org.nz/advice/sexual-orientation-and-gender-identity/gender-identity> [<https://perma.cc/PBQ6-57J8>]. Australian First Nation people use the terms “sistergirls” and “brotherboys” for transgender individuals. Emma Sleath, *Aboriginal*

nonconforming gods and religious icons devoted to a wide range of subjects, from war to the sanctity of marriage to the protection of LGBTQ+ individuals.¹¹⁷ LGBTQ+ identity is not a form of mental illness, nor is it a

'Sistergirls' Launch New Service, ABC LOCAL (Oct. 24, 2014, 6:06 PM), www.abc.net.au/local/stories/2014/10/24/4114304.htm [https://perma.cc/TD3H-DK37]. Hijras in India, and the "more encompassing term *bhauja siru* . . . include[] persons who identify as transgender, transsexual, a cross-dresser, or eunuch." Sonali Gupta, *The History of Hijras—South Asia's Transsexual and Transgender Community*, INDIA.COM (Sept. 16, 2015, 2:17 AM), <https://www.india.com/lifestyle/the-history-of-hijras-south-asias-transsexual-and-transgender-community-540754> [https://perma.cc/H8T5-8CEY]. Though, there are numerous terms in "various dialects that reference these communities." *Id.* The Pacific Islands have rich and diverse cultures, all of whom have their own terms to describe different sexualities and gender expressions. *Gender Identity and Sexual Identity in the Pacific and Hawai'i: Introduction*, *supra* note 115. To name a few: "[I]n Native Hawaiian culture an *aikeāne* was an intimate same-sex friend of a chief" who often had a sexual relationship with him. *Id.* *Akava'ine* (Cook Islands) . . . refers to an individual, usually male, who 'behaves like a woman.'" *Id.* The term "[m]ay refer to a third-gender and may be similar to transgender women (male to female)." *Id.* *Fa'afafine* "in Samoan culture [is] a third-gendered individual," who is a "recognized and integral part of traditional Samoan culture, [who is] born biologically male, embody[ing] both male and female gender traits." *Id.* *Fa'afatama* is a "contemporary Samoan word for a woman who identifies as a lesbian." *Id.* "Fafafine in Niuean culture [is] a third-gendered individual . . . [who] [m]ay be born biologically male and embody both male and female gender traits." *Gender Identity and Sexual Identity in the Pacific and Hawai'i: Introduction*, *supra* note 115. "Māhū in Native Hawaiian culture refers to an individual who may be considered third-gendered with characteristics of both sexes, usually a male to female. In contemporary Hawai'i the word is also used to describe people who are transgender, or gay." *Id.* *Māhūwahine*, a term coined in 2003, is "[a] gender identity encompassing transvestitism, transgenderism, and transsexualism." *Id.*

¹¹⁷ STEPHEN O. MURRAY & WILL ROSCOE, ISLAMIC HOMOSEXUALITIES: CULTURE, HISTORY, AND LITERATURE 65–66 (1997); *Ishtar*, BROOK. MUSEUM, https://www.brooklynmuseum.org/easca/dinner_party/place_settings/ishtar#:~:text=A%20multifaceted%20goddess%2C%20Ishtar%20takes,shown%20winged%20and%20bearing%20arms [https://perma.cc/U9W5-CRRF] (named by the Akkadians around 2300 B.C.E., Ishtar, (or Innana) has been described as "liminal," meaning not identified by one particular gender); In Greek mythology, Hermaphroditus is "the son of Hermes and Aphrodite" and is "partly male, partly female." *Hermaphroditus*, ENCYC. BRITANNICA (July 23, 2010), <https://www.britannica.com/topic/Hermaphroditus> [https://perma.cc/TF2T-MYU6]. In Italy, the Madonna of Montevergine is called the patron saint of the LGBTQ+ community, "due to a professed miracle in which she saved a mid-13th century male couple from attempted murder because of their love for one another." Catherine Buck, *Traditional Italian Madonna Devotion Attracts Third Gender "Femminielli"*, NEW WAYS MINISTRY (June 22, 2018), <https://www.newwaysministry.org/2018/06/22/traditional-italian-madonna-devotion-attracts-third-gender-femminielli> [https://perma.cc/GQ2H-Z5UJ]. The Church of Santa Muerte officiated its first same-sex wedding ceremony in 2010, with plans for more, stating that "el amor no tiene sexo" [love has no gender]. *Iglesia de Santa Muerte Casa a Gays*, EL UNIVERSAL (March 3, 2010, 4:46 PM), <https://web.archive.org/web/20220831080655> [https://perma.cc/QYQ7-S9MX]. "Santa Muerte" is an unrecognized Catholic saint, though she holds a following of "ten to twelve million" in Mexico. Lois Ann Lorentzen, *Santa Muerte: Saint of the Dispossessed, Enemy of Church and State*, HEMISPHERIC INST. (2023), <https://hemisphericinstitute.org/en/emisferica-13-1-states-of-devotion/13-1-essays/santa-muerte-saint-of-the-dispossessed-enemy-of-church-and-state.html> [https://perma.cc/TCW2-CZHW]. She is the patron saint of the "dispossessed," including the LGBTQ+ community. *Id.*

mark of sin; it is normal behavior. Those who seek to treat it as something curable are upholding untrue and dangerous practices that put human lives at risk based on misinformation and prejudice.

IV. BACKGROUND ON CONVERSION THERAPY

This section lays out the history of conversion therapy, the different types of conversion therapy, and the results and dangers of its use on individuals. This section articulates how the practice began with dangerous experimentation and continues today with invasive and unnecessary procedures, including the seemingly benign versions of “talk therapy.” Finally, this section explains the results of conversion therapy to emphasize the danger of using conversion therapy in any context on minors.

A. History

The Gay & Lesbian Alliance Against Defamation (GLAAD) defines conversion therapy as “any attempt to change a person’s sexual orientation, gender identity, or gender expression.”¹¹⁸ Conversion therapy began in 1899 when German psychiatrist Albert von Schrenck-Notzing touted a cure for homosexual men.¹¹⁹ He claimed he could hypnotize gay men into having “a lasting desire for women,”¹²⁰ but he based this supposed success on a paltry sample size of one adult man who received 45 hypnosis sessions over a period of four months.¹²¹ Two decades later, Austrian endocrinologist Eugen Steinach claimed that, by performing a testicular transplant, where the testicles of gay men were removed and replaced with the testicles of heterosexual men, he could cure homosexual behavior.¹²² The procedure, that has since been named the Steinach Operation,¹²³ was one he lauded as a

¹¹⁸ *What is Conversion Therapy?*, GAY AND LESBIAN ALL. AGAINST DEFAMATION, https://www.glaad.org/conversiontherapy?response_type=embed [<https://perma.cc/JJ4K-Z4VN>]. Conversion therapy is also known as Sexual Orientation Change Efforts (SOCE), Sexual Attraction Fluidity Exploration in Therapy (SAFE-T), eliminating, reducing or decreasing frequency or intensity of unwanted Same-Sex Attraction (SSA), Reparative Therapy, Sexual Reorientation Efforts, Ex-Ministry, among other names. *Id.*

¹¹⁹ Erin Blakemore, *Gay Conversion Therapy’s Disturbing 19th-Century Origins*, HISTORY.COM (June 28, 2019), <https://www.history.com/news/gay-conversion-therapy-origins-19th-century> [<https://perma.cc/7AX4-KEQA>].

¹²⁰ *Id.*

¹²¹ *Id.*; TOMMY DICKINSON, ‘CURING QUEERS’: MENTAL NURSES AND THEIR PATIENTS 1935–74 (2016).

¹²² THOMAS SCHLICH, *THE ORIGINS OF ORGAN TRANSPLANTATION: SURGERY AND LABORATORY SCIENCE, 1880-1930*, at 112–13 (2010).

¹²³ Christopher Turner, *Vasectomy, and Other Cures for Sloth: Better Living Through Monkey Glands*, CABINET MAG. (2008), <https://www.cabinetmagazine.org/issues/29/turner.php> [<https://perma.cc/GQT2-U4PY>].

treatment for homosexuality.¹²⁴ The basis for his claim, and supposed success, was predicated on the contemporary notion that same-sex attraction was a mixture of masculine and feminine traits produced by a mixture of male and female hormones, resulting in “atypical behavior” (homosexual behavior) that could be cured by “fixing” the hormone imbalance.¹²⁵ Steinach claimed that sex hormones could be reversed away from an attraction to men to an attraction to women.¹²⁶ Despite his attempts at curing homosexuality, Steinach’s experiments may have, in part, helped further gender-affirming surgeries and hormone replacement therapy for transgender individuals.¹²⁷

At the time, like many “ailments,” homosexuality was seen as something that could and *should* be eliminated from the human genome,¹²⁸ leading to attempts in 1922 by endocrinologists to corroborate Steinach’s experiments.¹²⁹ These later attempts to reproduce Steinach’s results used reverse engineering in a single-blind experiment on a heterosexual man, meaning only researchers would know which treatment the participant received until the trial ended.¹³⁰ Would the patient become homosexual if he did not know that his testicles came from a homosexual man? The answer was “no.”¹³¹ The patient remained “as heterosexual as ever,” and the results of Steinach’s experiments were concluded to be purely psychological.¹³²

In 1970, New Orleans based psychiatrist Robert Galbraith Heath began experimenting on a homosexual man, dubbed “B-19” during Heath’s experiment, who had been expelled from the military for “homosexual tendencies.”¹³³ Heath’s experiment involved implanting nine electrodes into

¹²⁴ *Id.*

¹²⁵ SCHLICH, *supra* note 122, at 112–13.

¹²⁶ *Id.*; Claudia Nunez-Eddy & Federica Turriziani Colonna, *Eugen Steinach (1861-1944)*, EMBRYO PROJECT ENCYC. (Feb. 16, 2017) [<https://perma.cc/252T-444D>] (“Steinach and Lichtenstern published [a] paper ‘Conversion of Homosexuality through Exchange of Puberty Glands,’ in which they discuss an experiment where Lichtenstern replaced the testes from homosexual men with those from heterosexual men They concluded that, after implantation, heterosexual tendencies replaced homosexual tendencies.”).

¹²⁷ SCHLICH, *supra* note 12, at 112–13.

¹²⁸ *Id.* at 115.

¹²⁹ *Id.*

¹³⁰ *Id.*; *Single-Blind Study*, NAT’L CANCER INST., <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/single-blind-study> [<https://perma.cc/8BLZ-DZR5>].

¹³¹ *Single-Blind Study*, *supra* note 130.

¹³² SCHLICH, *supra* note 122, at 115.

¹³³ Robert Colville, *The ‘Gay Cure’ Experiments That Were Written Out of Scientific History*, MOSAIC SCI. (July 4, 2016), <https://mosaicscience.com/story/gay-cure-experiments> [<https://perma.cc/H8V3-4GML>].

B-19's brain.¹³⁴ The wires connected to a control that would allow B-19 to stimulate the pleasure centers of his own brain via electrocution through the electrodes while he watched heterosexual pornography, which he initially watched with "revulsion" but subsequently "agreed [to] without reluctance."¹³⁵ The electrodes stimulated the pleasure centers of his brain, an experiment that rings eerily similar to the Intracranial Self-Stimulation (ISS) Experiment later performed on rats to determine the relationship between the pleasure centers in mammalian brains and behavior to study addiction.¹³⁶ The ISS Experiment showed that addiction is a powerful stimulus; the rats were so enamored with the stimulation that they would forego eating in favor of pressing their stimulation buttons.¹³⁷ If left alone with their devices, they would eventually starve to death.¹³⁸ In a similar fashion, B-19 "would hit the button up to 1,500 times over a three-hour session," in order to continue "self-stimulat[ing]."¹³⁹ It is possible that B-19 agreed to watch the film, not because he had been "cured" of his homosexuality, but rather because of the associated stimulus. Associated stimuli techniques have been used in conversion therapy, but with few, if any, long-term successes.¹⁴⁰ While they have initial success, in most people the stimuli eventually stop working and the subject is back to square one.¹⁴¹ The experiment concluded with Heath hiring a prostitute for \$50 and B-19's eventual copulation with her, thereby "confirming" his newfound heterosexuality.¹⁴²

B. Aversion Therapy and Talk Therapy

Aversion therapy is an oft used form of conversion therapy.¹⁴³ One of the most well-known examples of aversion therapy in popular culture is a

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Roy A. Wise, *Brain Reward Circuitry: Insights from Unsensed Incentives*, 36 NEURON 229, 231 (2002).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Colville, *supra* note 133.

¹⁴⁰ GEOFFREY SHOESMITH, PSYCHOLOGY: A NEW COMPLETE GCSE COURSE: FOR AQA SPECIFICATION 4180, at 207–11 (2015).

¹⁴¹ *Id.*; S. Stevens Negus & Laurence L. Miller, *Intracranial Self-Stimulation to Evaluate Abuse Potential of Drugs*, 66 PHARM. REV. 869, 872 (2014) (discussing how ISS experiments actually reference Heath's earlier work from the 1960s).

¹⁴² Colville, *supra* note 133.

¹⁴³ U.N. INDEP. EXPERT ON PROT. AGAINST VIOLENCE AND DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, REPORT ON CONVERSION THERAPY 2 (2020) [hereinafter IESOGI].

scene from Anthony Burgess's novel *A Clockwork Orange* and Stanley Kubrick's subsequent adaptation of that novel to film.¹⁴⁴ The main character, Alex, is strapped to a chair with his eyes held open by clamps and his head strapped in place so he is forced to watch a deluge of violent and perverse imagery while listening to the oeuvre of Ludwig van Beethoven.¹⁴⁵ By the end of his treatment, Alex has developed a negative association with Beethoven's music.¹⁴⁶ He is nauseated by the sound of what was once his favorite music, to the point where hearing it again prompts him to attempt suicide.¹⁴⁷ This may seem like a dramatic example of the use of aversion therapy, but in actual practice the techniques are often much worse and the results vary.

Aversion therapy uses classical conditioning where a reflex response is linked to a new stimulus.¹⁴⁸ It is in essence associating an unwanted behavior with an unpleasant experience in an attempt to link the two in the subject's mind so that they will associate the unwanted behavior with the unpleasant experience and cease the unwanted behavior.¹⁴⁹ Typically, aversion therapy is used to address alcoholism and substance abuse,¹⁵⁰ but it has also been used to treat behaviors ranging in scope from trichotillomania ("a mental disorder that involves recurrent, irresistible urges to pull out hair from [the] scalp, eyebrows or other areas of [the] body"¹⁵¹), to thumb sucking in children, to violent sexual behavior.¹⁵² Patients are often treated by using emetics (substances to make the person vomit),¹⁵³ and electric shocks.¹⁵⁴ It is a repetitious treatment where the person is exposed to the unpleasant stimuli

¹⁴⁴ *A Clockwork Orange*, THE INT'L ANTHONY BURGESS FOUND., <https://www.anthonymburgess.org/a-clockwork-orange/a-clockwork-orange-film> [<https://perma.cc/9A3P-EXPT>].

¹⁴⁵ *A CLOCKWORK ORANGE* (Polaris Productions Hawk Films 1971).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ SHOESMITH, *supra* note 140, at 206.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Trichotillomania (hair-pulling disorder)*, MAYO CLINIC (2022), <https://www.mayoclinic.org/diseases-conditions/trichotillomania/symptoms-causes/syc-20355188> [<https://perma.cc/VG7B-KFAY>].

¹⁵² SHOESMITH, *supra* note 140, at 206, 210; Nancy J. Keuthen et al., *Trichotillomania: Current Issues in Conceptualization and Treatment*, 67 *PSYCHOTHERAPY AND PSYCHOSOMATICS* 202, 208 (1998).

¹⁵³ See SHOESMITH, *supra* note 140, at 206–07; *Emetic*, ENCYC. BRITANNICA (2018), <https://www.britannica.com/science/emetic> [<https://perma.cc/PJK8-76XP>].

¹⁵⁴ SHOESMITH, *supra* note 140, at 206–07; Keuthen et al., *supra* note 152, at 208.

multiple times until the unwanted behavior ceases.¹⁵⁵ Physical responses may begin occurring in response to the unwanted behavior that reminds subjects of the unpleasant experience.¹⁵⁶ The technique may work for some people, but aversion therapy is not entirely effective in stopping addiction or learned behaviors.¹⁵⁷

Further, there are ethical questions associated with aversion therapy's practice because "[t]he method involves creating high levels of distress in the patient."¹⁵⁸ Aversion therapy is so ethically questionable that in 2012 the United Nations assessed whether it constituted torture when electric shocks were being used on autistic students by connecting electroshock pads to the children's skin to stop disapproved behaviors.¹⁵⁹ Then in 2020, the United Nations issued a special report recommending a global ban on the use of aversion therapy on children.¹⁶⁰ The report includes in its list of methods "psychotherapy," (the use of aversion therapy, like "electric shocks, nausea-inducing or paralysis-inducing drugs" or "interventions based on the belief that sexual or gender diversity is a product of an abnormal upbringing or experience"), "medical" approaches (using steroids or hormone therapy,"), and "faith-based" approaches ("[i]nterventions that act on the premise that there is something inherently evil in diverse sexual orientations and gender identities" where "victims are usually submitted to the tenets of a spiritual advisor, and subjected to programmes to overcome their 'condition'. Such programmes can include anti-gay slurs as well as beatings, shackling and food deprivation . . . sometimes combined with exorcism."").¹⁶¹

Use of aversion techniques in conversion therapy can range from electric shock, beatings, and starvation to the use of talk therapy to create negative

¹⁵⁵ SHOESMITH, *supra* note 140, at 206.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 207.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 208; see Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013); Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Addendum, Observations on Communications Transmitted to Governments and Replies Received*, 83–84, U.N. Doc. A/HRC/22/53/Add.4 (detailing the mistreatment of students at the Judge Rotenberg Center in Massachusetts).

¹⁶⁰ IESOGI, *supra* note 143, at 4.

¹⁶¹ *Id.*

mental associations in the subject's mind with homosexual desires and acts.¹⁶² In one instance, a man was told to think of his lover vomiting on him during sexual acts.¹⁶³ Individuals may also be asked to “pray away the gay,” through “Inner Healing[,] a form of prayer therapy,” where the individual is asked to imagine “the Holy Spirit . . . reveal[ing] unresolved hurt and woundedness in the life of the ex-gay subject.”¹⁶⁴ In another instance, a 15-year-old lesbian was “forced to watch gay pornography while smelling ammonia, [and was subjected to] hypnosis, mind-altering drugs, and solitary confinement.”¹⁶⁵ Constitutional law Professor David Cruz presents a horrifying list of experiments done on homosexual individuals.¹⁶⁶ It includes lobotomies to castration and oophorectomy (the full or partial removal of the ovaries),¹⁶⁷ to genital mutilation, cocaine and strychnine drug injections, and cauterization of the neck and back.¹⁶⁸ The list also includes seemingly tame treatments such as rest and “severe and fatiguing bicycle riding,” to the odd, like exorcism, “X-Ray-treatment,” and “hydrotherapy.”¹⁶⁹ Some “ex-gay” ministries purport to remove homosexual desires through religion, sometimes in “a fourteen-step approach that is adopted from Alcoholics Anonymous’ twelve-step program.”¹⁷⁰ Further types of conversion treatment include “covert sensitization, shame aversion, systematic desensitization, orgasmic reconditioning, and satiation therapy,”¹⁷¹ as well as masturbation reconditioning, avoidance conditioning, shock therapy, olfactory aversion therapy, anticipatory avoidance, calorie deprivation, desensitization, religious

¹⁶² Jeffrey G. Ford, *Healing Homosexuals: A Psychologist's Journey Through the Ex-Gay Movement and the Pseudo-Science of Reparative Therapy*, in *SEXUAL CONVERSATION THERAPY: ETHICAL, CLINICAL AND RESEARCH PERSPECTIVES* 69, 77–78 (Ariel Shidlo et al. eds., 2001).

¹⁶³ *Id.* at 78.

¹⁶⁴ *Id.* at 81.

¹⁶⁵ Karen Ocamb, *Shannon Minter on NARTH Lawsuit Against Psychological Child Abuse Law*, BILERICO PROJECT (Nov. 6, 2012, 4:00 PM), http://bilerico.lgbtqnation.com/2012/11/shannon_minter_on_narth_lawsuit_against_psychologi.php [<https://perma.cc/E8KL-GSHBJ>].

¹⁶⁶ Cruz, *supra* note 92, at 1305–06.

¹⁶⁷ *Oophorectomy (ovary removal surgery)*, MAYO CLINIC (Feb. 11, 2022), <https://www.mayoclinic.org/tests-procedures/oophorectomy/about/pac-20385030> [<https://perma.cc/K6D5-R2QG>].

¹⁶⁸ Cruz, *supra* note 92, at 1305–07.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1309.

¹⁷¹ JUDITH M. GLASSGOLD ET AL., AM. PSYCHIATRIC ASS'N, *APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION* 22 (2009), <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> [<https://perma.cc/K88P-Z49D>].

folk therapy, behavior therapy, psychotropic medication, hypnosis, in-patient treatment, and Bible study support groups.¹⁷²

One seemingly benign form of conversion therapy is talk therapy. While talk therapy appears relatively harmless in comparison to such extremes like aversion therapy and the use of physical abuse, it can be just as dangerous as physical interventions. There are a number of varying combinations of talk and aversive therapies used in conversion therapy. In 2001, Drs. Ariel Shidlo and Michael Schroeder presented their study of “Aversive Conditioning” techniques to the Association for Advancement of Behavioral Therapy.¹⁷³ Some of these techniques utilized electric shocks on subjects’ genitalia, fingers, and “other places on the body,” but in other instances talk therapy “was sometimes paired with disturbing images, including a bowl with feces and pictures of Kaposi’s Sarcoma lesions on gay men.”¹⁷⁴ Other therapies however were more like “the use of covert sensitization as hypnotherapy.”¹⁷⁵ One patient stated:

[The therapist would] lead me through different scenarios. Put myself in a nice beach, these men would come down, beautiful homosexual men, with Speedos. I would be attracted to them. As they opened their mouths, feces would come of their mouth, urine dripping out of their eyes and nose.¹⁷⁶

Conversion therapy’s combined use of covert sensitization as hypnotherapy and talk therapy thus puts the patient in a dangerous and uninformed position and puts the therapist in direct violation with the requirement that they receive informed consent from their patient.

C. Results, Dangers, and Ethical Considerations

Conversion therapy is “inherently humiliating, demeaning and discriminatory,”¹⁷⁷ and the use of aversion or talk therapy to change the

¹⁷² *Id.* at app. B, 125–30.

¹⁷³ JASON CIANCOTTO & SEAN CAHILL, NAT’L LGBTQ TASK FORCE, YOUTH IN THE CROSSHAIRS: THE THIRD WAVE OF EX-GAY ACTIVISM 71 (2006), <http://www.welcomingresources.org/crosshairs.pdf> [https://perma.cc/A2XE-YA9U].

¹⁷⁴ *Id.* at 72. Kaposi’s Sarcoma is sometimes experienced by people living with AIDS. *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ IESOGI, *supra* note 143.

sexual orientation of individuals is dangerous and harmful.¹⁷⁸ Sexual orientation and gender identity are not learned behaviors; they are varied and fluid parts of human nature.¹⁷⁹ They cannot be “undone” or “unlearned” through any kind of treatment, and attempting to “correct” a person’s sexual orientation will likely result in high levels of depression, suicide, post-traumatic stress disorder, and long-term damage to individuals’ understandings of self and their interpersonal relationships.¹⁸⁰ Studies from as recently as 2015 on the effects of conversion therapy show that conversion therapy is harmful to the psyche of children in both the short and long term.¹⁸¹ The American Psychiatric and American Psychological Associations have both issued statements, with some as early as 1997, like the Resolution on Appropriate Therapeutic Responses to Sexual Orientation,¹⁸² declaring that “homosexuality is not a mental disorder” as established by the American Psychiatric Association in 1973, and the American Psychological Association “opposes portrayals of lesbian, gay, and bisexual youth and adults as mentally ill due to their sexual orientation.”¹⁸³ Similarly, in 2018, the Family Acceptance Project, referencing LGBTQ+ youth subjected to conversion therapy, found that:

1. Rates of attempted suicide by LGBT[Q+] young people whose parents tried to change their sexual orientation were more than double (48%) the rate of LGBT[Q+] young adults who reported no conversion experiences (22%).
2. Suicide attempts *nearly tripled* for LGBT[Q+] young people who reported both home-based [and out-of-home] efforts to change their sexual orientation . . . (63%).
3. High levels of depression more than doubled (33%) for LGBT[Q+] young people whose parents tried to change their sexual orientation compared with those who reported

¹⁷⁸ AMIT PALEY, TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2020 (2020), <https://www.thetrevorproject.org/survey-2020/?section=Introduction> [<https://perma.cc/LC49-BCZS>].

¹⁷⁹ SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., ENDING CONVERSION THERAPY: SUPPORTING AND AFFIRMING LGBTQ YOUTH 15 (2015), <https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4928.pdf> [<https://perma.cc/ZF7Z-MT6N>].

¹⁸⁰ PALEY, *supra* note 178; Blosnich et al., *supra* note 10.

¹⁸¹ SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., *supra* note 179.

¹⁸² Am. Psych. Assoc. Council of Representatives, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation*, AM. PSYCHIATRIC ASS’N (Aug. 14, 1997), https://lgbpsychology.org/html/resolution97_text.html [<https://perma.cc/7FWT-3WET>].

¹⁸³ *Id.*

no conversion experiences (16%) and more than tripled (52%) for LGBT[Q+] young people who reported both home-based [and out-of-home] efforts to change their sexual orientation.

4. Sexual orientation change experiences during adolescence by both parents/caregivers and externally by therapists and religious leaders were associated with lower young adult socioeconomic status: less educational attainment and lower weekly income.¹⁸⁴

The Williams Institute at the University of California Los Angeles School of Law's study "Sexual Orientation Change Efforts, Adverse Childhood Experiences, and Suicide Ideation and Attempt Among Sexual Minority Adults, United States, 2016–2018" notes that of those children that were subjected to conversion therapy, four out of five of were treated by a religious leader, and compared to children who were not exposed to SOCE, those that were exposed were twice as likely to consider suicide, three out of four times more likely to plan to attempt suicide, and nearly nine out ten times more likely to attempt suicide.¹⁸⁵ The American Psychological Association issued a statement in 2021 noting that generally LGBTQ+ youth are more disproportionately likely to experience suicidal thoughts, depression, and anxiety.¹⁸⁶ They are likely to be victimized in school and some have a higher risk of pregnancy.¹⁸⁷ The statement also noted that children are aware at a very young age about their identities.¹⁸⁸ The American Psychiatric Association has condemned the "treatment" of homosexuality, stating, "[t]he potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already

¹⁸⁴ *First Study Shows Pivotal Role of Parents in Conversion Efforts to Change LGBT Adolescents' Sexual Orientation*, S.F. ST. UNIV. FAM. ACCEPTANCE PROJECT (Nov. 8, 2018) (emphasis omitted), <https://familyproject.sfsu.edu/first-study-shows-pivotal-role-parents-conversion-efforts-change-lgbt-adolescents-sexual> [<https://perma.cc/3XJR-LWD4>].

¹⁸⁵ Blossnich et al., *supra* note 10.

¹⁸⁶ AM. PSYCHIATRIC ASS'N, APA RESOLUTION ON SEXUAL ORIENTATION CHANGE EFFORTS 5 (2021), <https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf> [<https://perma.cc/6PWS-EFS8>].

¹⁸⁷ *Resolution on Supporting Sexual/Gender Diverse Children and Adolescents in Schools*, AM. PSYCHIATRIC ASS'N (Feb. 2020), <https://www.apa.org/pi/lgbt/resources/policy/gender-diverse-children> [<https://perma.cc/K9SU-RJM2>].

¹⁸⁸ *Id.*

experienced by the patient.”¹⁸⁹ This means that not only is conversion therapy capable of doing harm by instilling in the patient ideas of low self-worth, but it also may exacerbate these feelings that a patient may have prior to receiving treatment.

Further, a number of proponents of conversion therapy have since retracted their own studies that supposedly had successful results. GLAAD notes that, in May 2001, a now-defunct study by Dr. Robert Spitzer of Columbia University stated that “highly motivated” homosexuals can change their sexual orientation through therapy or other means.¹⁹⁰ GLAAD reports that this study was predicated on anti-gay activist groups; the study excluded unsuccessful experiences; ignored bisexuality; and was promoted more by political efforts than by science.¹⁹¹ In 2006, “Spitzer also told the Los Angeles Times . . . that he now believes some of [the] subjects [in his study] may have been either deceiving themselves or lying to him” about the effectiveness of SOCE in “curing” their homosexuality.¹⁹² Thus, the data for this study may have initially appeared to support the notion that same-sex attraction could be cured through conversion therapy, but the conductor of the research retracted the overall findings because he recognized the anti-LGBTQ+ bias of the data collectors and the likelihood his subjects falsely reported success.

In 2013, Exodus International, the self-proclaimed “oldest and largest Christian ministry dealing with faith and homosexuality,”¹⁹³ shut down¹⁹⁴ and its president Alan Chambers issued a public apology for the organization’s

¹⁸⁹ *Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, AM. PSYCHIATRIC ASS’N (May 2000), http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2000_ReparativeTherapy.pdf [<https://perma.cc/QS36-E2KS>] (emphasis added); see also *Policy and Position Statements on Conversion Therapy*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/policy-and-position-statements-on-conversion-therapy> [<https://perma.cc/X37Y-DFUS>].

¹⁹⁰ GAY & LESBIAN ALL. AGAINST DEFAMATION, GLAAD MEDIA REFERENCE GUIDE 35–36 (2010) [hereinafter GLAAD MEDIA REFERENCE GUIDE]; CIANCOTTO & CAHILL, *supra* note 173 at 4.

¹⁹¹ GLAAD MEDIA REFERENCE GUIDE, *supra* note 190, at 36.

¹⁹² *Id.*

¹⁹³ Daniel Trotta, *U.S. Group That ‘Converted’ Gays Closes its Doors and Apologizes*, REUTERS (June 20, 2013, 11:31 AM), <https://www.reuters.com/article/us-usa-gay-exodus/u-s-group-that-converted-gays-closes-its-doors-and-apologizes-idUSBRE95J0W020130620> [<https://perma.cc/J4Y6-NJK2>].

¹⁹⁴ Jonathan Merritt, *The Downfall of the Ex-Gay Movement*, ATLANTIC (Oct. 6, 2015), <https://www.theatlantic.com/politics/archive/2015/10/the-man-who-dismantled-the-ex-gay-ministry/408970> [<https://perma.cc/8HXL-NN75>].

“efforts to change a person’s sexual orientation.”¹⁹⁵ Chambers had issued previous statements, “disavow[ing] reparative therapy at the annual Gay Christian Network conference in January 2012.”¹⁹⁶ He has stated that he believes conversion therapy “does great harm to many people,” and that he “stand[s] with President Obama[’s call] for a ban on [conversion therapy] for minors and for greater measures to protect adults seeking this niche therapeutic intervention.”¹⁹⁷

By 2018, myriad leading medical journals and organizations had begun to oppose conversion therapy.¹⁹⁸ These medical organizations have condemned conversion therapy, including talk therapy, as a harmful practice.¹⁹⁹ For example, the World Medical Association has called on both “its practitioners [of conversion therapy] to be denounced and subject to sanctions and penalties”²⁰⁰ and on National Medical Associations to “promote ethical conduct among physicians for the benefit of their patients. Ethical violations must be promptly corrected, and the physicians guilty of

¹⁹⁵ Sarah Pulliam Bailey, *Ex-Gay Group Exodus International Shuts Down President Apologizes*, WASH. POST (June 20, 2013), https://www.washingtonpost.com/national/on-faith/ex-gay-group-exodus-international-shuts-down-president-apologizes/2013/06/20/13dc7364-d9cf-11e2-b418-9dfa095e125d_story.html [https://perma.cc/FG85-EEJR].

¹⁹⁶ *Id.*

¹⁹⁷ Alan Chambers, *Alan Chambers: President Obama Is Right to Try to End Ex-Gay Therapy for Minors* (COMMENTARY), WASH. POST (Apr. 9, 2015), https://www.washingtonpost.com/national/religion/alan-chambers-president-obama-is-right-to-try-to-end-ex-gay-therapy-for-minors-commentary/2015/04/09/3e5fd6f6-def7-11e4-b6d7-b9bc8acf16f7_story.html [https://perma.cc/MV5V-6D6Z]; Merritt, *supra* note 194; Lou Chibbaro Jr., *Former ‘Ex-Gay’ Leader to March in Pride*, WASH. BLADE (June 9, 2016), <https://www.washingtonblade.com/2016/06/09/former-ex-gay-leader-to-march-in-pride-parade> [https://perma.cc/Q8RL-73RM].

¹⁹⁸ BARRY S. ANTON, PROCEEDINGS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION FOR THE LEGISLATIVE YEAR 2009: MINUTES OF THE ANNUAL MEETING OF THE COUNCIL OF REPRESENTATIVES AND MINUTES OF THE MEETINGS OF THE BOARD OF DIRECTORS 80–81 (2010); *Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, AM. PSYCHIATRIC ASS’N (2000), http://media.mlive.com/news/detroit_impact/other/APA_position_conversion%20therapy.pdf [https://perma.cc/JK8U-QXW3]; *APA Reiterates Strong Opposition to Conversion Therapy*, AM. PSYCHIATRIC ASS’N (Nov. 15, 2018), <https://web.archive.org/web/20181230125020/https://www.psychiatry.org/newsroom/news-releases/apa-reiterates-strong-opposition-to-conversion-therapy> [https://perma.cc/BAL4-RSNB]; The Independent Forensic Group, *supra* note 5, at 1–2; *Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Feb. 2018), https://www.aacap.org/aacap/policy_statements/2018/Conversion_Therapy.aspx [https://perma.cc/N3EY-CMKW].

¹⁹⁹ See ANTON, *supra* note 198, at 389; *Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, *supra* note 198; *APA Reiterates Strong Opposition to Conversion Therapy*, *supra* note 198.

²⁰⁰ The Independent Forensic Group, *supra* note 5, at 5 (emphasis omitted).

ethical violations must be disciplined and rehabilitated.”²⁰¹ Likewise, most Americans oppose conversion therapy.²⁰² Twenty states and over 70 municipalities and territories have issued bans for conversion therapy²⁰³ and the number of individuals in support of banning conversion therapy laws was over 50% in many conservative states.²⁰⁴

Additionally, there are major ethical considerations at stake when it comes to conversion therapy. The doctrine of informed consent presents a legitimate concern, as it requires that “[t]he therapist must disclose *all known collateral risks*, and also *make reasonable efforts to discover unknown collateral risks*” to protect patients who have little to no knowledge about medical procedures or therapeutic treatments.²⁰⁵ The therapists must exercise due diligence in informing the individual that they are about to undergo a type of treatment that may lead to a rise in suicidality, depression, self-harm, and other forms of psychological harm.²⁰⁶ Informed consent would also mean that the patient is made aware of the recognized rate of success for the therapy from a medical organization like the American Psychological Association, not the therapist’s personal belief of risks or success. A therapist that practices counseling is bound in their practice by the Ethics Code, in this case, §§ 3.04, Avoiding Harm, and 3.06, Conflicts of Interest.²⁰⁷ A therapist must:

- (a) [T]ake reasonable steps to avoid harming their clients/patients . . . and to minimize harm where it is foreseeable and unavoidable.

²⁰¹ *WMA Declaration of Madrid on Professional Autonomy and Self-Regulation*, WORLD MED. ASS’N (June 29, 2017), <https://www.wma.net/policies-post/wma-declaration-of-madrid-on-professional-autonomy-and-self-regulation/#:~:text=The%20World%20Medical%20Association%20urges,autonomy%20in%20patient%20care%20decisions> [https://perma.cc/Y3B2-PJ4T].

²⁰² CHRISTY MALLORY ET AL., UCLA SCH. L. WILLIAMS INST., *CONVERSION THERAPY AND LGBT YOUTH* 3 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-Update-Jun-2019.pdf> [https://perma.cc/9JBH-9RP5] (see table 1 and table 2).

²⁰³ *Conversion Therapy Bans by U.S. State*, BORN PERFECT (2019), <https://bornperfect.org/facts/conversion-therapy-bans-by-state/> [https://perma.cc/4PDQ-RNXW]; *Ohio’s Equality Profile*, MOVEMENT ADVANCEMENT PROJECT (2021), https://www.lgbtmap.org/equality_maps/profile_state/OH [https://perma.cc/S67A-CANN]; *Snapshot: LGBTQ Equality by State*, MOVEMENT ADVANCEMENT PROJECT (2021), <https://www.lgbtmap.org/equality-maps> [https://perma.cc/K4WE-CFQA].

²⁰⁴ MALLORY ET AL., *supra* note 202, at tbl. 2 (referring to Arizona at 59%, Virginia at 64%, Florida at 71%, and North Carolina at 80%).

²⁰⁵ Lawrence P. Hampton, *Malpractice in Psychotherapy: Is There a Relevant Standard of Care?*, 35 CASE W. RESV. L. REV. 251, 266 (1984) (emphasis added).

²⁰⁶ See PALEY, *supra* note 178.

²⁰⁷ ETHICAL PRINCIPLES OF PSYCH. AND CODE OF CONDUCT §§ 3.04, 3.06 (2017).

(b) Psychologists do not participate in, facilitate, assist, or otherwise engage in torture, defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, or in any other cruel, inhuman, or degrading behavior²⁰⁸

Therapists' responsibility to avoid harming clients during the practice of conversion therapy, however, is inherently contradictory because of the statistical risk of harm the treatment presents.

Therapists must also forego treating a patient if their own beliefs or relationships “impair their objectivity, competence, or effectiveness in performing their functions as psychologists or expose the person or organization with whom the professional relationship exists to harm or exploitation.”²⁰⁹ Some therapists' willingness to endanger the lives of LGBTQ+ individuals despite the outstanding evidence that this kind of treatment is harmful and dangerous, just to uphold their own personal beliefs regarding LGBTQ+ orientation, speaks to an impairment of their competence and objectiveness. Therapists are additionally bound by anti-discriminatory practices set out in § 3.01, barring unfair discrimination based on a patient's immutable characteristics and established legal standards.²¹⁰ Individual states often also have laws requiring informed consent for treatment to protect patients from therapist harm, thereby creating a tripartite series of protections for patients against ethical violations, discrimination, and general harm.²¹¹

The fact that individuals claim they can “treat” LGBTQ+ identities' states of being—which the medical community considers normal and not a form of mental illness²¹²—with medical treatment like talk therapy is dangerous

²⁰⁸ *Id.* § 3.04 (emphasis added).

²⁰⁹ *Id.* § 3.06 (emphasis added).

²¹⁰ *Id.* § 3.01.

²¹¹ See, e.g., OHIO ADMIN. CODE 4757-5-02(B)(2) (2021) (“Licensees and registrants shall provide services to clients only in the context of a professional relationship based on valid informed consent.”); FLA STAT. §490.009(1)(q) (2022) (“Performing any treatment or prescribing any therapy which, by the prevailing standards of the mental health professions in the community, would constitute experimentation on human subjects, without first obtaining full, informed, and written consent.”); KAN. ADMIN. REGS. § 102-1-10a(e)(1) (2004) (“[I]nformed consent shall include a description of the possible effects of treatment or procedures when there are known risks to the client or patient.”).

²¹² See Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. TIMES (Dec. 16, 1973), <https://www.nytimes.com/1973/12/16/archives/psychiatrists-in-a-shift-declare-homosexuality-no-mental-illness.html> [<https://perma.cc/M3MB-X58Z>]; *Understanding Sexual Orientation and Homosexuality*, AM. PSYCHIATRIC ASS'N (2008),

because it exposes the patient to treatment that the medical community regards as harmful and that is practiced by therapists who do not follow the doctrine of informed consent or the APA's Code of Ethics. Conversion therapy treats healthy individuals as though they are sick, which will likely lead to psychological harm to the individual.²¹³ In short, therapists should be allowed some margin of error, but that error should not violate the rights of their patients to fully understand the risks associated with conversion therapy. Therefore, continuing the practice of conversion therapy would endanger patients, violate a therapist's ethics code, and ultimately violate federal and state laws protecting children from abuse.

V. IS CONVERSION THERAPY TORTURE?

This section looks at the recognition of conversion therapy as a form of torture by global organizations. It discusses the discriminatory practice of conversion therapy on LGBTQ+ individuals and argues that conversion therapy should be recognized in the United States as a form of psychological, physical, spiritual, and emotional abuse.

A. Global Recognition

In 2016, the United Nations General Assembly Human Rights Council issued their "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."²¹⁴ The report focuses primarily on international law and the experiences of women, girls, lesbian, gay, bisexual, transgender, and intersex persons.²¹⁵ The use of conversion therapy on lesbian, gay, bisexual, transgender, and intersex persons includes: refusing individuals medical treatment, subjecting individuals to verbal abuse and public humiliation, "psychiatric evaluations, forced procedures such as sterilization . . . hormone therapy and genital-normalizing surgeries under the guise of 'reparative therapies.'"²¹⁶ The report acknowledges that the

<https://www.apa.org/topics/lgbtq/orientation> [<https://perma.cc/7CY8-DFST>] ("Is homosexuality a mental disorder? . . . No, lesbian, gay and bisexual orientations are not disorders . . . [S]everal decades of research and clinical experience have led all mainstream medical and mental health organizations in this country to conclude that these orientations represent normal forms of human experience."); *WMA Statement on Natural Variations of Human Sexuality*, WORLD MED. ASS'N (June 29, 2022), <https://www.wma.net/policies-post/wma-statement-on-natural-variations-of-human-sexuality> [<https://perma.cc/4ZGK-Y3QC>] ("The WMA strongly asserts that homosexuality does not represent a disease, but rather a natural variation within the range of human sexuality.").

²¹³ See Lyons, *supra* note 212.

²¹⁴ Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/31/57 (Jan. 5, 2016) [hereinafter U.N. Doc. A/HRC/31/57].

²¹⁵ *Id.* at 3.

²¹⁶ *Id.* at 13.

criminalization of homosexuality leads to “pervasive discrimination” against the LGBTQ+ community and is a “clear violation of international human rights standards such as the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.”²¹⁷ The report states that refusing to acknowledge a transgender person’s identity “leads to grave consequences for the enjoyment of their human rights, including obstacles to accessing education, employment, health care and other essential services.”²¹⁸ It also notes that, “[v]iolence motivated by homophobia and transphobia tends to be characterized by particularly brutal acts, often resulting in murder,” and sexual violence, including the practice of “‘corrective rape,’ [which] uniquely affects lesbian, gay, bisexual, transgender and intersex individuals.”²¹⁹ Additionally, “[d]iscrimination and violence against lesbian, gay, bisexual, transgender and intersex persons extends into the family sphere and can include placement in psychiatric institutions, forced marriage and honour-based violence.”²²⁰

Further, the U.N. report recognizes governments’ responsibility, acknowledging that allowing conversion therapy to continue within a country is dangerous to the victims of conversion therapy and must be prevented, investigated, and punished to protect the citizens of each nation.²²¹ To allow conversion therapy to continue undermines the scientific and psychological community’s findings that homosexuality is not an aberration nor is it dangerous; conversion therapy’s continuation would make the nation states “complicit in violence against” this class of people.²²² “Indifference or inaction by the [s]tate provides a form of encouragement and/or de facto permission [for the practice].”²²³

In May of 2020, the Human Rights Council reviewed “[p]ractices of so-called ‘conversion therapy’” as reported by the Independent Expert, which stated that “[f]aith-based organizations that actively promote, and often perpetrate, practices of ‘conversion therapy’ act on the premise that there is something inherently evil in diverse sexual orientations and gender identities,” and that in the United States these actions “include[d] treatment of great cruelty” such as LGBTQ+ individuals “having been blindfolded and

²¹⁷ *Id.*

²¹⁸ *Id.* at 13–14.

²¹⁹ *Id.* at 16

²²⁰ U.N. Doc. A/HRC/31/57, *supra* note 214, at 16.

²²¹ *Id.* at 4.

²²² *Id.*

²²³ *Id.*

pummelled with basketballs, bound with duct tape, rolled up into blankets and subjected to anti-gay slurs.”²²⁴ Fear of such abuse may even lead individuals to avoid seeking legitimate medical treatment for their mental or physical wellbeing.²²⁵ Conversion therapy has further been recognized as torture by the Independent Forensic Expert Group²²⁶ who co-published their stance against conversion therapy in the *Journal of Forensic and Legal Medicine* and in *Torture Journal*.²²⁷ The Group has stated that “[c]onversion therapy represents a form of discrimination, stigmatisation, and social rejection.”²²⁸ In fact, the Group argues “[m]any conversion therapy practices bear similarity to acts that are internationally acknowledged to constitute torture or other cruel, inhuman, or degrading treatment or punishment.”²²⁹ The Group also stated:

The fact that a treatment or practice has a valid medical use does not mean that it is not physically and psychologically harmful to individuals. . . . All forms of conversion therapy, including talk or psychotherapy, can cause intense psychological pain and suffering. All practices attempting conversion are inherently humiliating, demeaning, and discriminatory. . . . Children and minors are particularly vulnerable.²³⁰

The United Nations issued two subsequent reports, the UN Independent Expert on Sexual Orientation and Gender Identity in 2018²³¹ and the UN

²²⁴ Victor Madrigal-Borloz, (Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Practices of So-called “Conversion Therapy”: Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, at 1, 12, U.N. Doc. A/HRC/44/53 (May 1, 2020).

²²⁵ *Id.* at 11.

²²⁶ IFEG Member Prof. Duarte Nuno Vieira Distinguished for Forensic Science Excellence, INT’L REHAB. COUNS. FOR TORTURE VICTIMS (June 23, 2014), <https://web.archive.org/web/20220203074406/https://irct.org/media-and-resources/latest-news/article/826> [<https://perma.cc/P4V9-387V>]. The International Rehabilitation Council for Torture Victims states, “The Independent Forensic Expert Group is a group of preeminent independent health specialists who provide technical advice and expertise in cases where allegations of torture are made. The Group conducts evaluation missions, produces medico-legal reports, as well as serves as a global reference point on the issue. It advocates for the increased use of medical evidence and continues to build a body of knowledge on the subject of forensic documentation.” *Id.*

²²⁷ The Independent Forensic Group, *supra* note 5, at 3.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* (emphasis added).

²³¹ See U.N. Comm. Against Torture, *Concluding Observations on the Fifth Periodic Report of China*, at U.N. Doc. CAT/C/CHN-HKG/CO/5 (Feb. 3, 2016).

Special Rapporteur on Torture in 2019,²³² reaffirming the Independent Forensic Expert Group’s 2016 findings that conversion therapy “can inflict severe pain or suffering . . . [and] can amount to torture.”²³³

B. Does Conversion Therapy Constitute Child Abuse under United States Law?

Both federal and state laws protect minors from physical and emotional harm.²³⁴ The Federal Child Abuse Prevention and Treatment Act (CAPTA) provides the federal guidelines for the prevention of child abuse.²³⁵ Likewise, each state has its own statutes concerning child abuse; nearly all of them contain some subsection addressing “physical abuse,” “emotional abuse,” “emotional injury,” or “mental injury.”²³⁶ The vast majority define child abuse as including some form of “emotional damage,”²³⁷ “emotional maltreatment,”²³⁸ “mental injury,”²³⁹ or “emotional injury.”²⁴⁰ While “emotional harm” is not explicitly defined in state or federal law,²⁴¹ the risk of suicide and long-term emotional distress certainly warrants consideration, especially from treatments that have been overwhelmingly condemned by medical institutions. Some statutes specifically address depression, suicidality, social dysfunction, withdrawal, or nonaccidental mental injury.²⁴² Overall,

²³² See Rep. of the G.A., *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/74/148 (July 12, 2019).

²³³ The Independent Forensic Group, *supra* note 5, at 4.

²³⁴ See Child Abuse Prevention and Treatment and Adoption Reform (CAPTA), 42 U.S.C. ch. 67; OHIO REV. CODE ANN. § 2151.421 (2021); FLA. STAT. § 39.201 (2021); MONT. ADMIN. R. 24.189.2305 (2021); MONT. CODE ANN. § 41-3-102 (2022); KY. REV. STAT. ANN. § 600.020 (2022); WIS. STAT. §§ 48.02, 48.981(2022); 23 PA. CONS. STAT. § 6303 (2022); W. VA. CODE ANN. § 49-1-3 (2022); TENN. CODE ANN. §§ 37-1-102, 37-1-602 (2022); MISS. CODE ANN. § 43-21-105 (2022); TEX. FAM. CODE ANN. § 261.001 (2022); OKLA. STAT. ANN. tit. 10A, § 1-1-105 (2022); ARIZ. REV. STAT. ANN. § 8-201 (2022); ALA. CODE § 26-14-1(1)–(3) (2022); GA. CODE ANN. § 19-7-5(b) (2022) (providing legal protections for minors against physical, mental, and emotional abuse).

²³⁵ CAPTA, 42 U.S.C. ch. 67.

²³⁶ Karolyn Ann Hicks, “Reparative” Therapy: Whether Parental Attempts to Change a Child’s Sexual Orientation Can Legally Constitute Child Abuse, AM. 46:2 UNIV. L. REV. 505, 516, 519, 528 (Dec. 1999).

²³⁷ WIS. STAT. ANN. § 48.02(5j).

²³⁸ MONT. CODE ANN. § 41-3-102(8).

²³⁹ OHIO REV. CODE ANN. § 2151.011.

²⁴⁰ KY. REV. STAT. ANN. § 600.020 (2022).

²⁴¹ 42 U.S.C.A. § 5101 (1996).

²⁴² *Id.*

these laws confirm that children have the right to be free from invasive and harmful therapies that cause “emotional abuse” or “mental injury.”²⁴³

According to *Psychology Today*, abuse includes “intentional action that poses a threat to your child’s life or physical well-being, or that results in significant physical or emotional harm to your child.”²⁴⁴ Further, new studies are emerging that suggest psychological abuse may be as or more detrimental to childhood development than sexual or physical abuse.²⁴⁵ Psychological abuse is becoming more widely defined and recognized. The general definition includes:

Rejecting. The adult refuses to acknowledge the child’s worth and the legitimacy of the child’s needs

Isolating. The adult cuts the child off from normal social experiences, prevents the child from forming friendships, and makes the child believe that [they are] alone in the world

Terrorizing. The adult verbally assaults the child, creates a climate of fear, bullies and frightens the child, and makes the child believe that the world is capricious and hostile

Corrupting. The adult “mis-socializes” the child, stimulates engagement in destructive antisocial behavior, reinforces deviance, and makes the child unfit for normal social experience

Verbally Assaulting. The adult abuses the child with constant name-calling, harsh threats, and sarcastic comments that continually “beat down” the child’s self-esteem with humiliation.²⁴⁶

²⁴³ *Id.*; OHIO REV. CODE ANN. § 2151.421; FLA. STAT. § 39.201 (2021); MONT. ADMIN. R. § 24.189.2305 (2021).

²⁴⁴ Elise M. Howard, *What Is Considered Child Abuse?*, PSYCHIATRIC TODAY (Oct. 22, 2018), <https://www.psychologytoday.com/us/blog/parent-s-guide-children-s-therapy/201810/what-is-considered-child-abuse> [https://perma.cc/C8YR-WE7P]. For a more comprehensive list, please see MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT, CHILD WELFARE INFO. GATEWAY (Apr. 2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf> [https://perma.cc/F4FH-V9RD].

²⁴⁵ Joseph Spinazzola, *Childhood Psychological Abuse as Harmful as Sexual or Physical Abuse*, AM. PSYCHIATRIC ASS’N (2014), <https://www.apa.org/news/press/releases/2014/10/psychological-abuse> [https://perma.cc/A9PQ-6TJ9].

²⁴⁶ Stephanie Hamarman & William Bernet, *Evaluating and Reporting Emotional Abuse in Children: Parent-Based, Action-Based Focus Aids in Clinical Decision-Making*, 39 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 928, 928–30 (2000).

All of these actions are involved in conversion therapy. Rejecting occurs when parents deny a child's gender identity or sexual orientation. Children who were subjected to conversion therapy have often been told that being gay would send them to hell, and that there was something fundamentally "broken" about being LGBTQ+.²⁴⁷ Isolating occurs when they are removed from their peers by transporting them to facilities for conversion therapy or when they are made to feel like they have no one on whom they can rely on to be their true selves. Individuals have been told to keep their orientation secret so they can continue on in the community, to cease any contact with family members, or leave school to focus on becoming straight.²⁴⁸ Terrorizing and verbal assault occurs in conversion therapy when a child is verbally abused by adults who tell them they are sinful or immoral in their identities and that no one will accept them as they are. Former members of religious communities have been told that by coming out to their families, friends, or coworkers, they have now damned themselves to an afterlife without salvation and without their loved ones; that some of their loved ones passed away *because* God was punishing them for being in a same-sex relationship.²⁴⁹ Corrupting occurs as a result of this, wherein a child begins to engage in self-destructive or violent behaviors. The medical community has documented the effects of conversion therapy on American youth, which includes an extensive list of potential harms, including increased risk of suicide, suicidal ideation, depression, and self-harm.²⁵⁰

VI. DO CHILDREN HAVE THE RIGHT TO BE FREE FROM HARMFUL TREATMENT?

Courts are beginning to expand their understanding of caregiver harm from only physical abuse, sexual abuse, and extreme emotional abuse, to include broader kinds of harm. Some of these include neglect of one's duties to provide proper nutrition to a child (a court removed a severely obese child

²⁴⁷ Tim Fitzsimons, 'Doesn't Surprise Me': Conversion Therapy Survivors on Another Ex-Therapist Coming Out, NBC NEWS (Sept. 4, 2019, 4:29 PM), <https://www.nbcnews.com/feature/nbc-out/doesn-t-surprise-me-conversion-therapy-survivors-another-ex-therapist-n1049781> [<https://perma.cc/DRP9-JM8U>].

²⁴⁸ Tim Teeman, *Gay Conversion Therapy Survivors Speak Out: 'It's Torture'*, DAILY BEAST (Dec. 1, 2020, 8:19 PM), <https://www.thedailybeast.com/gay-conversion-therapy-survivors-speak-out-its-torture> [<https://perma.cc/M9N5-98E4>]; Brad Hoylman, *NY Daily News: Sexual Orientation Conversion Therapy Victims Speak out at Hearing for Banning the Practice on Minors*, N.Y. STATE SENATE (May 16, 2014), <https://www.nysenate.gov/newsroom/in-the-news/brad-hoylman/ny-daily-news-sexual-orientation-conversion-therapy-victims-speak> [<https://perma.cc/UF3S-3M3Y>]; Darren Calhoun, *Survivor: Darren Calhoun*, BORN PERFECT (June 14, 2018), <https://bornperfect.org/survivors/survivor-darren-calhoun> [<https://perma.cc/L35F-XGA3>].

²⁴⁹ Teeman, *supra* note 248.

²⁵⁰ See *infra* Part IV.C.

from his mother's care due to the mother's insufficient knowledge regarding the need to help her child lose weight),²⁵¹ lack of knowledge of required medical treatments (a court removed a child from their mother's custody after a determination that the mother could not understand the severity of her child's condition and therefore could not care for the child's medical needs),²⁵² and treatment of autism with dangerous chemicals (a mother was arrested for administering a life-threatening substance containing bleach to her child as a "cure" for autism).²⁵³ These decisions show that courts have a vested interest in keeping children safe from harm, and because of that interest they have a right to remove children from dangerous households or monitor parents' behavior to ensure the safety of the child.

Generally, "[t]he legal norm for minors is that parents provide consent on behalf of the child and the child provides 'assent' to the extent he or she is developmentally able to do so."²⁵⁴ The legal separation between child abuse and rights of the parent to make decisions regarding the welfare of their child is a thin margin. Family units are generally permitted to function with parents at the helm of their child's upbringing, including medical care and home discipline, but "the state also has a role in protecting the interests of those who cannot protect themselves, for example in cases of child abuse, when the rights of the parent conflict with the state's role as *parens patriae*, or 'parent of the nation.'"²⁵⁵ Attorney Carolyn Hicks uses the Reasonably Prudent Parent Standard under New York Law²⁵⁶ "to determine whether a parent has abused or neglected [their] child."²⁵⁷ The "reasonably prudent parent has a

²⁵¹ Rachel Dissell, *Cuyahoga County Executive Ed FitzGerald Won't Take Sides in Case Involving Removal of Obese Boy*, CLEVELAND.COM (Dec. 2, 2011, 11:00 AM), https://www.cleveland.com/metro/2011/12/fitzgerald_wont_take_sides_in.html [<https://perma.cc/VPV4-H94U>].

²⁵² *In re K.W.*, No. 86275, 2005 WL 2471014, at *2–3 (Ohio Ct. App. Oct. 5, 2005).

²⁵³ Marwa Eltagouri, *Indiana Mom Arrested for Feeding Her Autistic Daughter Bleach After Facebook Group Touted it as a Cure*, CHI. TRIB. (Feb. 15, 2018, 7:02 AM), <https://www.chicagotribune.com/nation-world/ct-arrest-bleach-autism-treatment-20180214-story.html> [<https://perma.cc/QK32-GSRM>].

²⁵⁴ Valarie Blake, *Minors' Refusal of Life-Saving Therapies*, 14 AM. MEDIC. ASS'N J. ETHICS 792, 792 (Oct. 2012), <https://journalofethics.ama-assn.org/article/minors-refusal-life-saving-therapies/2012-10> [<https://perma.cc/WK3W-6R89>].

²⁵⁵ *Id.*

²⁵⁶ Hicks, *supra* note 236, at 523. The law was adopted in 1995 in *Enright v. Busy Bee Playschool*, 625 N.Y.S.2d 453, 454 (N.Y. App. Div. 1995).

²⁵⁷ Hicks, *supra* note 256, at 236; see also Heidi Redlich Epstein & Anne Marie Lancour, *The Reasonable and Prudent Parent Standard*, A.B.A. (Oct. 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/october-2016/the-reasonable-and-prudent-parent-

duty to investigate the places where the child will spend time and the people who will supervise the child.”²⁵⁸ Thus, a reasonably prudent parent would research conversion therapy, discover its harmful effects, recognize that it is not a medically accepted practice, and then prudently choose to not send their child to receive treatment.²⁵⁹ Further, parents must understand that with parenthood comes certain obligations to keep their children from harm, including access to harmful substances and behaviors in which parents participate (allowing one’s children access to cigarettes and associated paraphernalia constitutes parental neglect).²⁶⁰ Parents are likewise required to acknowledge their child’s disabilities and actively participate in creating an environment in which their child can properly develop.²⁶¹ Hicks notes that parental autonomy is limited throughout the United States.²⁶² Parents are limited in the exercise of their control over their children in child labor,²⁶³ school attendance,²⁶⁴ and child abuse.²⁶⁵ The state can intervene in child abuse cases so long as they “meet [the] procedural requirements by clear and convincing evidence.”²⁶⁶

Parents’ rights to deny or obtain medical treatment should inform a standard for the judicial evaluation of harmful treatment on their children. Pediatric bioethicist and physician Douglas Diekema suggests that the standard by which courts examine parental abuse, the best interest standard, should actually be that of a harm threshold.²⁶⁷ The right to refuse medical

standard [<https://perma.cc/QL6T-EEJK>]. The Reasonable and Prudent Parent Standard is applicable across all states under federal law enacted by the Obama Administration in 2014. *Id.* The Sex Trafficking and Strengthening Families Act subsection on Supporting Normalcy for Children in Foster Care directs “caregivers use a ‘reasonable and prudent parent standard’ when determining whether to allow a child in foster care to participate in extracurricular, enrichment, cultural, and social activities.” *Id.* The purpose is to allow children to develop in healthy ways, mentally, physically, and socially. *Id.* Some states have provisions or standards on how to determine what “normalcy” entails; for example, California notes that caregivers must not expose children to an “unreasonable risk of harm, or subject the child to abuse or neglect.” CAL. WELF. & INST. CODE § 361.2.

²⁵⁸ Hicks, *supra* note 236, at 523–24.

²⁵⁹ *Id.* at 523–25.

²⁶⁰ *Id.* at 521 n.75 (citing *In re Glenn II*, 650 N.Y.S.2d 437, 438 (N.Y. App. Div. 1996)).

²⁶¹ *Id.* at 522–23.

²⁶² *Id.* at 535–43.

²⁶³ See *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 320 (1913); Hicks, *supra* note 236, at 536 n.188.

²⁶⁴ See *State v. Bailey*, 61 N.E. 730, 730 (Ind. 1901); Hicks, *supra* note 236, at 536 n.89.

²⁶⁵ Hicks, *supra* note 236, at 536–37.

²⁶⁶ *Id.* at 537.

²⁶⁷ Douglas S. Diekema, *Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention*, 25 THEORETICAL MED. 243, 245–64 (2004).

treatment arose in 1891 in *Union Pacific Railway Co. v. Botsford*, where the court determined that to give unwanted treatment may amount to criminal or civil battery.²⁶⁸ Further, in 1914 in *Schloendorff v. Society of New York Hospital*, the court held that a patient must give informed consent to a procedure before its execution.²⁶⁹ The right to refuse treatment and grant informed consent does not disappear for individuals who are incompetent, and under United States law, parents have the right to exercise decision making for their children except when “they place the child’s health, well-being, or life in jeopardy.”²⁷⁰ Therefore, we begin with the assumption that the child is best suited under the legal care of their parents because in theory a child’s parents care about their children, are better suited to know their children, and generally want what is best for them.²⁷¹ The “*parens patriae*” doctrine is a safety net when this presumption falls short.²⁷² The doctrine allows “the state [to] act as ‘surrogate parent’ when necessary to *protect the life and health* of those who cannot take care of themselves, including children.”²⁷³

The best interests of the child standard is long-standing and predominantly used today to determine outcomes in court hearings where children are involved, though it is not without its pitfalls.²⁷⁴ Diekema suggests that the ultimate the goal of the best interest standard is to “act[] so as to promote maximally the good of the individual,”²⁷⁵ or “a surrogate decision maker must determine the highest net benefit among the available options, assigning different weights to interests the patient has in each option and discounting or subtracting inherent risks or costs.”²⁷⁶ Thus, in the end, what is known as best interest standard is actually a harm-based weighing of options.²⁷⁷ Diekema suggests the courts use a harm principle, where “[t]he characteristic of parental decision-making that justifies interference is not that it is contrary to the child’s best interest, but rather that the decision poses

²⁶⁸ *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 258 (1891).

²⁶⁹ *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93–95 (N.Y. 1914).

²⁷⁰ Diekema, *supra* note 267, at 244.

²⁷¹ *Id.*

²⁷² *Id.* at 244–45.

²⁷³ *Id.* at 244 (emphasis added).

²⁷⁴ *Id.* at 245–46.

²⁷⁵ *Id.* at 246 (quoting ALLEN E. BUCHANAN & DAN W. BROCK, *DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION-MAKING* 234–37 (1990)).

²⁷⁶ Diekema, *supra* note 267, at 246 (quoting TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 99–103 (5th ed. 2001)).

²⁷⁷ *Id.* at 246–49.

some harm to the child.”²⁷⁸ Therefore, the *parens patrie* doctrine allows courts to act on behalf of children to prevent the child’s parents from doing harm to the child regardless of whether that harm is deliberate or the result of misguided parental decisions that endanger the child’s wellbeing.²⁷⁹ The harm principle would only be implemented in serious cases where the risk of harm done by parental decision making caused “interference with interests necessary for more ultimate goals like physical health and vigor, *integrity and normal functioning of one’s body*, absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, and *emotional stability*.”²⁸⁰ The child’s right to be free from those harms should subvert the parents’ right to control over the child’s welfare, as it no longer aligns with the goals of the harm principle, keeping the child free from harm.²⁸¹

In each instance of child mistreatment and abuse, public policy should lean towards protecting each child’s personal wellbeing as best it can; the United States can take steps to achieve that goal by enacting legislation that bans conversion therapy on minors. Notwithstanding parental rights to determine child treatment, one pressing question is whether children have the right to refuse treatment on their own. If they have this right, then they should be able to refuse conversion therapy to maintain the integrity of their physical and mental wellbeing. Courts have allowed children to give consent to procedures in cases of emergency, emancipation, sexual wellness, substance abuse, and mental health.²⁸² Many states allow youth and teens to make decisions regarding their physical wellbeing and medical treatment if they demonstrate an adequate understanding of the “consequences of their decisions . . . either in contradiction to their parents’ wishes or without consulting their parents. Courts often view teenagers’ refusal of life-saving therapies as an extension of the mature minor rules.”²⁸³

Courts also consider the legal age of majority in each case. Attorney and bioethicist, Vivian Hamilton argues that the age of majority “insufficiently meets current social needs,” evidenced by the many exceptions that apply in specific legal concepts (for example, minors’ participation in the labor market, contract rights, and the right to some medical and procreative

²⁷⁸ *Id.* at 250.

²⁷⁹ *Id.* at 249–50.

²⁸⁰ *Id.* at 251 (emphasis added); *see also id.* at 251–52 (“The American Academy of Pediatrics Committee on Bioethics argues that state intervention should be a last resort, wielded only when treatment is likely to prevent substantial harm or suffering or death.”).

²⁸¹ Diekema, *supra* note 267, at 252.

²⁸² Blake, *supra* note 254, at 792; Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 76–77 (2016).

²⁸³ Blake, *supra* note 254, at 793.

choices).²⁸⁴ Therefore, courts should look at the age of the minor within a larger scope, a concept that requires flexibility in decision-making on the part of the court to determine whether the child in question can make decisions regarding their own treatments with the information at hand and with the medical knowledge available at the time of consideration.²⁸⁵ Decisions regarding personal health can be tailored to individual circumstances to best suit each child and the specific medical questions regarding that child's health and wellbeing. If "the reasoning and basic information-processing capacities of the typical sixteen-year-old are 'essentially indistinguishable' from those of adults,"²⁸⁶ so long as there are no spur of the moment stressors, then children should be considered competent to deny medical treatment, provided they are given adequate time and information upon which to rely.²⁸⁷ These reasoning skills support "the explicit adoption of a 'rule comprising exceptions'—in other words, for the abandonment altogether of the presumptive age of legal majority in favor of *context-specific rules*."²⁸⁸ Hamilton argues that existing law, which is laden with exceptions, "demonstrates that context specific decision-making imposes no undue burden on lawmakers."²⁸⁹ Further, the state should take into account those "autonomy-related interests [that] pertain to [minors] exercising those specific liberties of which they are capable."²⁹⁰ In the case of conversion therapy, context specific rules would allow for the court to consider a minor's ability to understand their own wants and desires, to recognize that their wants may differ from those of their parents, and to understand that subjecting the minor to harmful treatment not only violates the harm principle, but also ignores the minor's ability to make meaningful and accurate decisions regarding their own wellbeing. These rules might impose hard limitations similar to those regarding the ability to contract with a minor—if the child is a minor, then any use of conversion therapy on that child without their consent should be illegal.

The concept of the age of reason also allows for some insight into the justification of allowing for consideration of the wants and needs of a minor based on that minor's reasoning skills. For example seven was the age of reason under Common Law and "were conclusively presumed incapable of committing a crime because they did not possess the reasoning ability to

²⁸⁴ Hamilton, *supra* note 282, at 76–77.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 87.

²⁸⁷ *Id.* at 88–90.

²⁸⁸ *Id.* at 91 (emphasis added).

²⁸⁹ *Id.* at 55.

²⁹⁰ Hamilton, *supra* note 282, at 92–93.

understand . . . their conduct and accepted standards of acceptable community behavior,” but the presumption could be rebutted.²⁹¹ Nevertheless, “[a] child over the age of [14] was considered to be fully responsible for his or her actions.”²⁹² The age of reason required courts to consider the child’s ability to fully understand their actions, and required adjustment of courts’ legal decisions regarding a child’s actions based on their age and their associated level of mental development. Child and adolescent psychologist Dr. Dana Dorfman suggests that “[t]he age of reason refers to the developmental cognitive, emotional, and moral stage in which children become more capable of rational thought, have internalized a conscience, and have better capacity to control impulses (than in previous stages).”²⁹³ While the age of reason may be largely applied to criminal cases, the fact that a minor may be held responsible and understanding of their actions towards another individual suggests society is fully aware of a child’s ability to comprehend the world around them, so why can it not recognize their ability to determine their own wellbeing?

Certainly, case law surrounding the limitations of parental rights and medical decisions for their children largely addresses the issue of courts preventing or punishing parents that choose to *withhold* lifesaving treatment rather than to administer it. Denying a parent the right to impose conversion therapy on their children, however, follows the same logical process—if a parent wishes to *impose* harmful practices on their child, then courts have the vested interest to intervene to save the physical and mental wellbeing of that child. If parents impose conversion therapy on their child, courts should also have the ability usurp a parent’s rights so the court can protect the child. This is not a novel idea—when the parent-imposed treatment may prevent a serious risk of harm to or death of the child, courts may intervene to protect the wellbeing of that child.²⁹⁴ For example, in *In re E.G.*, a Jehovah’s Witness parent denied blood transfusion treatment of her 17-year-old daughter for Leukemia for religious reasons.²⁹⁵ The long-term prognosis was a 20–25% chance of survival with treatment, and approximately one month to live without it.²⁹⁶ The trial court still appointed a guardian to ensure the child would receive medical treatment and overruled the mother’s decision to

²⁹¹ *Age of Reason*, FREE DICTIONARY (2008), <https://legal-dictionary.thefreedictionary.com/Age+of+Reason> [<https://perma.cc/B53L-5R5D>].

²⁹² *Id.*

²⁹³ Megan Zander, *A Milestone Developmental Stage: The Age of Reason*, SCHOLASTIC (Apr. 12, 2019), <https://www.scholastic.com/parents/family-life/social-emotional-learning/development-milestones/age-reason.html> [<https://perma.cc/E9TH-KVY4>].

²⁹⁴ Blake, *supra* note 254, at 792.

²⁹⁵ *In re E.G.*, 549 N.E.2d 322, 323 (Ill. 1989).

²⁹⁶ *Id.*

withhold treatment.²⁹⁷ The mother was convicted of medical neglect.²⁹⁸ A similar issue arose in *In the Matter of the Child of Colleen Hauser and Anthony Hauser, Parents*, where the parents of a 13 year old with Hodgkin's lymphoma denied her medical treatment despite the child having an 80–95% chance of survival with the treatment but little to no chance of survival without treatment.²⁹⁹ Their religious beliefs followed the “practice of Nemenhah, a Native American healing practice,” which demanded they withhold treatment to “do no harm.”³⁰⁰ Still, the court held that the state interests outweighed familial beliefs, and the parents were forced to allow their child to receive chemotherapy.³⁰¹ In both cases, the interest of preserving the life of the child outweighed the parents' religious beliefs and right to deny treatment.³⁰² Likewise, in *Commonwealth v. Nixon*, a 16-year-old died of diabetic ketoacidosis because of the familial beliefs rooted in the Faith Tabernacle Church.³⁰³ The parents were convicted of involuntary manslaughter and child endangerment.³⁰⁴

The law is more flexible for religious beliefs relating to non-healthcare related decisions. Under *Wisconsin v. Yoder*, where an Amish family sought to end their children's formal education after eighth grade in furtherance of their religious beliefs, the Court held that:

“[T]he traditional interest of parents with respect to the religious upbringing of their children” [i]s strong enough to trump the state law requiring [school] attendance “[H]owever strong the state's interest in universal compulsory education, it is by no means an absolute to the exclusion or subordination of all other interests.”³⁰⁵

Informal vocational education at home is key to the Amish peoples' way of life and sits at the core of their belief system.³⁰⁶ The Court reasoned that

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 328.

²⁹⁹ *In re Child of Colleen Hauser and Anthony Hauser*, No. JV-09-068, 2009 WL 1421504, at *1–3 (D. Minn. May 14, 2009)).

³⁰⁰ *Id.* at *2).

³⁰¹ *In re Child of Colleen Hauser and Anthony Hauser*, 2009 WL 1421504, at *18–19.

³⁰² Blake, *supra* note 254, at 794.

³⁰³ *Commonwealth v. Nixon*, 761 A.2d 1151, 1152 (Pa. 2000)).

³⁰⁴ *Id.*

³⁰⁵ Hicks, *supra* note 236, at 539 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972)).

³⁰⁶ See *Wisconsin v. Yoder*, 406 U.S. 205, 209–12 (1972) (describing central tenets of Old Order Amish communities including their belief that “secondary school education as an impermissible exposure of their children to a ‘worldly’ influence.”).

when a state's law "gravely endanger[s] if not destroy[s] the Free Exercise of [the] respondents' religious beliefs"³⁰⁷ such that "the state's interest in compelling the law might lead to the possible elimination of the Amish religion," that exercise of religion must be allowed.³⁰⁸ Importantly, this principle cannot apply to the use of conversion therapy within the Abrahamic Religions. Unlike home vocational training in the Amish religion, conversion therapy is only a small factor in the Abrahamic religions; Islam, Christianity, and Judaism can survive within contemporary settings like education, healthcare, and other aspects of contemporary life, and would continue to survive without the use of conversion therapy.³⁰⁹ Moreover, Hicks notes other important differences between conversion therapy and the *Yoder* case: "unlike the Amish, there is no ultimatum posed to a Christian to either assimilate into society at large or abandon [their] religion upon a finding that 'reparative' therapy constitutes child abuse and neglect."³¹⁰ Furthermore, she argues that "Amish 'beliefs and attitudes towards life, family and home have remained constant,'" whereas conversion therapy is relatively new.³¹¹ Lastly, "the children in *Yoder* agreed with their parents and did not want to attend school, whereas in the context of [conversion] therapy the children are often involuntarily placed."³¹²

Moreover, *Prince v. Massachusetts* illustrates a case where the state had a compelling interest and the "parent's right, even when coupled with a religious conviction, [was] not absolute."³¹³ In *Prince*, a religious family violated child labor laws by having their young children sell religious pamphlets to members of the public.³¹⁴ The family argued that their right to free speech and free exercise of religion allowed for the distribution of the religious literature; however, the Court held that the state had the ability to prevent children from working, as it is a governmental interest to protect children from harm related to child labor or negative "street" influences.³¹⁵ The Court wrote, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare[;] . . . this

³⁰⁷ *Id.* at 219.

³⁰⁸ Hicks, *supra* note 236, at 539.

³⁰⁹ *Id.*; see *supra* Part II.

³¹⁰ Hicks, *supra* note 236, at 540.

³¹¹ *Id.* (quoting *Yoder*, 406 U.S. at 216).

³¹² *Id.*

³¹³ *Id.* at 542 (citing *Prince v. Massachusetts*, 321 U.S. 158, 159 (1994)).

³¹⁴ *Prince*, 321 U.S. at 159–60.

³¹⁵ *Id.* at 167–69.

includes, to some extent, matters of conscience and religious conviction.”³¹⁶ In that same vein, if the government has an interest in protecting children from harm that may come from selling religious literature on the streets, then they should also be able to prevent children from experiencing harm that comes from the practice of religious “therapeutic” treatments such as conversion therapy.

The law also protects against harms that result from religious practices. For example, a parent may not administer prayer or “anointment” as a substitute for medical treatment,³¹⁷ and regardless of a parent’s conviction that their religious belief is appropriate or accurate, medical science may prove them wrong.³¹⁸ Further, “[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”³¹⁹ Consequences of imposing conversion therapy on minors should also be similar. Courts should be permitted, through abuse or neglect proceedings, to deny a conversion therapy as treatment due to the harmful effects to the child. Courts may also choose to impose monitoring by a guardian ad litem or issue counseling to help parents understand the harmful effects of conversion therapy and how homosexuality is a normal part of human behavior. In some cases, the removal of the child from the household through relocation or emancipation may be appropriate. A better solution, however, would be to prohibit the use of conversion therapy on minors in any context through legislative means.

One of the first successful transfers of guardianship for the protection of a transgender child occurred in Cincinnati, Ohio, in 2018 in *In re JNS*.³²⁰ The judge raised concerns over the manner in which the question of guardianship came to court; the court discussed the validity of the risk of suicide and danger to JNS’s safety over maintaining the family unit and

³¹⁶ *Id.* at 167.

³¹⁷ *See* Commonwealth v. Nixon, 761 A.2d 1151, 1152 (Pa. 2000) (affirming conviction of parents with a child who had a medically treatable diabetic acidosis of involuntary manslaughter for treating her diabetes with “anointment” in the Faith Tabernacle Church); Hermanson v. State, 570 So.2d 322, 324 (Fla. Dist. Ct. App. 1990) (upholding the felony child abuse and third degree murder convictions of parents of a seven-year-old girl who used prayer to treat her diabetic ketoacidosis).

³¹⁸ *In re Willmann*, 493 N.E.2d 1380, 1383–84, 1389–90 (Ohio Ct. App. 1986) (affirming an order for a child to undergo cancer treatment after finding that a family’s belief that their son’s osteogenic sarcoma was fully cured based on religious conviction was insufficient in the face of overwhelming medical evidence to the contrary).

³¹⁹ *Prince*, 321 U.S. at 166–67.

³²⁰ *In re JNS*, No. F17-334X, at 2 (Hamilton Cnty. Juv. Ct. Feb. 16, 2018), <https://web.archive.org/web/20191103022425/https://www.prizmnews.com/wp-content/uploads/371667957-Ruling-from-Judge-Sylvia-Sieve-Hendon-on-transgender-boy.pdf> [<https://perma.cc/Z7XW-WPLQ>].

allowing JNS to remain with his parents.³²¹ The judge did ultimately decide to allow the child to remain under the guardianship of his grandparents.³²² The decision removed him from his parent's home, an environment that championed "Christian therapy" as a means of reaffirming the child's sex assigned at birth.³²³ The court recognized medical journals, testimony, and research regarding the need for "consisten[cy] in the presentation of [the child's] gender identity,"³²⁴ and noted the need for legislative guidance regarding requests to transition from assigned sex/gender at birth to a different sex/gender identity.³²⁵ The court also noted a distinct lack of existing research on whether raising transgender children according to their pronouns and gender identity as opposed to their sex assigned at birth was actually helpful.³²⁶ Yet today, research shows that:

Socially transitioned transgender children who are supported in their gender identity have developmentally normative levels of depression and only minimal elevations in anxiety, suggesting that psychopathology is not inevitable within this group. Especially striking is the comparison with reports of children with [gender dysphoria]; socially transitioned transgender children have notably lower rates of internalizing psychopathology than previously reported among children with [gender dysphoria] living as their natal sex.³²⁷

Pediatrician and transgender specialist, Dr. Michelle Forcier perhaps stated it best: "if your child had asthma and was turning blue, you wouldn't deny them their albuterol inhaler or say, 'let's wait' If this were cancer or diabetes, we wouldn't be having this conversation, but people get funny when it comes to medical care when gender is involved, and that's harmful."³²⁸

³²¹ *Id.* at 3–4. For more background, see CNN Wire, *Ohio Parents Seek Custody to Stop Transgender Teen From Having Hormone Treatment*, KTLA5 (Feb. 13, 2018, 6:05 AM), <https://ktla.com/news/nationworld/ohio-parents-seek-custody-to-stop-transgender-teen-from-having-hormone-treatment> [<https://perma.cc/TC9H-Y4VS>].

³²² *In re JNS*, No. F17-334 X, at 4.

³²³ CNN Wire, *supra* note 320.

³²⁴ *In re JNS*, No. F17-334 X, at 2.

³²⁵ *Id.* at 4.

³²⁶ *Id.* at 2.

³²⁷ Kristina R. Olson et al., *Mental Health of Transgender Children Who are Supported in Their Identities*, 137 PEDIATRICS 1, 1 (2016).

³²⁸ CNN Wire, *supra* note 320.

Some opponents of gender affirming care may wonder whether parents taking their children to conversion therapy is the same as providing treatment for depression and suicidality. The answer is “No.” It is not “treatment” for depression or suicidality if the treatment exacerbates the suicidal thoughts and provides a negative environment in which the child is expected to get better. Further, the primary purpose of conversion therapy is to “cure” homosexuality, gender non-conforming and other LGBTQ+ behaviors,³²⁹ none of which are recognized as mental diseases or disorders.³³⁰

Nonetheless, court-ordered emancipation from unsupportive families is not viable for all children as it nearly always cuts off financial support, healthcare, and housing. Moreover, children may not wish to be emancipated from their families despite their parents’ religious beliefs. Similarly, removal of children from their household may not be possible, as not all children have family members with whom they can live that would provide alternative options from their parents’ religious beliefs, as they may be the same throughout the family. Some cases may require third party professionals to independently assess whether a child requires temporary or permanent placement with someone other than their parents.

VII. THE FIRST AMENDMENT’S FREE SPEECH AND FREE EXERCISE CLAUSES

This section considers the parameters of the Free Speech and Free Exercise Clauses, whether states have an interest in keeping children free from harm despite a parent’s religious beliefs, and whether conversion therapy qualifies for protections as religious speech under the Free Exercise and Freedom of Speech Clauses.

This Part argues that religious speech of conversion therapy does not qualify for protection under the Free Exercise Clause or the Freedom of Speech Clause because legal bans on the practice of conversion therapy withstand strict scrutiny, as they are narrowly tailored to further a compelling governmental interest. Further, conversion therapy as speech does not satisfy the legal parameters under which religious exemptions are examined. Under the Constitution’s First and Fourteenth Amendments, the Free Exercise Clause allows for the free practice of religious beliefs,³³¹ the “right to believe

³²⁹ The Independent Forensic Group, *supra* note 5.

³³⁰ *Health and Medical Organization Statements on Sexual Orientation, Gender Identity/Expression and “Reparative Therapy”*, LAMBDA LEGAL, at 1–5 (Jan. 2011), https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_health-and-med-orgs-stmts-on-sex-orientation-and-gender-identity_1.pdf [https://perma.cc/92s7-AD3f].

³³¹ U.S. CONST. amend. I; U.S. CONST. amend XIV (making the First Amendment applicable to the states through incorporation).

and profess whatever religious doctrine one desires.”³³² Thus, the First Amendment obviously excludes all governmental regulation of religious beliefs as such, but importantly, “religious beliefs do not excuse disobeying an otherwise valid law.”³³³ For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court “held that while religious expression is protected, the “ingestion of peyote is prohibited.”³³⁴ Similarly, in *Cantwell v. Connecticut*, “freedom to believe [in a religion] . . . is absolute but . . . [freedom to act] remains subject to regulation for the protection of society.”³³⁵ Under *Cantwell*, the Fourteenth Amendment, applying the First Amendment to the states through incorporation, allows for the free practice of religion; however, individuals may not use that exercise of religion to engage in child abuse or violate laws forbidding discrimination.³³⁶ Individuals subjected to conversion therapy experience mental distress and emotional trauma from those experiences, even from experiences as seemingly inconsequential as being called by the wrong name.³³⁷ Parental control should thus be limited due to the medical evidence of threat of harm posed to a child. Further, parent-imposed conversion therapy should constitute an extension of child abuse due to the threat of psychological, and sometimes physical, threat of harm to the child, and receive no protections under the Free Exercise Clause.

There are limitations on not only the free exercise of religion, but also on free speech. These limitations fall under constitutional protections that are subject to strict scrutiny, with exceptions for laws or regulations that can be narrowly tailored to serve a compelling governmental interest to protect

³³² *Emp. Div., Dept. of Hum. Res. v. Smith*, 494 U.S. 872, 877 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1, *as recognized in* *Ramirez v. Collier*, 142 S. Ct. 1264 (2022).

³³³ *Emp. Div., Dep’t of Hum. Res. of Oregon*, 494 U.S. at 890; *see also* *Guilty plea in killing of 70-year-old Lansdowne man*, 6 ABC NEWS (Feb. 28, 2012), <https://6abc.com/archive/8561370/> [<https://perma.cc/Z6FQ-PLQV>] (noting that religious beliefs similarly do not protect against stoning a homosexual man to death); Alexandra Holden, *The Gay/Trans Panic Defense: What It Is, and How to End It*, A.B.A. (Apr. 1, 2020), <https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/> [<https://perma.cc/3HHS-M2KP>].

³³⁴ Hicks, *supra* note 236, at 532.

³³⁵ *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

³³⁶ *Id.* at 303–05. Hicks expands her reasoning with *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997), stating, “a valid state law of general applicability which only incidentally burdens someone’s religious beliefs is constitutional[.]” and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), stating “a law directed at a specific religious practice is not per se unconstitutional, but rather, the law will be constitutional if it survives strict scrutiny.” Hicks, *supra* note 236, at 535 n.177.

³³⁷ *Why Deadnaming is Harmful*, CLEV. CLINIC (Nov. 18, 2021), <https://health.clevelandclinic.org/deadnaming> [<https://perma.cc/92GK-YYR3>].

members of the public.³³⁸ Those limitations on speech may not be content-based.³³⁹ The Supreme Court has previously stated,

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.³⁴⁰

The question therefore is whether the language of conversion therapy presents a clear and present danger to those patients. This means that the language that is regulated must not be limited because of the religious content of the speech, but rather based on the conduct of the practitioners and their unique ability to cause immediate harm to patients using talk therapy. Circuit courts have already begun to examine the limitations on speech with regard to conversion therapy, though with varying results. For example, in *Otto v. City of Boca Raton*, the Eleventh Circuit held that the City of Boca Raton's legislative ban on Sexual Orientation Change Efforts (SOCE) was unconstitutional, as it violated therapists' rights to free speech under the First Amendment.³⁴¹ The therapists claimed that the SOCE ordinances were content-based "because the local governments disagree[d] with the message, ideas, subject matter, and content of the words spoken during their clients' therapy;" the court agreed, meaning the ordinances "must receive strict scrutiny."³⁴² The court indicated that to determine whether or not speech is content-based, one must ask "whether enforcement authorities must 'examine the content of the message that is conveyed.'"³⁴³ The *Otto* court ultimately held that the legislative ban did not pass strict scrutiny and the SOCE were protected by the First Amendment.³⁴⁴

The *Otto* court further built its assessments using out-of-date information, like the American Psychological Association's 2009 task force report "assessing SOCE," which claimed there is a "complete lack" of rigorous recent research" on the effects of SOCE and that there is "no clear indication of the prevalence of harmful outcomes among people who have

³³⁸ *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 101 (1972).

³³⁹ *Id.*

³⁴⁰ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

³⁴¹ *Otto v. City of Boca Raton*, 981 F.3d 854, 871 (11th Cir. 2020).

³⁴² *Id.* at 861.

³⁴³ *Id.* at 862 (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)).

³⁴⁴ *Id.* at 859.

undergone' SOCE."³⁴⁵ To satisfy scrutiny, the *Otto* court rightly stated that it must use more than "ambiguous proof," to demonstrate causation of harm³⁴⁶ yet it based its own analysis on a report from 2009, thereby bypassing a slew of more recent condemnations of conversion therapy by the medical community that correct their earlier findings. The *Otto* court thus disregarded statements by national medical associations, including an amicus curiae brief by the American Psychological Association condemning the practice and urging the court to find in favor of the ban, the very same organization the court sought to use as the source of its medical research.³⁴⁷ The President of the American Psychological Association, Dr. Sandra Shullman, has stated, "[t]he scientific research since 2009 has greatly increased the evidence that participants in [SOCE] believe they were harmful."³⁴⁸ The APA filed their brief in association with the Florida Psychological Association, the National Association of Social Workers, the National Association of Social Workers Florida Chapter, and the American Association for Marriage and Family Therapy in support of the conversion therapy ban and to reaffirm their firm position against the use of conversion therapy to "cure" homosexuality or gender dysphoria.³⁴⁹ There are not only myriad studies empirically proving the psychological and physical harm of conversion therapy, but also studies proving that transgender individuals raised in accepting households mentally develop in the same way as cisgender individuals.³⁵⁰ Instead, the *Otto* court utilized outdated information to execute a decision overturning a law that prevented children from being harmed in a therapeutic setting.

The *Otto* court likewise contests that regulation of "professional speech" is a First Amendment violation by citing *National Institute of Family and Life*

³⁴⁵ *Id.* at 869 n.8. The Dissenting Opinion in *Otto* also criticizes the interpretation of this task force data as being misinterpreted, stating that "it seems as though no study (or studies) would satisfy the majority." *Id.* at 877 (Martin, J., dissenting).

³⁴⁶ *Otto v. City of Boca Raton*, 981 F.3d 854, 868 (11th Cir. 2020) (majority opinion) (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 800 (2011)).

³⁴⁷ *Otto*, 981 F.3d at 21; Brief for the American Psychological Ass'n et al. as Amici Curiae Supporting Defendants-Appellees at 17, *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020) (No. 9:18-cv-80771-RLR).

³⁴⁸ *APA Criticizes Appeals Court Ruling Overturning Local Ban on So-Called Conversion Therapy*, AM. PSYCH. ASS'N (Nov. 22, 2020), <https://www.apa.org/news/press/releases/2020/11/conversion-therapy-ban-ruling> [<https://perma.cc/TFZ8-434P>].

³⁴⁹ Brief of American Psychological Ass'n, et al. as Amici Curiae Supporting Plaintiff-Appellants at 5, *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020) (No. 19-10604).

³⁵⁰ Olson et al., *supra* note 326, at 1–2 (2016).

Advocates v. Becerra (NIFLA).³⁵¹ In *NIFLA*, the distinction between professional speech surrounded crisis pregnancy centers who sued for a violation of free speech over a law that required the public posting of abortion as an alternative option to pregnancy and of the centers' licensure status.³⁵² The Court held that the law violated the centers' constitutional rights to free speech and accordingly refused to recognize professional speech "as a unique category that is exempt from ordinary First Amendment principles."³⁵³ While it is true that professional speech cannot be regulated insofar as it is unconstitutional to force a crisis pregnancy center to display their licensure status and to provide abortion as an alternative option regarding pregnancy,³⁵⁴ that hardly applies in the case of conversion therapy. Conversion therapy practitioners are presumed to be licensed therapists, and there is no requirement that they post any alternatives to their practice, the case surrounds the imposition of speech—the *requirement* of a public posting of alternatives—rather than the withholding of harmful speech.³⁵⁵ The Court did not tell the centers that they *could not* discuss a topic with their clients, rather that they could not force the centers to discuss abortion with pregnant women.³⁵⁶

On both points concerning speech, earlier courts disagree with *Otto*. For example, in 2013, *Pickup v. Brown* held that limitations on SOCE were not content-based and therefore not subject to strict scrutiny.³⁵⁷ *Pickup* determined that California's anti-conversion therapy Bill SB 1172 was constitutional, as it "regulation of professional *conduct* . . . even though such regulation may have an incidental effect on speech,"³⁵⁸ something the *Otto* court recognizes as legitimate.³⁵⁹ Therefore, those anti-SOCE bills were in

³⁵¹ Nat'l Inst. of Fam. and Life Advoc. v. Becerra (NIFLA), 138 S. Ct. 2361, 2375 (2018) (refusing to recognize professional speech as a new category of speech deserving less constitutional protection).

³⁵² *Id.* at 2370–71.

³⁵³ *Id.* at 2375.

³⁵⁴ *Id.* at 2370–71.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 2377–78.

³⁵⁷ *Pickup v. Brown*, 728 F.3d 1042, 1048, 1055–57 (9th Cir. 2013).

³⁵⁸ *Id.* at 1055; see also Ruthann Robson, *The Constitutionality of Legal Prohibitions of Sexual Conversion Therapy*, AM. PSYCHOLOGY-LAW SOC'Y (Oct. 2014), <https://www.apadivisions.org/division-41/publications/newsletters/news/2014/10/legal-update> [<https://perma.cc/YP42-3QHP>] (discussing the constitutionality of legal prohibitions of sexual conversion therapy).

³⁵⁹ *Otto v. City of Boca Raton*, 981 F.3d 854, 869 (11th Cir. 2020).

fact subject to rational basis review.³⁶⁰ While the Ninth Circuit ultimately amended its opinion in 2014, it did not change the legality of California’s bill.³⁶¹ Instead, while it kept its initial ruling, stating, “SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors,”³⁶² it changed the leeway awarded to therapists such that they would be permitted to discuss “the pros and cons of SOCE with their patients.”³⁶³ Also in 2014, in *King v. Christie*³⁶⁴ “[t]he Third Circuit rejected the possibility of any meaningful distinction between the categories of ‘conduct’ and ‘speech’ in the (talk) therapy context. . . . [and] crafted a notion of ‘professional speech’ as speech that occurs pursuant to the practice of a licensed profession.”³⁶⁵ Thus, *Otto* further misinterprets the limiting elements of speech with regard to professional practice and content by utilizing case law that does not require licensure and imposes speech rather than withholds it.³⁶⁶

Regardless, even if the *Otto* court was correct in its determination that this type of language is subject to strict scrutiny, the First Amendment should still not protect this kind of speech. Free speech is protected insofar as it is non-violent; speech that is violent is not protectable.³⁶⁷ You cannot yell “fire” in a crowded theatre,³⁶⁸ nor can you advocate for individuals to do harm to others³⁶⁹ specifically such that the speech will lead to “imminent lawless

³⁶⁰ *Id.* at 868.

³⁶¹ *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014); *see also* Clay Calvert et al., *Conversion Therapy and Free Speech: A Doctrinal and Theoretical First Amendment Analysis*, 20 WM & MARY J. RACE, GENDER & SOC. JUST. 525, 527 (2014) (analyzing Ninth Circuit upholding the constitutionality of the California statute).

³⁶² *Pickup*, 728 F.3d at 1057.

³⁶³ *Pickup*, 740 F.3d at 1229.

³⁶⁴ *King v. Christie*, 767 F.3d 216, 216 (3d Cir. 2014).

³⁶⁵ Robson, *supra* note 357.

³⁶⁶ *Otto v. City of Boca Raton*, 981 F.3d 854, 873 (11th Cir. 2020).

³⁶⁷ *See* *Schenck v. United States*, 249 U.S. 47, 52 (1919) (holding that words that provoke individuals to act in a certain manner may be protected, however the type of language must be examined with regard to the circumstances in which the words are being used). *Schenck* sent anti-war propaganda to individuals’ homes, which during a war where draftees were needed, was considered unprotectable speech. *Id.*; *see also* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (holding that speech which advocates for harm to others is not protected by the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444, 449 n.4 (1969) (“Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action . . .”).

³⁶⁸ *Schenck*, 249 U.S. at 52.

³⁶⁹ *Chaplinsky*, 315 U.S. at 573.

action.”³⁷⁰ Violent language has protections only so long as that speech does not advocate for violence or law-breaking that will immediately occur.³⁷¹ If it is clinically and empirically proven that language can do harm, and that the *type of language used in conversion therapy can do harm*, then simply speaking those words to a client must cause immediate harm and should not be protected under the Free Speech Clause of the Constitution.

Moreover, religious beliefs cannot be used as a protection against doing harm to others or against breaking the law,³⁷² and religious beliefs can be usurped if there is “a compelling public necessity.”³⁷³ A cursory examination of the type of service provided by conversion therapists would perhaps lead one to think that SOCE is merely an expression of personal religious opinion. Talk therapy is much more than that. A therapist may voice their personal opinion about homosexuality and religion and may retain constitutional protections as a private citizen; but, once that therapist attempts to use that opinion to impose a definitively harmful practice on another person in a clinical setting, it becomes more than a protected expression—it is now a deliberate use of language to impose a harm on another, thereby becoming unprotected speech.³⁷⁴ In the same way, an individual may shout their beliefs, however unsavory, to the rooftops on the street, but that individual may not voice a belief such that it imposes harm on another person if they are ethically bound to do no harm towards that individual.³⁷⁵ In short, therapists are

³⁷⁰ *Brandenburg*, 395 U.S. at 449 n.4.

³⁷¹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933–34 (1982) (holding that the nonviolent portions of the speech were protected, but the portions of the speech which could have led to violence may not be protected).

³⁷² *Cantwell v. State of Connecticut*, 310 U.S. 296, 311 (1940).

³⁷³ *ShIPLEY v. City of New York*, 37 N.E.3d 58, 62 (N.Y. 2015); *see also* *Montgomery v. County of Clinton*, No. 90-1940, 1991 WL 153071, at *6 (6th Cir. Aug. 9, 1991) (“The proof does not establish that plaintiff’s religion forbids autopsies but rather appears to allow them in these circumstances.”); *see also* LA. REV. STAT. ANN. § 13:5713(D) (2018) (“If the family of the deceased objects to an autopsy on religious grounds, the autopsy shall not be performed unless the coroner finds that the facts surrounding the death require that an autopsy be performed in the interest of the public safety, public health, or public welfare.”); Tex. CODE CRIM. PROC. ANN. art. 49.04 (2021) (establishing the circumstances which require an autopsy, without a religious exception); FLA. STAT. § 406.11 (2022) (establishing the circumstances which require an autopsy, without a religious exception); FLA. ADMIN. CODE ANN. r. 11G-2.003 (2012) (establishing that the medical examiner has the unlimited discretion to conduct an autopsy in certain situations); ALA. CODE § 15-4-2 (1975) (establishing that a coroner gets to determine when an autopsy should be conducted).

³⁷⁴ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

³⁷⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572–73 (1942). The Court clarifies that “lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” are not

permitted to tell a patient, “Because of my religious beliefs, I do not approve of same-sex behavior.” They may not say, “Because of my religious beliefs I do not approve of same-sex behavior, and therefore I can use those beliefs in a clinical setting to prevent you from doing said behavior,” because that would cause an undue and specific harm to the individual through breach of duty by a therapist to a patient in a special relationship.

Therefore, conversion therapy can be banned under the First Amendment in any circumstance. As *Yoder* established, if the religion can survive without a practice set within that religion, it is not a fundamental belief whose removal will set about the destruction of the religion.³⁷⁶ Religious belief cannot stand “as a defense to the commission of an act which is in plain violation of the law of the state.”³⁷⁷ To that extent, freedom of speech and religion cannot act as a refuge for the violation of child abuse laws if the state decides that those protections for child safety surmount religious liberties. Conversion therapy, including talk therapy, is a form of torture. A therapist is ethically bound to do research on a practice based on established medical science and refrain from imposing torture on their patients. This triumvirate of facts must lead to the conclusion that conversion therapy is not protected speech, is a violation of a child’s right to be free from harm, and a breach of the relationship between therapist and patient. Conversion therapy should not qualify as a form of protected speech nor should courts use content-based strict scrutiny analysis to determine whether bans on conversion therapy violate constitutional liberties. The examination must fall under rational basis review and ask whether the prevention of child abuse is enough to enact a ban on the practice. Thus, there is no circumstance where conversion therapy satisfies all legal parameters under which a law can survive scrutiny. Conversion therapy is not a fundamental part of any religion without which the religion would collapse. Child abuse is a compelling government interest that leads to the logical conclusion that conversion therapy is not protected speech, and to that end, *even if* child abuse did not constitute a compelling public interest, therapists’ duty of care to their patients to not enact torture on their patients would impel them against the practice of conversion therapy.

covered. *Id.* at 572. The Court continued, writing that “no words being forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.” *Id.* at 573 (citing *State v. Brown*, 38 A. 731, 731 (N.H. 1894); *State v. McConnell*, 47 A. 267, 267–68 (N.H. 1900); *see also* *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969)).

³⁷⁶ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

³⁷⁷ *People v. Pierson*, 68 N.E. 243, 244 (N.Y. 1903).

VIII. CONCLUSION

In 2021, England's then-Prime Minister Boris Johnson promised to follow through on a ban on conversion therapy as a practice in England,³⁷⁸ a sentiment echoed in early 2023 by Michelle Donelan as Culture Minister appointed by the short-lived Truss cabinet.³⁷⁹ Northern Ireland, too, has passed a non-binding motion calling for a ban on conversion therapy in all forms,³⁸⁰ and in 2022 Scotland passed The Gender Recognition Reform bill that makes it easier for transgender people to change their legal gender.³⁸¹ Wales has since joined in their resolution and filed their own plans to make gender affirming legislation more accessible.³⁸² In the United States, the Biden Administration has also sought to expand healthcare rights for transgender individuals.³⁸³ The Affordable Care Act has explicit prohibitions on discrimination under the Health Care Rights Law, also known as Section 1557, which “bans discrimination on the basis of race, color, national origin, sex, age, and disability in health programs and activities that receive federal funding.”³⁸⁴ While 22 states have passed or are considering bills that deny

³⁷⁸ Harry Farley & Eleanor Lawrie, *What Is Conversion Therapy and When Will It Be Banned?*, BBC NEWS (May 11, 2021), <https://www.bbc.com/news/explainers-56496423> [<https://perma.cc/ELU3-EF8M>].

³⁷⁹ Sachin Ravikumar, *Britain Vows New Law to Ban Conversion Therapy for LGBT People*, REUTERS (Jan. 17, 2023, 7:51 AM), <https://www.reuters.com/world/uk/britain-promises-new-law-ban-conversion-therapy-targeting-lgbt-people-2023-01-17> [<https://perma.cc/ZR7B-N7DJ>]. At the time of writing Michelle Donelan has since been replaced as Culture Minister under the Sunak cabinet. It is unclear what steps now-Prime Minister Rishi Sunak will take regarding protections for all members of the LGBTQ+ community against the practice of conversion therapy.

³⁸⁰ *Id.*

³⁸¹ *Scotland Passes Bill Making It Easier to Change Gender*, REUTERS (Dec. 22, 2022, 2:18 PM), <https://www.reuters.com/world/europe/scotland-passes-bill-make-it-easier-change-gender-2022-12-22> [<https://perma.cc/58Q9-B7KR>].

³⁸² James Greig, *Wales Joins Scotland in Defying Westminster on Trans Rights*, DAZED (Feb. 7, 2023, 9:19 AM), <https://www.dazeddigital.com/life-culture/article/58130/1/wales-scotland-want-trans-rights-england-doesnt-gra-rishi-sunak> [<https://perma.cc/TUT7-BCYU>].

³⁸³ Amy Goldstein, *Biden Administration Revives Anti-Bias Protections in Health Care for Transgender People*, WASH. POST (May 10, 2021, 5:51 PM), https://www.washingtonpost.com/health/transgender-protection-hhs/2021/05/10/0852ce88-b17d-11eb-a980-a60af976ed44_story.html [<https://perma.cc/5NJP-3QMJJ>].

³⁸⁴ *Trump Administration Plan to Roll Back Health Care Nondiscrimination Regulation: Frequently Asked Questions*, NAT'L CTR. TRANSGENDER EQUAL. (Apr. 2020), <https://transequality.org/HCRL-FAQ> [<https://perma.cc/5KZN-GJVX>]. As established in *Bostock v. Clayton County*, “sex” includes gender identity and sexual orientation as a subset of protected immutable characteristics. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (“Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding

individuals access to gender affirming care in various extremes,³⁸⁵ some in direct opposition to this Article,³⁸⁶ states like Minnesota, Illinois, and California, among others, are enacting explicit legal protections for gender affirming care and passing legislation that prevents legal prosecution of those who violate laws of other states preventing the receiving of gender-affirming care.³⁸⁷ At the same time, in 2022, the Senate passed The Respect for Marriage Act, which provides federal protections for same sex and interracial marriages.³⁸⁸

There is still more to do to protect LGBTQ+ individuals, specifically LGBTQ+ youth, from discriminatory practices. Conversion therapy is an inherently discriminatory practice with potential risks that endanger the lives and wellbeing of LGBTQ+ youth. Specific bans must not only be upheld once in place but permitted to be put into effect by state legislatures. Ideally, the United States government should enact a federal ban on conversion therapy to prevent the continued harm to children across the country. Until that time, state courts should continue to protect children from the practice by acknowledging the risks associated with conversion therapy and by utilizing the harm principle to weigh those risks against the wellbeing of the child.

LGBTQ+ individuals must be given the same rights as heterosexual and cisgender individuals under the Constitution, including access to healthcare and protections against abuse. Conversion therapy is a dangerous, unsound

to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.”).

³⁸⁵ Grace Eliza Goodwin, *Utah Just Banned Gender-Affirming Healthcare For Transgender Kids. These 21 Other States Are Considering Similar Bills in 2023*, INSIDER (Feb. 1, 2023, 9:19 AM), <https://www.insider.com/states-considering-bills-ban-gender-affirming-healthcare-transgender-youth-2023-1> [<https://perma.cc/5NLD-KAAX>].

³⁸⁶ Katherine Tangelakis-Lippert, *Florida Courts could Allow ‘Emergency’ Custody of Kids with Trans Parents or Siblings – Even if They Live in Another State*, BUS. INSIDER (Mar. 4, 2023, 12:47 AM), <https://www.businessinsider.com/florida-anti-trans-bill-court-custody-kids-gender-affirming-care-2023-3> [<https://perma.cc/C3G4-9ZU8>] (The bill would allow the state to remove a child from households where parents seek gender-affirming care for their child and place them in ‘emergency custody’ to prevent the child from receiving care to “protect them from domestic violence and abuse.”).

³⁸⁷ Steve Karnowski, *Minnesota Governor Signs Executive Order Protecting Rights to Gender Affirming care*, PBS (Mar. 8, 2023, 5:49 PM), <https://www.pbs.org/newshour/politics/minnesota-governor-signs-executive-order-protecting-rights-to-gender-affirming-care>; Brooke Migdon, *Three States Mulling Protections for Gender-Affirming Health Care*, THE HILL (Dec. 29, 2022), <https://thehill.com/changing-america/respect/diversity-inclusion/3791028-three-states-mulling-protections-for-gender-affirming-health-care/> [<https://perma.cc/SNC3-QBEH>].

³⁸⁸ Mary Clare Jalonick, *Watch: House Passes Bill Protecting Same-Sex and Interracial Marriages*, PBS (Dec. 8, 2022, 11:44 AM), <https://www.pbs.org/newshour/politics/watch-house-passes-bill-protecting-same-sex-and-interracial-marriages> [<https://perma.cc/B6FD-PKA7>].

practice that must cease to be awarded protections regardless of religious freedom because it violates child protection laws. It has been denounced by reputable medical groups. It finds its support in recognized hate groups across the United States. It is inherently discriminatory and creates immediate harm to individuals subjected to its practice. Conversion therapy is torture, and the safety and wellbeing of minors in the United States depends on the termination of its practice in all forms.