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Health and Safety Striving for Change: California's Attempt to Outlaw Conversion Therapy

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Striving for Change: California’s Attempt to Outlaw Conversion Therapy

*Devinn Larsen**

Code Sections Affected

Civil Code §§ 1761, 1770 (amended).
AB 2943 (Low); Ordered inactive.

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I. INTRODUCTION

James Guay struggled at an early age with haunting religious concerns associated with his feelings of same-sex attraction.¹ Fearing eternal damnation, he tried to abide by the confines of his religious upbringing by repressing and denying his thoughts and feelings.² He was unsuccessful on his own, but the self-hate taught by religious leaders, family, and friends was influential.³ Influence from his religious community made him contemplate self-harm and suicide, and eventually drove him to psychotherapeutic sexual orientation change efforts.⁴ Sexual orientation change efforts (“SOCE”), also known as “conversion therapy” or “reparative therapy,” seek to stop an individual from being homosexual or transgender.⁵ SOCE methods treat homosexuality and non-heterosexual gender identities as defects that can be treated or cured through methods such as hypnosis, heterosexual training, or even electroconvulsive shock therapy to negatively reinforce homosexual feelings.⁶

Guay was assured that the cure to homosexuality was to build non-sexual same-sex friendships, to identify as more masculine, and to date women.⁷ After attending therapy sessions and conferences for others struggling with similar internal conflicts, Guay’s confusion persisted until eventually, he realized that avoidance was not the solution.⁸ Psychological treatment to undo years of self-hate along with acceptance and freedom opened Guay’s eyes “to hopeful possibilities” that life has to offer.⁹

Others have dealt with experiences like Guay’s; for example, Samuel Brinton’s experience with SOCE included aversion therapy, a practice used to re-learn certain behaviors through physical stimulation or associated acts.¹⁰ Similar

1. James Guay, *My Hellish Youth in Gay Conversion Therapy and How I Got Out*, TIME (July 15, 2014), <http://time.com/2986440/sexual-conversion-therapy-gay/> (on file with *The University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. #BornPerfect: *The Facts About Conversion Therapy*, NAT’L CTR. FOR LESBIAN RTS., <http://www.nclri.org/bornperfect-the-facts-about-conversion-therapy/> (last visited Oct. 2, 2018) (on file with *The University of the Pacific Law Review*).

6. *Id.*

7. Guay, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Behavioral Psychology: Aversion Therapy*, PSYCHOLOGIST WORLD, <https://www.psychologistworld.com/behavior/aversion-therapy> (last visited Oct. 2, 2018) (on file with *The University of the Pacific Law Review*); Nico Lang, *Conversion Therapy Is “Torture”*: LGBT Survivors Are Fighting to Ban “Pray the Gay Away” Camps, SALON (Mar. 21, 2017), <https://www.salon.com/2017/03/21/conversion-therapy-is-torture-lgbt-survivors-are-fighting-to-ban-pray-the-gay-away-camps/> (on file with *The University of the Pacific Law Review*).

to training through a physical response like the “Pavlov dog experiment,” Brinton recalled having hands burned or frozen while simultaneously viewing homoerotic images in efforts to discourage his same-sex attraction.¹¹

Additionally, after Mathew Shurka came out to his parents at the age of sixteen, his father found him a conversion therapist in Manhattan to address the family’s concerns regarding homosexuality.¹² The conversion therapist did not believe in the existence of homosexuality and assured Mathew, and his family, that Mathew’s feelings were curable.¹³ As part of his therapy, the therapist separated Matthew from the female influence in his life, his mother and sister, for three years.¹⁴ Instead, he was allowed only to interact with the men in his family and males at his school.¹⁵ Nevertheless, the therapy did not work and his homosexual desires were “only getting stronger.”¹⁶

Research shows that people subjected to SOCE are at risk of significant mental health problems, including suicidal thoughts and depression.¹⁷ Furthermore, researchers have not only found a lack of credible evidence supporting the scientific validity of SOCE, but have even recommended that these efforts be avoided because instances of apparent success are often outweighed by significant psychological harm.¹⁸ The American Psychiatric Industry suggested that SOCE be avoided as “anecdotal reports of ‘cures’ are counterbalanced by anecdotal claims of psychological harm.”¹⁹

To increase support of California’s Lesbian, Gay, Bisexual, Transgender, and Questioning (“LGBTQ”) community, Assemblymember Evan Low authored AB 2943 to protect individuals from experiencing damages—both economic and psychological—as a result of exposure to the business practice of SOCE.²⁰

Review).

11. Lang, *supra* note 10.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. See *id.* (quoting Mathew Shurka in discussing his experience during conversion therapy treatments: “There wasn’t a moment when my actual attraction was going away,” Shurka said. “If anything, it was the opposite: it was only getting stronger.”).

17. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2943, at 5 (Apr. 10, 2018).

18. *Id.*

19. *Position Statement on Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)*, AM. PSYCHIATRIC ASS’N (Mar. 2000), <https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2000-therapies-change-sexual-orientation.pdf> [hereinafter *Position Statement*] (on file with *The University of the Pacific Law Review*).

20. AB 2943, §§ 1(q)–(r), 2018 Leg., 2017–2018 Sess. (as amended on May 30, 2018, but not enacted); see Lori Grisham, *What Does the Q in LGBTQ Stand For?*, USA TODAY (July 22, 2016, 12:45 PM), <https://www.usatoday.com/story/news/nation-now/2015/06/01/lgbtq-questioning-queer-meaning/26925563/> (on file with *The University of the Pacific Law Review*) (describing the increasing use of the letter “Q” in the LGBTQ acronym to include individuals identifying as “questioning” or “queer”).

II. LEGAL BACKGROUND

Medical professionals do not accept SOCE as a means of achieving a “cure” to homosexuality.²¹ Many states have acted to protect the LGBTQ community from SOCE practices by expanding their laws to prevent SOCE from occurring.²² Section A discusses the expansion of California legislation relating to SOCE,²³ as well as the Consumer Legal Remedies Act (“CLRA”).²⁴ Section B examines laws enacted by other states in an effort to protect individuals from SOCE.²⁵ Section C explores the constitutionality of AB 2943.²⁶

A. California’s Law Prior to AB 2943

In 1952, The American Psychiatric Association (“APA”) classified homosexuality as a “sociopathic personality disturbance.”²⁷ In 1973, the APA altered the classification of homosexuality and replaced it with “sexual orientation disturbance” which was meant to identify those who had conflicting feelings about their sexual orientation.²⁸ It was not until 1987 that homosexuality was completely removed from the APA classification and in 1992, the World Health Organization removed homosexuality altogether from its classification of mental disorders in its billing code system.²⁹ Subsection 1 discusses California’s current prohibition of SOCE on minors.³⁰ Subsection 2 explains the CLRA.³¹ Subsection 3 describes laws enacted by other states regarding SOCE on minors.³²

1. SOCE on Minors

Recognizing its compelling interest in protecting the LGBTQ community,

21. *Position Statement*, *supra* note 19.

22. See generally Susan Miller, ‘Being LGBTQ Is Not an Illness’: Record Number of States Banning Conversion Therapy, USA TODAY (Apr. 26, 2018, 5:56 PM), <https://www.usatoday.com/story/news/nation/2018/04/17/states-banning-conversion-therapy/518972002/> (on file with *The University of the Pacific Law Review*) (discussing bans on SOCE by other U.S. states).

23. *Infra* Part II.A.

24. *Infra* Part II.A.2.

25. *Infra* Part II.B.

26. *Infra* Part II.C.

27. *LGBT Rights Milestones Fast Facts*, CNN (Apr. 1, 2019, 6:24 PM), <https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html?no-st=1527822573> (on file with *The University of the Pacific Law Review*).

28. Neel Burton, *When Homosexuality Stopped Being a Mental Disorder*, PSYCHOLOGY TODAY (Sept. 18, 2015), <https://www.psychologytoday.com/us/blog/hide-and-peek/201509/when-homosexuality-stopped-being-mental-disorder> (on file with *The University of the Pacific Law Review*).

29. *Id.*

30. *Infra* Part II.A.1.

31. *Infra* Part II.A.2.

32. *Infra* Part II.A.3.

California prohibits the practice of SOCE on minors.³³ California became the first state to ban SOCE on children in the United States by enacting section 865 of the Business and Professions Code.³⁴ Only those therapy practices that actually alter a minor's sexual orientation are prohibited.³⁵ Practices that are sexual orientation-neutral, or those that do not seek to change sexual orientation, are permitted.³⁶ As a result of section 865, California considers engaging in SOCE on a minor patient to be unprofessional conduct.³⁷ State licensing agencies may discipline mental health providers who engage in SOCE.³⁸ Section 865 protects minors from the unethical SOCE practices that result in "irreparable psychological and emotional harm."³⁹

2. Consumer Legal Remedies Act

The CLRA makes "unfair methods of competition and unfair or deceptive acts or practices" relating to the sale of goods or services unlawful in multiple situations, including representing services as having benefits they cannot confer or misrepresenting the quality of a service.⁴⁰ The CLRA provides that customers who are harmed as a result of any "unfair or deceptive acts or practices" can bring an action to recover those damages.⁴¹ Additionally, the CLRA provides customers with an efficient remedial process against businesses that engage in unfair or deceptive business practice by allowing customers to seek damages against those businesses.⁴² Customers may bring an action seeking recovery or damages, an order prohibiting the practice, restitution, punitive damages, and any other relief deemed proper by the court.⁴³ The CLRA is liberally interpreted to ensure that consumers are protected from any unfair or deceptive acts of businesses in representing their goods or services.⁴⁴

33. 2011 Cal. Stat. ch. 835, §1(n); CAL. BUS. & PROF. CODE § 865.1 (West 2018).

34. Wyatt Buchanan, *State Bans Gay-Repair Therapy for Minors*, SF GATE (Sept. 29, 2012, 11:07 PM), <https://www.sfgate.com/news/article/State-bans-gay-repair-therapy-for-minors-3906032.php> (on file with *The University of the Pacific Law Review*).

35. CAL. BUS. & PROF. CODE § 865(b)(1) (West 2018).

36. *Id.* § 865(b)(2); ASSEMBLY JUDICIARY COMMITTEE, *supra* note 17.

37. CAL. BUS. & PROF. CODE § 865.2 (West 2018).

38. *Id.*

39. James Eng, *California Becomes First State in Nation to Ban 'Gay Cure' Therapy for Children*, MSNBC (Sept. 30, 2012, 11:43 AM), <http://www.msnbc.com/msnbc/california-becomes-first-state-nation> (on file with *The University of the Pacific Law Review*).

40. CAL. CIV. CODE §§ 1770(a)(5), 1770(a)(7) (West 2018).

41. *Id.* § 1770(a); *Id.* § 1780(a).

42. *Id.* § 1760.

43. *Id.* § 1780(a).

44. *Id.* § 1760.

B. Other States' SOCE Laws

After California enacted section 865 of its Business and Professions Code, other states followed its lead by outlawing SOCE on minors.⁴⁵ On August 19, 2013, New Jersey passed a law that made it illegal to engage in any SOCE practice on a minor.⁴⁶ Additionally, on December 22, 2014, the District of Columbia banned the practice.⁴⁷ Oregon followed on May 19, 2015 by also banning SOCE practices on minors.⁴⁸ Subsequently, between 2016 and 2018, Illinois, Vermont, New Mexico, Connecticut, Rhode Island, Nevada, Washington, Hawaii, Maryland, and New Hampshire also banned the practice of SOCE on minors.⁴⁹

While some states have not sought to ban the practice, individual cities took it upon themselves to begin banning conversion therapy practices seeking to change the sexual orientation or gender identity of minors.⁵⁰ In 2015, Cincinnati, Ohio became the first city in the United States to outlaw SOCE on minors, and since then several others have followed suit.⁵¹ Although many cities and states currently have legislation or regulations banning SOCE on minors, California seeks to become the first state to extend those protections to adults and declare the practice fraudulent under the CLRA.⁵²

C. Constitutionality of AB 2943

The First Amendment states, “Congress shall make no law respecting an

45. *#BornPerfect: The Facts About Conversion Therapy*, NAT'L CTR. FOR LESBIAN RTS., <http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/> (last visited July 15, 2018) (on file with *The University of the Pacific Law Review*).

46. *#BornPerfect: Laws & Legislation By State*, NAT'L CTR. FOR LESBIAN RTS., <http://www.nclrights.org/bornperfect-laws-legislation-by-state/> (last visited July 15, 2018) (on file with *The University of the Pacific Law Review*).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *See id.* (listing the cities that have enacted legislation banning SOCE on minors between 2015 and 2018, including: Miami Beach, Florida; Wilton Manors, Florida; Seattle, Washington; Miami, Florida; North Bay Village, Florida; West Palm Beach, Florida; Bay Harbor Islands, Florida; Pittsburgh, Pennsylvania; Boynton Beach, Florida; Lake Worth, Florida; El Portal, Florida; Toledo, Ohio; Key West, Florida; Columbus, Ohio; Tampa, Florida; Delray Beach, Florida; Riviera Beach, Florida; Wellington Village, Florida; Dayton, Ohio; Philadelphia, Pennsylvania; Allentown, Pennsylvania; Greenacres, Florida; Athens, Ohio; Pima County, Arizona; Boca Raton, Florida; Oakland Park, Florida; Palm Beach County, Florida; Reading, Pennsylvania; Doylestown, Pennsylvania. Broward County, Florida; State College, Pennsylvania; Erie County, New York; Gainesville, Florida; Milwaukee, Wisconsin; Madison, Wisconsin; New York City, New York; and Albany, New York).

52. Morgan Brinlee, *California's Conversion Therapy Bill, If Passed, Would Make It The First State To Ban This Practice*, BUSTLE (Apr. 21, 2018), <https://www.bustle.com/p/californias-conversion-therapy-bill-if-passed-would-make-it-the-first-state-to-ban-this-practice-8861433> (on file with *The University of the Pacific Law Review*).

establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.”⁵³ Laws preventing the practice of SOCE, have been challenged by various religious and conservative organizations on constitutional grounds related to the free exercise of religion and speech.⁵⁴

In *Pickup v. Brown*, the Ninth Circuit Court of Appeals ruled on an issue related to the constitutionality of SOCE as practiced on minors.⁵⁵ In *Pickup*, a medical practitioner challenged the effect of Business and Professions Code section 865 on a therapist’s ability to speak freely to their patient about issues relating to sexual orientation.⁵⁶ The court discussed section 865 and concluded that it only regulated conduct, like therapy practices, in disallowing SOCE on minors.⁵⁷ The court suggested that section 865 would not interfere with a licensed therapist’s ability to discuss SOCE objectively with patients.⁵⁸ Then, the court explained that mental health professionals would have the ability to express their views on homosexuality or SOCE with their patients.⁵⁹

Further, the court explained only a limited reach existed towards the actual practice of SOCE and held that if the legislature deemed the practice harmful, California had the ability to regulate it.⁶⁰ The court applied its rational basis review and relied on reasoning provided during the legislative process of enacting section 865 to determine that the law is “rationally related to the legitimate governments interest of protecting the well-being of minors.”⁶¹ Legislators stated that section 865 did not violate the Constitution because it would not prevent any mental health provider from either performing SOCE on adults or recommending SOCE practices on children or adults by an unlicensed counselor, like a religious leader.⁶²

With the inclusion of adults and relation to violations of the CLRA, AB 2943 could have potentially violated some of the factors relied upon in the court’s reasoning in *Pickup* and if enacted, might have been subjected to different constitutional challenges.⁶³

53. U.S. CONST. amend. I.

54. See *Pickup v. Brown*, 740 F.3d 1208, 1225 (9th Cir. 2014) (deciding on the issue of whether SOCE efforts restricts freedom of speech in violation of the First Amendment of the United States Constitution).

55. *Id.* at 1217.

56. *Id.* at 1225.

57. *Id.*

58. *Id.* at 1229.

59. *Pickup*, 740 F.3d at 1223.

60. *Id.* at 1229.

61. *Id.* at 1232.

62. *Id.* at 1223.

63. Compare AB 2943, 2018 Leg., 2017–2018 Sess. (as amended on May 30, 2018, but not enacted) (expanding protection from SOCE to adults), with *Pickup*, 740 F.3d at 1223 (using the exclusion of adults as a factor for upholding constitutionality).

III. AB 2943

AB 2943 was designed to reduce harm and damage associated with SOCE by prohibiting the practice “to all persons, regardless of age.”⁶⁴ The prospective law, as written, recognized that the California Legislature has a “compelling interest in protecting the . . . well-being” of its citizens and desired to protect consumers from the harm attributed to practices which deceptively claim to change sexual orientation.⁶⁵ To achieve this, AB 2943 would have expanded protection of the LGBTQ community afforded by section 865 to those adults who suffer from the psychological and financial dangers of SOCE.⁶⁶

AB 2943 defined “sexual orientation change efforts” as “any practices that seek to change an individual’s sexual orientation” including “efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same sex.”⁶⁷ Further, practices that are gender orientation-neutral, or that provide support or acceptance for those seeking gender identity exploration, would not have been considered SOCE under the statute.⁶⁸

Finally, AB 2943 would have amended section 1770 of the Civil Code to include “advertising, offering for sale, or selling services constituting sexual orientation change efforts” as unlawful business practices under the CLRA.⁶⁹ This bill would have codified SOCE as a fraudulent business practice to support California’s LGBTQ community from the dangerous psychological and financial effects of SOCE.⁷⁰ Including SOCE as an unlawful business practice would have created a private right of action for those who suffered harm or damages as a result of SOCE therapy directly against those advertising or selling such practices.⁷¹

IV. ANALYSIS

AB 2943 would have outlawed SOCE under the CLRA and expressly declared the commercial practice of SOCE in exchange for any monetary compensation as a prohibited, unfair, and deceptive business practice due to the lack of substantiated evidence as to its success.⁷² This section analyzes the effect this bill would have had on California law as well as the arguments for and

64. ASSEMBLY JUDICIARY COMMITTEE, *supra* note 17, at 1.

65. AB 2943, §§ 1(q)–(r), 2018 Leg., 2017–2018 Sess. (as amended on May 30, 2018, but not enacted).

66. *Id.*

67. ASSEMBLY JUDICIARY COMMITTEE, *supra* note 17, at 2.

68. *Id.*

69. AB 2943, § 2, 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as amended May 30, 2018, but not enacted).

70. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2943, at 8 (July 3, 2018).

71. ASSEMBLY JUDICIARY COMMITTEE, *supra* note 17, at 3.

72. AB 2943, 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as amended May 30, 2018, but not enacted).

against AB 2943.⁷³

Section A discusses how the bill would have changed California's current Civil Code by declaring SOCE an unlawful business practice.⁷⁴ Section B analyzes the benefits the bill could have provided to the LGBTQ community.⁷⁵ Section C describes the concerns brought forth by the bill's opponents as well as potential constitutional challenges.⁷⁶

A. How AB 2943 Would Have Changed California Law

AB 2943 would have changed California law by identifying an additional business practice as unlawful under the CLRA.⁷⁷ Currently, the CLRA declares various "unfair methods of competition and unfair or deceptive acts or business practices" resulting in the sale of services as "unlawful."⁷⁸ The CLRA contains twenty-seven different provisions that state various unlawful methods used or deceitful acts including: misrepresenting the approval of a service, representing a service as having a quality it does not have, and advertising services with an intent not to sell them in the way they were advertised.⁷⁹ AB 2943 would have identified a twenty-eighth unfair or deceptive practice—the advertising for, offering to sell, or selling of SOCE services.⁸⁰

The addition of "advertising, offering for sale, or selling services constituting sexual orientation change efforts" to the Civil Code would have made it illegal for anyone to suggest that their therapy practices offered could change another person's gender identity or sexual orientation.⁸¹ Integrating SOCE into the CLRA would have affected those advertising or selling SOCE as a way to change sexual orientation because the practice technically misrepresents the effects of the service.⁸² Although, including this bill in California's legislation would not have prohibited discussing SOCE practices or communicating about SOCE objectively.⁸³ AB 2943 would have merely restricted the advertisement of SOCE practices as a way to cure or reduce same-sex or questioning attractions and would halted any for-profit use of SOCE.⁸⁴

73. *Infra* Part IV.

74. *Infra* Part IV.A.

75. *Infra* Part IV.B.

76. *Infra* Part IV.C.

77. SENATE RULES COMMITTEE, *supra* note 70, at 1.

78. CAL. CIV. CODE § 1770(a) (West 2018).

79. CAL. CIV. CODE §§ 1770(a)(2), 1770(a)(5), 1770(a)(9) (West 2018).

80. AB 2943, § 2, 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as amended May 30, 2018, but not enacted).

81. Brinlee, *supra* note 52.

82. SENATE RULES COMMITTEE, *supra* note 70, at 5.

83. Brinlee, *supra* note 52.

84. *Id.*

B. Supporting Arguments for AB 2943

A significant number of medical researchers reject or discourage the use of SOCE due to the lack of credible evidence as to its actual ability to change sexual orientation and the negative effects caused by SOCE.⁸⁵ Criticizing SOCE practices as “harmful or dangerous,” medical professionals have encouraged therapists to avoid representing SOCE to their patients in a way that would suggest a cure to homosexuality or as a way to change sexual orientation.⁸⁶ There is little to no research available that substantiates the practice of SOCE as successfully changing an individual’s sexual orientation.⁸⁷ Additionally, medical professionals encourage social support and the use of accurate information related to sexual orientation to reduce the rejection of those struggling with the “normal and positive variations of human sexuality regardless of sexual orientation identity.”⁸⁸ Insufficient evidence exists to support or prove that SOCE is successful,⁸⁹ and the dangers of engaging in SOCE practices within the LGBTQ community are apparent and immense.⁹⁰

Subsection 1 discusses current and recent medical research on SOCE practices which legislators relied on while drafting AB 2943.⁹¹ Subsection 2 explains the protections that AB 2943 would have afforded to Californians, especially members of the LGBTQ community.⁹²

1. Recent Medical Research on SOCE

All major medical professions reject therapy practices that claim to eliminate, change, or suppress homosexuality.⁹³ Sexual orientation is the attraction one feels

85. SENATE RULES COMMITTEE, *supra* note 70, at 4.

86. B.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*, AM. PSYCHOLOGIST 31 (2010), available at <http://www.apa.org/about/policy/sexual-orientation.aspx> (on file with *The University of the Pacific Law Review*).

87. *Position Statement*, *supra* note 19.

88. Anton, *supra* note 86.

89. *Id.*

90. See AB 2943, § 1(b), 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as amended May 30, 2018, but not enacted) (describing the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation findings: “The task force concluded that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame towards parents, feels of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.”).

91. *Infra* Part IV.B.1.

92. *Infra* Part IV.B.2.

93. *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel*, AM. PSYCHOLOGICAL ASS’N 5 (2008), available at <http://www.apa.org/pi/lgbt/resources/just-the-facts.aspx> [hereinafter *Just the Facts*] (on file with *The University of the Pacific Law Review*).

towards those of the opposite sex, same sex, or both sexes.⁹⁴ No one factor clearly determines sexual orientation, and sexual orientation is known to vary among individuals.⁹⁵ Additional challenges arise in this transformative time, especially for those within the LGBTQ community because of potential prejudice and discrimination from family or society.⁹⁶ The pressures and concerns relating to social norms can often drive individuals to practitioners who promise to provide a cure for their homosexual beliefs, but that actually cause great harm to the individual.⁹⁷

Organizations including the American Psychological Association, the American Psychiatric Association, the Pan American Health Organization, and the American Counseling Association have issued statements discrediting SOCE for lack of medical justification and advising therapists and school counselors to try to promote acceptance to counteract any bias related to sexual orientation.⁹⁸ AB 2943 would have provided clear notice to medical professionals, and Californians generally, that SOCE cannot be practiced because it fraudulently misleads consumers as to its ability.⁹⁹

2. Providing Protection

AB 2943 provided clarification as to the fact that SOCE falsely promises to change a person's sexual orientation while also limiting the scope of its application to those services which are advertised or practiced in exchange for some sort of monetary compensation.¹⁰⁰ California has taken steps to protect consumers from any unfair, deceptive, or fraudulent business practices resulting in the sale of goods and services.¹⁰¹ Additionally, extending those protections in the law to therapy practices are necessary to ensure that licensed medical practitioners are providing helpful and beneficial services to patients.¹⁰² Laws preventing the practice of SOCE help protect individuals from being coerced into subjecting themselves or others into therapies which may not be as effective as they claim.¹⁰³ Currently, section 865 considers the practice of SOCE on minors to be unprofessional conduct.¹⁰⁴ By expanding the scope of SOCE to include adults, AB 2943 would have afforded additional consumers protection from harmful

94. *Id.* at 5.

95. *Id.* at 3.

96. *Id.*

97. *Id.* at 4; Guay, *supra* note 1.

98. #BornPerfect: *The Facts About Conversion Therapy*, *supra* note 45; *Just the Facts*, *supra* note 93, at 6.

99. SENATE RULES COMMITTEE, *supra* note 70, at 8.

100. *Id.* at 5.

101. CAL. CIV. CODE §§ 1770(a)(5), 1770(a)(7) (West 2018).

102. #BornPerfect: *The Facts About Conversion Therapy*, *supra* note 45.

103. *Id.*

104. CAL. BUS. & PROF. CODE § 865.2 (West 2018).

practices by extending the CLRA to include SOCE as an unfair, deceptive, and fraudulent business practice.¹⁰⁵ Supported by over twenty organizations including the Equality Project, the Trevor Project, the California Medical Association, and the Consumer Attorneys of California, AB 2943 would have reinforced California's interest in protecting the well-being of its LGBTQ community.¹⁰⁶

C. Arguments Against AB 2943

Over sixty organizations and 1,000 private individuals registered in opposition to AB 2943.¹⁰⁷ Many of the organizations were religious groups, one of which claimed that the bill unfairly restricted the moral and ethical “truths of the Bible.”¹⁰⁸ People were concerned that the bill's language would potentially “make it illegal to distribute resources, sell books, offer counseling services, or direct someone to a biblically based model for getting help with gender confusion and homosexuality.”¹⁰⁹ Believing that AB 2943 unfairly targeted conservatives and religious groups, a representative for the Concerned Women for America argued that the bill placed “fraudulent and illegal” restrictions on biblical principles relating to sexual orientation and gender identity.¹¹⁰ Additionally, opponents argued that AB 2943 interfered with an individual's ability to access counseling services to curb unwanted same-sex feelings of attraction.¹¹¹ Oppositional organizations claimed that anti-conversion therapy groups relied on data which falsely state that conversion therapy is “ineffective and harmful.”¹¹² Though concerns existed, AB 2943 applied strictly to the advertisement for SOCE or performance of SOCE for profit, and would not have affected practices such as the distribution or use of the Bible.¹¹³

Subsection 1 discusses the constitutionality concerns and effects that a ban on SOCE would have on a person's ability to freely choose a therapist.¹¹⁴ Subsection 2 addresses the question raised by oppositional groups relating to the

105. *Id.*; SENATE RULES COMMITTEE, *supra* note 70, at 5.

106. SENATE RULES COMMITTEE, *supra* note 70, at 5; AB 2943, § 1(q), 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on May 30, 2018, but not enacted).

107. SENATE RULES COMMITTEE, *supra* note 70, at 6–8.

108. *Id.* at 8.

109. Emily Jones, *California Senate Stalls Vote on Controversial LGBT Bill*, CBN NEWS (July 5, 2018), <http://www1.cbn.com/cbnnews/us/2018/july/california-senate-stalls-vote-on-controversial-lgbt-bill> (on file with *The University of the Pacific Law Review*).

110. Marlo Tucker, *Prayer and Action Needed – Oppose AB 2943!*, CONCERNED WOMEN FOR AM. (May 16, 2018), <https://concernedwomen.org/prayer-and-action-needed-oppose-ab-2943/> (on file with *The University of the Pacific Law Review*).

111. *Id.*

112. Peter Sprigg, *Protect Client and Therapist Freedom of Choice Regarding Sexual Orientation Change Efforts*, FAM. RES. COUNCIL (Mar. 2014), <https://www.frc.org/socetherapyban> (on file with *The University of the Pacific Law Review*); Tucker, *supra* note 110.

113. Brinlee, *supra* note 52.

114. *Infra* Part IV.B.1.

bill's effect on the distribution and other uses of the Bible.¹¹⁵

1. Constitutionality and Effects on Therapy Practices

People who opposed AB 2943 argued that the bill restricted freedom of speech, impinged on religious freedom, and discouraged a person's choice of preferred therapy.¹¹⁶ AB 2943 would have banned all, voluntary and involuntary, SOCE.¹¹⁷ The opposition raised concerns regarding the bill's restriction on SOCE as it may inhibit a person seeking therapy to combat their conflicting sexual orientation feelings in relation to their religious faith from participating in any practice of SOCE, regardless of whether they desire the service or not.¹¹⁸ AB 2943 would have made it illegal to engage in the advertising, offering to sell, or selling of services constituting SOCE, even if a person seeks out such therapy.¹¹⁹ Individuals struggling with their sexual orientation are not prohibited from seeking help; however, they are merely restricted from purchasing services that attempt, aim, or advertise to change their sexual orientation.¹²⁰

The opposition discussed the dissent's opinion in *Pickup v. Brown* in great detail.¹²¹ There, a judge disagreed with the majority as to the constitutionality of section 865, which prohibited the practice of SOCE on minors.¹²² Opponents argued that the dissent highlights the fact that the majority basically bypassed the conditionality issue by identifying SOCE only as conduct and not speech.¹²³ The reclassification of counseling services, including SOCE, as "conduct" allows for the regulation of interactions between patients and mental health professionals.¹²⁴ Alternatively, if SOCE was classified only as "speech" protected by the First Amendment, regulations between medical professionals and their patients would likely be very minimal or non-existent.¹²⁵

Additionally, opponents argued that AB 2943 was unconstitutional because it infringed on religious liberty.¹²⁶ The opposition raised issues regarding the

115. *Infra* Part IV.B.2.

116. Jones, *supra* note 109.

117. Sprigg, *supra* note 112.

118. Tucker, *supra* note 110.

119. Letter from Kevin Snider, Chief Counsel, Pac. Just. Inst., to Toni G. Atkins, Senator, Cal. State Senate (June 19, 2018) (on file with *The University of the Pacific Law Review*); Tucker, *supra* note 110.

120. SENATE RULES COMMITTEE, *supra* note 70, at 9.

121. Sprigg, *supra* note 112.

122. *Id.*

123. *Id.*

124. Dale Carpenter, *A Constitutional Right to "Cure" Gays? No Way, Says the Ninth Circuit*, WASH. POST (Jan. 29, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/29/the-ninth-circuit-again-upholds-californias-ban-on-gay-conversion-therapy/?noredirect=on&utm_term=.480c0ca39655 (on file with *The University of the Pacific Law Review*).

125. *Id.*

126. Sprigg, *supra* note 112.

conflict between religious beliefs and struggles with homosexual attraction.¹²⁷ Therapy practices sought by those who have religious beliefs opposing homosexuality may try to seek therapy to better comply with their religious beliefs.¹²⁸ Outlawing such therapies might inhibit the free exercise of religion.¹²⁹ Individuals who set goals to eliminate their homosexual desires would have been unable to do so because of AB 2943 and government intervention.¹³⁰ Additionally, opponents raised concerns about the jobs of Christian counselors practicing biblical based therapy methods for gender confusion or homosexuality because if accepting money for services, the bill would have banned their practices.¹³¹ Opponents feared that AB 2943 unconstitutionally interfered with an individual's right to "set their own course on matters of sexual behavior," but that right may not be protected by the Constitution.¹³² Individuals may still seek out religious guidance regarding gender identity as they desire, but they would be unable to purchase any service which sought to outright change their sexual orientation.¹³³

2. AB 2943 and the Bible

Assemblymember Evan Low, the author of AB 2943, stated specifically that the bill would not ban the Bible, but the opposition did not agree.¹³⁴ Marlo Tucker of the Concerned Woman for America expressed concerns that AB 2943 would interfere with religious organizations, book sales, and religious-based counseling services.¹³⁵ As introduced, the bill's language prohibited or banned any "advertising, offering to engage in or engaging in sexual orientation change efforts with an individual."¹³⁶ As the CLRA applies to services as well as books and other educational materials, the broad language of AB 2943 created concerns regarding the Bible and whether the Bible, if used as a way to overcome same-sex attraction, would be considered SOCE under the potential statute.¹³⁷ With many religious groups supporting only heterosexual relationships in their

127. *Id.*

128. *Id.*

129. *Id.*

130. Tucker, *supra* note 110.

131. Jones, *supra* note 109; Tucker, *supra* note 110.

132. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2943, at 11 (June 12, 2018) (quoting oppositional arguments of the Christian Center); see also U.S. CONST. amend. I (protecting only constitutional rights of freedom of religion, free speech, free press, freedom to assemble peaceably, and freedom "to petition the Government for a redress of grievances")

133. SENATE RULES COMMITTEE, *supra* note 70, at 5.

134. Target 'Gay Conversion Therapy,' Not Religion, L.A. TIMES (May 7, 2018, 4:10 AM), <http://www.latimes.com/opinion/editorials/la-ed-gay-conversion-20180507-story.html> (on file with *The University of the Pacific Law Review*); Tucker, *supra* note 110.

135. Tucker, *supra* note 110.

136. Target 'Gay Conversion Therapy,' Not Religion, *supra* note 134.

137. *Id.*

teachings and texts, the unclear nature of the original drafting raised concerns as to the effect AB 2943 would have had on the use of the Bible during religious counseling.¹³⁸

To limit its application, the language of AB 2943 was amended to declare unlawful the “advertising, offering for sale, or selling services constituting sexual orientation change efforts to an individual” under the CLRA.¹³⁹ AB 2943 included language that seemed to inadvertently target religion and the use of religious texts related to moral viewpoints on gender identity and sexual orientation, but the bill “cover[ed] only sexual orientation change efforts that result in the ‘sale or lease of goods or services’ and thus wouldn’t affect a lot of religious communications in which no money changes hands.”¹⁴⁰ Because the CLRA must be liberally construed, many were fearful that the amendment to AB 2943 might prohibit paid speaking engagements or religious conferences discussing SOCE.¹⁴¹ According to Assemblymember Low, AB 2943 would not have affected any books or prevented speaking or writing on issues relating to SOCE.¹⁴² Assemblymember Low indicated a desire to accommodate and address religious concerns.¹⁴³ Nevertheless, certain religious groups have stated that “no amendment would be enough to win their support.”¹⁴⁴ Though AB 2943 did not expressly include any specification related to books, the practices banned in the proposed statute included only those that constituted the advertisement for or the actual sale of SOCE services.¹⁴⁵

V. CONCLUSION

Enacting AB 2943 into law would have made California the first state to ban

138. *Id.*

139. SENATE RULES COMMITTEE, *supra* note 70, at 1 (July 3, 2018); AB 2943, 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as amended on May 30, 2018, but not enacted).

140. *Target ‘Gay Conversion Therapy,’ Not Religion*, *supra* note 134.

141. Calvin Freiburger, *California Bill Banning Books, Therapy to Help Unwanted Gay Attraction Stalls Amid Lawsuit Fears*, LIFE SITE NEWS (July 12, 2018, 3:33 PM), <https://www.lifesitenews.com/news/california-reparative-therapy-bill-stalls-in-senate-amid-fear-of-lawsuits> (on file with *The University of the Pacific Law Review*).

142. SENATE JUDICIARY COMMITTEE, *supra* note 132, at 5.

143. Freiburger, *supra* note 141.

144. *Id.*

145. SENATE RULES COMMITTEE, *supra* note 70, at 5 (including a statement from AB 2943’s author: “AB 2943 does one thing, and one thing only: it codifies existing court decisions and clarifies that California’s consumer fraud laws bar the long-discredited and harmful practice of conversion therapy, which falsely promises to be able to change an individual’s sexual orientation or gender identity. The bill by its express terms is limited to the practice of conversion therapy as a commercial service in exchange for monetary compensation. It does not apply to the sale of books or any other kind of goods, and it does not prevent anyone from speaking or writing on the subject of conversion therapy in any forum. People spend years of their lives and thousands of dollars on these programs, only to find that they have wasted their time and money on false promises.”).

the performance of SOCE on any person, adults and minors alike.¹⁴⁶ SOCE practices are very controversial.¹⁴⁷ Countless individuals recall stories of the harsh effects of their experiences with SOCE,¹⁴⁸ but some individuals still desire and require assistance in exploring their sexual orientation.¹⁴⁹ AB 2943 would not have inhibited the free exploration of gender identity, but actually recognized that individuals may struggle to understand it.¹⁵⁰ Throughout the legislative process, both sides argued that AB 2943 created increased risks to adolescents,¹⁵¹ and noted the lack of credible evidence of either the positive effects of SOCE¹⁵² or the negative effects of SOCE.¹⁵³ Towards the end of the legislative session, Assemblymember Low attempted to reconcile concerns about the breadth of AB 2943 with the opposition, but his attempts failed.¹⁵⁴ Assemblymember Low ordered AB 2943 to the inactive file, effectively killing the legislation for this session, in “hopes of finding consensus with religious communities who vigorously opposed the proposal.”¹⁵⁵ Additionally, in a statement made after the withdrawal of AB 2943, Assemblymember Low explained, “The best policy is not made in a vacuum and in order to advance the strongest piece of legislation, the bill requires additional time to allow for an inclusive process not hampered by legislative deadlines.”¹⁵⁶ The true effects of AB 2943 on SOCE may not be entirely known, but the authors, as well as the bill itself, indicated that the bill would have simply established that selling SOCE services are unfair, deceptive, and unlawful practices because “[i]n the last four decades, ‘reparative’ therapists have not produced any rigorous scientific research to substantiate their claims of cure.”¹⁵⁷ With most medical professionals discrediting SOCE as a legitimate way to change sexual orientation, the Legislature aimed to declare the advertisement and sale of such services as fraudulent within California’s law to better protect its citizens.¹⁵⁸

146. Brinlee, *supra* note 52.

147. Freiburger, *supra* note 141; *see* SENATE JUDICIARY COMMITTEE, *supra* note 132, at 8 (discussing various arguments for and against the ban on SOCE practices).

148. *See supra* Part I (describing stories of individuals subjected to SOCE in their youth).

149. SENATE JUDICIARY COMMITTEE, *supra* note 132, at 9.

150. *Id.*

151. ASSEMBLY JUDICIARY COMMITTEE, *supra* note 17, at 5; SENATE JUDICIARY COMMITTEE, *supra* note 132.

152. SENATE JUDICIARY COMMITTEE, *supra* note 132.

153. ASSEMBLY JUDICIARY COMMITTEE, *supra* note 17, at 5; *Position Statement*, *supra* note 19.

154. Melanie Mason, *California Legislator Shelves Bill to Ban Paid ‘Gay Conversion Therapy’ for Adults*, LA TIMES (Aug. 31, 2018, 3:30 PM), <https://www.latimes.com/politics/la-pol-ca-conversion-therapy-bill-20180831-story.html> (on file with *The University of the Pacific Law Review*).

155. *Id.*

156. Press Release, Assemblymember Evan Low, Assemblymember Low Statement on Assembly Bill 2943 (Aug. 31, 2018) (on file with *The University of the Pacific Law Review*).

157. *Position Statement*, *supra* note 19.

158. Brinlee, *supra* note 52.