

EXPRESSIVE ENDS:
UNDERSTANDING CONVERSION THERAPY BANS

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ABSTRACT

LGBT rights groups have recently made bans on conversion therapy, a practice intended to reduce or eliminate a person's same-sex sexual attractions, a primary piece of their legislative agenda. However, the statutes only apply to licensed mental health professionals, even though most conversion therapy is practiced by religious counselors and lay ministers. Conversion therapy bans thus present a striking legal question: Why have LGBT rights advocates expended so much effort and political capital on laws that do not reach conversion therapy's primary providers? Based on archival research and original interviews, this Article argues that the bans are significant because of their expressive function, rather than their prescriptive effects. The laws' proponents are using the statutes to create a social norm against conversion therapy writ large, thus broadening the bans' reach to the religious practitioners the law cannot directly regulate. LGBT rights groups are also extending the bans' expressive message to support the argument that sexual orientation is immutable and to reverse a historical narrative that cast gays and lesbians as dangerous to children. These related claims have been central to gay rights efforts for much of the twentieth century and continue to shape LGBT rights battles. While the expressive effects of the bans are important, the laws and the campaign around them may have a negative effect. LGBT rights organizations working on the laws do not distinguish between conversion therapy efforts aimed at changing sexual orientation and those targeting behavior. This is troubling, not only because it fails to acknowledge the needs of same-sex attracted individuals who wish to live in accordance with their religious beliefs, but also because it reinforces a limited view of gay identity. Many within the LGBT movement contest the identity model that legal advocates have championed, and that conception of sexual orientation may in fact hinder the movement's long-term goals. Differentiating between the various types of conversion therapy would help remedy this by emphasizing the law's need to respect and protect sexual decisions and expressions, as well as create a platform from which to promote a more expansive vision of LGBT rights.

INTRODUCTION

LGBT¹ rights groups have made bans on conversion therapy, a practice intended to manage, reduce, or eliminate a person's same-sex sexual

1. This Article uses the term "LGBT" to refer to the contemporary rights movement. While many communities have embraced a broader membership and vision of rights—including queer, intersex, and asexual individuals within their umbrella—the legal movement, for better or worse, has limited its focus to lesbian, gay, bisexual, and transgender issues. When discussing the movement of the 1970s, 1980s,

attractions, a primary piece of their legal agenda.² These laws prohibit licensed mental health providers from offering conversion therapy to minors, identifying the practice as one that exposes minors to “serious harms.”³ However, mental health professionals have overwhelmingly rejected conversion therapy, such that most conversion therapy practitioners are religious and lay counselors to whom the laws do not apply.⁴ Conversion therapy bans thus present a striking legal puzzle: Why have LGBT rights advocates expended so much effort and political capital on laws that do not reach conversion therapy’s primary providers? This Article argues that the bans are significant because of their expressive function, rather than their prescriptive effects.

Conversion therapy bans emerged as a centerpiece of LGBT rights advocacy in 2012, when California became the first state to prohibit licensed mental health professionals from providing conversion therapy to minors.⁵ Four states and the District of Columbia quickly did the same, followed by several cities.⁶ On February 6, 2016, New York’s Governor, Andrew Cuomo, issued an executive order prohibiting insurers from covering conversion therapy practiced within the state.⁷ The state laws prohibit licensed mental health professionals, such as psychiatrists, psychologists, social workers, psychoanalysts, and counselors, from engaging in conversion therapy with minors, with conversion therapy defined as practices or treatments that seek to eliminate or reduce sexual or

and early 1990s, this Article refers to “gay and lesbian rights” or just “gay rights” advocates, as the movement’s scope had not yet expanded beyond these categories. Steven G. Epstein, *Gay and Lesbian Movements in the United States: Dilemmas of Identity, Diversity, and Political Strategy*, in *THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT* 66–68, 74–75 (Adam et al. eds., 1998); Amy L. Stone, *More than Adding a T: American Lesbian and Gay Activists’ Attitudes towards Transgender Inclusion*, 12 *SEXUALITIES* 334, 335–36, 349 (2009).

2. Conversion therapy is sometimes also referred to as reparative therapy or sexual orientation change efforts (SOCE). This article uses “conversion therapy,” as this term more accurately describes the religious “conversion” element of the practice. Reparative therapy is a specific approach to conversion therapy, popularized by Joseph Nicolosi and the National Association of Research and Therapy of Homosexuality (NARTH), while SOCE is an umbrella term that encompasses aversive, talk, cognitive, and reparative therapies aimed at changing same-sex attraction.

3. CAL. BUS. & PROF. CODE § 865 (West Supp. 2017); D.C. CODE § 7-1231.14a (LexisNexis Supp. 2016); 405 ILL. COMP. STAT. ANN. 48/20 (West Supp. 2016); N.J. STAT. ANN. 45:1-55 (West Supp. 2016); OR. REV. STAT. § 675.850(2)(a)(A) (2015); VT. STAT. ANN. tit. 26 § 1354(a)(40) (West Supp. 2016).

4. See *infra* Part I.B.1.

5. CAL. BUS. & PROF. CODE § 865.1.

6. Hayley Miller, *Cincinnati Becomes First City to Ban Conversion Therapy*, HUMAN RIGHTS CAMPAIGN (Dec. 9, 2015), <http://www.hrc.org/blog/cincinnati-becomes-first-city-to-ban-conversion-therapy>; Trudy Ring, *Seattle Bans Conversion Therapy for Minors*, ADVOC. (Aug. 1, 2016), <http://www.advocate.com/politics/2016/8/01/seattle-bans-conversion-therapy-minors>.

7. Press Release, N.Y. Governor’s Press Office, Governor Cuomo Announces Executive Actions Banning Coverage of Conversion Therapy, (Feb. 6, 2016), <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-banning-coverage-conversion-therapy>.

romantic attractions or feelings towards individuals of the same sex.⁸ Legislators have explicitly excluded from the definition of conversion therapy any counseling to individuals undergoing gender transition.⁹

Laws prohibiting conversion therapy are currently pending in thirteen states, and LGBT rights advocates are working with legislators to introduce these types of statutes throughout the rest of the country.¹⁰ At the federal level, both houses of Congress are considering four different bans and resolutions against conversion therapy, and the Obama Administration issued a statement denouncing the practice.¹¹ 2016 Democratic presidential candidate and former Secretary of State Hillary Clinton tweeted her support for the laws, stating, “It is time to put an end to conversion therapy for minors. We should be supporting LGBT kids—not trying to change them.”¹² The Republican Party, on the other hand, affirmed its support for conversion therapy in its 2016 national platform.¹³ Despite the GOP’s opposition, the bans have garnered a great deal of public attention and support as a means of eradicating homophobia and protecting vulnerable queer youth, who are at a higher risk of suicide than their heterosexual peers.¹⁴

Legislators and advocates discussing bans on conversion therapy rarely address the practice’s deeply religious dimension, nor do they differentiate between the different types of conversion therapy that practitioners offer. Individuals typically seek conversion therapy to reconcile their religious beliefs and their sexual orientation. For some, this means developing opposite-sex attractions and identifying as heterosexual, while for others the goal is instead to alter their behavior so as to not act on their same-sex desires.¹⁵ Mental health professionals have rejected efforts to change sexual

8. CAL. BUS. & PROF. CODE § 865; D.C. CODE § 7-1231.14a; 405 ILL. COMP. STAT. ANN. 48/20; N.J. STAT. ANN. 45:1-55; OR. REV. STAT. § 675.850(2)(a)(A); VT. STAT. ANN. tit. 26 § 1354.

9. See *supra* sources cited in note 8.

10. SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., ENDING CONVERSION THERAPY: SUPPORTING AND AFFIRMING LGBTQ YOUTH 39 (2015) [hereinafter SAMHSA]; #BornPerfect: Laws & Legislation by State, NAT’L CTR. FOR LESBIAN RIGHTS, <http://www.nclrights.org/bornperfect-laws-legislation-by-state/> (last visited Jan. 7, 2016).

11. SAMHSA, *supra* note 10, at 37, 39.

12. Hillary Clinton, (@HillaryClinton), TWITTER (Dec. 21, 2015, 11:06AM), twitter.com/HillaryClinton/status/679015185575645184.

13. REPUBLICAN NAT’L COMM., REPUBLICAN PLATFORM 2016, at 37 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf); Jeremy W. Peters, *Emerging Republican Platform Goes Far to the Right*, N.Y. TIMES (July 12, 2016), https://www.nytimes.com/2016/07/13/us/politics/republican-convention-issues.html?_r=0.

14. SAMHSA, *supra* note 10, at 2.

15. Individuals who seek to change their sexual orientation aim to transform their underlying identity, while those who want to control their behavior fall somewhere between conversion and either passing or covering. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 786 (2002). Unlike passing or covering, where the “underlying identity is . . . modified only for popular consumption,” controlling sexual behavior so as to align with identity is a rejection of homosexuality. *Id.*

orientation as unethical,¹⁶ all but relegating this type of conversion therapy to religious ministries. The American Psychological Association has, however, endorsed “sexual identity exploration” therapy, a supportive approach aimed at helping devout individuals with same-sex attractions explore a range of options, including changing their behaviors, in a nonjudgmental setting.¹⁷ This type of therapy seems to be excluded from the laws’ definition of conversion therapy, although the statutory language is ambiguous. This lack of clarity is perhaps deliberate, as the LGBT campaign identifies any type of behavioral modification therapy, even if offered in supportive therapeutic settings, as rooted in antigay sentiment. From the point of view of campaign activists, it perpetuates the view of same-sex sexual attraction as something that needs to be avoided, and therefore is equally harmful as its moralistic counterpart.¹⁸

This Article details how conversion therapy came to be primarily the province of religious and lay counselors, to explain why the laws have limited regulatory impact. It then argues that, given the laws’ narrow scope, their significance is in their expressive effects.¹⁹ The laws contribute to a

16. SAMHSA, *supra* note 10, at 11–14.

17. AM. PSYCHOLOGICAL ASS’N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 4 (2009); James A. Cates, *Identity in Crisis: Spirituality and Homosexuality in Adolescence*, 24 CHILD & ADOLESCENT SOC. WORK J. 369, 377–78 (2007); Douglas C. Haldeman, *When Sexual and Religious Orientation Collide: Considerations in Working with Conflicted Same-Sex Attracted Male Clients*, 32 COUNSELING PSYCHOLOGIST 691, 708, 710 (2004).

18. Telephone Interview with Samantha Ames, #BornPerfect Campaign Coordinator, National Center for Lesbian Rights (Oct. 26, 2015); Kate Kendell, *Our Goal—End Conversion Therapy in Five Years*, NAT’L CTR. FOR LESBIAN RIGHTS (Nov. 18, 2014), <http://www.nclrights.org/our-goal-end-conversion-therapy-in-five-years/>.

19. Writing on conversion therapy has tended to focus on the bans’ constitutionality, rather than their effects, and as such has not delved into the laws’ substance. Clay Calvert et al., *Conversion Therapy and Free Speech: A Doctrinal and Theoretical First Amendment Analysis*, 20 WM. & MARY J. WOMEN & L. 525, 561–69 (2014); Christian S. Cyphers, *Banning Sexual Orientation Therapy: Constitutionally Supported and Socially Necessary*, 35 J. LEGAL MED. 539, 549–50 (2014); Patrick Bannon, Note, *Intermediate Scrutiny vs. the “Labeling Game” Approach: King v. Governor of New Jersey and the Benefits of Applying Heightened Scrutiny to Professional Speech*, 23 J.L. & POL’Y 649, 680–87 (2015); Diahann DaSilva, Note, *Playing a “Labeling Game”: Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 792–801 (2015); Daniel Greene, Note, *The Right to “Cure” A Child’s Homosexuality?: A Constitutional Analysis of State Laws Banning Sexual Orientation Change Efforts on Minors*, 67 FLA. L. REV. F. 176, 185–93 (2016); Brielle N. Kovalcheck, Note, *Do Actions Speak Louder Than Words?: An Analysis of Conversion Therapy as Protected Speech Versus Unprotected Conduct*, 16 RUTGERS J. L. & RELIGION 428, 438–41 (2015); Megan E. McCormick, Note, *The Freedom to be “Converted”?: An Analysis of the First Amendment Implications of Laws Banning Sexual Orientation Change Efforts*, 48 SUFFOLK U. L. REV. 171, 197–201 (2015); Brian McGinnis, Note, *Not Strictly Speaking: Why State Prohibitions Against Practicing Sexual Orientation Change Efforts on Minors are Constitutional Under First Amendment Free Speech Principles*, 67 RUTGERS U. L. REV. 243, 273–82 (2015); Warren Geoffrey Tucker, Note, *It’s Not Called Conduct Therapy; Talk Therapy as a Protected Form of Speech Under the First Amendment*, 23 WM. & MARY BILL RTS. J. 885, 896–902 (2015). *But see* Peter R. Dubrowski, *The Ferguson v. Jonah Verdict and a Path Towards National Cessation of Gay-to-Straight “Conversion Therapy,”* 110 NW. U. L. REV. ONLINE 77 (2015); Curtis Schube, *Catch 22: The Rising Concern of*

broad social norm against conversion therapy, thereby expanding the bans' reach beyond mental health professionals. The laws' criticisms of conversion therapy, particularly its ineffectiveness and potential for harm, apply to all providers, not just licensed mental health professionals. Additionally, LGBT rights groups have used the laws as an opportunity to promote movement norms that the bans implicate: immutability and child protection. Since the 1970s, antigay conservative groups have opposed gay rights arguments with two interrelated claims—that homosexuality is a choice and that gays and lesbians are harmful to children.²⁰ According to these theories, because homosexuality is not innate it is undeserving of legal protections. At the same time, because this deviation occurs in childhood, children need to be protected from influences that could result in their becoming homosexual. This longstanding cultural war with religious conservatives continues to be fought over antidiscrimination laws, anti-bullying legislation, and adoption and foster care rights, often in the form of religious exemption laws.²¹ The anti-conversion therapy campaign is thus the latest chapter in a decades-old debate over the etiology of homosexuality and the place of gays and lesbians in American life.²²

While these expressive messages are extremely powerful and useful in promoting LGBT rights, the campaign for the bans may have a negative effect. There is no question that conversion therapy can be extremely traumatic and harmful, and that it is important to act against the egregious practices that result in isolation, depression, and suicide. However, the campaign's unwillingness to differentiate between types of conversion therapy is normatively undesirable. For religious individuals who do not

Faith Being Removed from Counseling and the First Amendment Concerns Associated, 35 N. ILL. U. L. REV. 375, 390–94 (2015); Marlena McMurchie, Note, “*The Dustbin of Quackery*”? *Senate Bill 1172 and the Legal Implications of Banning Reparative Therapy for Homosexual Minors*, 87 S. CAL. L. REV. 1519, 1532–37 (2014); Caitlin Sandley, Note, *Repairing the Therapist?: Banning Reparative Therapy for LGB Minors*, 24 HEALTH MATRIX 247, 259–63 (2014). Some commentators have also focused on the ways in which conversion therapy constitutes a deceptive consumer practice. John M. Satira, Note, *Determining the Deception of Sexual Orientation Change Efforts*, 58 WM. & MARY L. REV. 641, 657–63 (2016).

20. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1328–29 (2000); Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. C.L. 357, 359 (2009); Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607 (2013); see also Clifford J. Rosky, *No Promo Hetero: Children's Right to be Queer*, 35 CARDOZO L. REV. 425 (2013).

21. Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 173–74 (2014); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518 (2015); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1237–38 (2012).

22. The bans' proponents have also focused on the need to protect transgender youth. While this Article recognizes this important dimension of the laws, it emphasizes the bans' effect on gay and lesbian rights because this has been the historical site of struggle between LGBT rights advocates and religious conservatives.

want to act on their same-sex attractions, psychological treatment rooted in a nonjudgmental model of homosexuality would have less harmful outcomes.²³ In addition to promoting safer treatment, disaggregating the two types of conversion therapy—and the supportive model from its stigmatizing counterpart—could have important legal benefits for the LGBT movement as a whole. By conflating sexual orientation and expression, the campaign does more than reinforce sexual orientation's immutability; it also asserts the primacy of immutability-based arguments and reduces the legal import of sexual autonomy protections. However, the law also needs to protect individuals' consensual sexual practices. Immutability is not enough.

Litigation rights groups made the strategic decision to anchor rights in Equal Protection immutability claims, rather than Due Process privacy and autonomy arguments, three decades ago.²⁴ That strategy has been successful, securing marriage equality in 2015, but it has also been contested within the movement as a conservative move.²⁵ Queer theorists in particular criticize immutability arguments, arguing the LGBT movement instead should be protecting sexual object choice, expression, and behavior. It is possible for the law to do both, and for the conversion therapy campaign to promote immutability *and* autonomy. By differentiating between different types of conversion therapy, the laws can be drafted and discussed in such a way as to emphasize autonomy in sexual decisions and expressions, rather than simply re-inscribing the identity paradigm. In this way, conversion therapy bans can serve as a platform from which to expand the contours of the current LGBT movement so as to make it more inclusive.

Part I unpacks the conventional narrative around conversion therapy bans by demonstrating that the laws do not reach the majority of practitioners and therefore have little practical effect. It draws upon unpublished archival documents from medical associations, scientific studies, judicial opinions, unpublished court filings, and newspaper articles to explain how conversion therapy shifted from a mainstream medical practice to a marginalized treatment, transferring the locus of conversion therapy to religious ministers and conservative religious groups. It also analyzes how conversion therapy is actually practiced, which demonstrates the highly religious nature of contemporary conversion and sexual identity therapy.

23. See *supra* sources cited in note 17.

24. See generally Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).

25. Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 23–24 (2010).

Part II explains the laws' impact by turning to the expressive power of conversion therapy bans. Drawing on extensive archival research, legislative histories, and interviews with both LGBT rights advocates and conversion therapy proponents, this Part traces the history of conservative opposition to gay rights. It examines the rhetoric of mutability and child protection within the context of antidiscrimination laws, school curricular reforms, and family law contests to explain how and why the reformulation of these dual arguments is so important for LGBT rights organizations. This Part bridges the literatures on the expressive function of law and social movement scholarship, demonstrating how the two are interrelated and emphasizing how the lawmaking process serves expressive ends.

Part III analyzes how the bans implicate the LGBT movement's goals and strategy. LGBT rights groups have used the bans to promote the view that sexual orientation is immutable and fixed, and have also tied sexual behavior to identity. This has clear benefits for gay rights litigation but reinforces a particular vision that not everyone in the movement shares and limits future avenues for legal change. This Part thus complicates the narrative of the campaign and the bans as an unmitigated good, identifying how the laws, and the discourse surrounding them, further solidify the current approach of the LGBT rights movement. It also suggests how to reframe the campaign and rewrite the statutes so as to promote a different vision of LGBT rights. Thus, while the bans as they are currently formulated are problematic, they do not need to be.

Although LGBT rights groups do not distinguish between different types of conversion therapy practices, conflating them has significant medical, theological, and legal implications. As a result, when discussing therapeutic practices this Article will identify "conversion therapy" as efforts to change sexual orientation, which is almost exclusively a religious practice. For attempts to change behavior it will use "sexual identity therapy," a term the mental health professions have adopted to emphasize the need for religious and sexual identity congruence.²⁶ Both religious ministries and medical providers offer behavioral counseling but do so from very different perspectives—one is rooted in antigay morality, and the other is avowedly nonjudgmental. This Article only considers the therapeutic approach to sexual identity therapy as normatively desirable and will distinguish between the two contexts wherever necessary. It will use "conversion therapy bans" to describe the laws, even though they

26. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 55.

address both practices, as the rhetoric around the statutes does not differentiate between the categories.

I. THE RELIGIOUS PRACTICE OF CONVERSION THERAPY

Conversion therapy bans prohibit licensed mental health professionals from helping minors alter their homosexual sexual orientations or attractions, and yet conversion therapy today is primarily the province of religious and lay counselors. This Part analyzes how conversion therapy changed from a medical to a religious practice, tracing psychiatric debates on this issue to explain how and why conversion therapy became discredited within the scientific profession as it became increasingly embraced by religious conservatives. It then examines the contemporary practice of conversion and sexual identity therapy, presenting the ways in which religion is integral to its participants, practitioners, and theoretical underpinnings. These discussions correct commentators' mischaracterization of conversion therapy as a medical practice and provide the necessary background to understand what practical effect the laws have. These Sections also reveal that the ethical and legal issues around conversion therapy are more complicated than the rhetoric around the laws suggests.

A. *From Medicine to Morality*

The medical mainstream only began distancing itself from conversion therapy in the late 1980s, even though the American Psychiatric Association declassified homosexuality as a mental illness in 1973.²⁷ Those debates over conversion therapy led dissenters to coalesce as a formal group to promote the increasingly marginalized practice, working with conservative political organizations to disseminate their views. As this Section demonstrates, concomitant to conversion therapy's move out of the medical mainstream was its entry into evangelical politics, further reinforcing the relationship between conversion therapy and religion.

1. *Moving Out of the Medical Mainstream*

Before the declassification of homosexuality from the Diagnostic and Statistical Manual (DSM), medical efforts to alter sexual orientation were a subject of debate, but many prominent doctors used a variety of biological

27. *Id.* at 23.

and behavioral methods to eliminate homosexual attractions.²⁸ The biological approaches included surgical interventions, like lobotomies, castrations, clitoridectomies, and cauterization of the spinal cord, as well as convulsive electric shock treatments and hormonal injections.²⁹ Behavioral methods included cognitive therapy and aversive conditioning, such as pairing electric shocks or nausea-inducing drugs with homoerotic images.³⁰ After the declassification, the psychiatric profession began to condemn these types of treatments, identifying aversive therapies as unethical and inhumane.³¹ The number of published studies of efforts to change sexual orientation decreased dramatically, although the profession continued to endorse non-aversive treatments.³²

Even after the declassification, the American Psychiatric Association identified conversion therapy as an appropriate treatment for individuals distressed by their homosexuality, keeping the practice within the medical mainstream. Indeed, at the same time as the American Psychiatric Association announced the declassification, it added a category to the DSM-II called “sexual orientation disturbance” to diagnose those who were disturbed by or wished to change their same-sex attractions.³³ In preparing the DSM-III in 1977, the Task Force on Nomenclature renamed the category “Ego-Dystonic Homosexuality,” defining the diagnosis as applying to those with “a desire to acquire or increase heterosexual arousal, so that heterosexual relationships can be initiated or maintained”³⁴ The diagnostic category thus identified conversion therapy as a viable goal, although the manual also noted that medical professionals disputed its effectiveness.³⁵ The DSM-III’s comments on the viability of treatment for Ego-Dystonic Homosexuality were deliberately vague, the product of a fierce debate among the medical community over what treatment methods and goals were appropriate for individuals distressed by their same-sex attractions.

28. *Id.* at 22; NAOKO WAKE, PRIVATE PRACTICES: HARRY STACK SULLIVAN, THE SCIENCE OF HOMOSEXUALITY, AND AMERICAN LIBERALISM 217 (2011); William J. Helmer, *New York’s “Middle-Class” Homosexuals*, HARPER’S MAG., Mar. 1963, at 89–90.

29. Susan L. Morrow & A. Lee Beckstead, *Conversion Therapies for Same-Sex Attracted Clients in Religious Conflict: Context, Predisposing Factors, Experiences, and Implications for Therapy*, 32 COUNSELING PSYCHOLOGIST 641, 642 (2004).

30. *Id.*; AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 22.

31. AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 24.

32. *Id.*

33. Press Release, Am. Psychiatric Ass’n (Dec. 15, 1973) (on file with Carl A. Kroch Library, Cornell University, National Gay and Lesbian Task Force Records, Collection No. 7301, Box 164, Folder 39).

34. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 281 (3d ed. 1980).

35. *Id.* at 282.

While a vocal minority opposed any attempts to change a person's sexual orientation, many professionals believed homosexuals could and should be helped to become heterosexual. These included Judd Marmor, a leading psychiatrist who had been influential in arguing for the declassification.³⁶ Marmor emphasized that conversion was only for the "small minority of gay people [who] want that," indicating that this type of treatment was inappropriate for most homosexual patients and thus that heterosexuality should not be the primary goal in the majority of cases.³⁷ However, many in the medical profession took a more expansive view of conversion therapy, encouraging it as a treatment for potentially all gay patients. In 1981, four years after the DSM-III's publication, the American Medical Association (AMA) issued a report on the health care needs of gay patients that emphasized the changeability of homosexuality.³⁸ It maintained that physicians should not accept the "myth," propounded by homosexual groups, that homosexuality could never be changed, as scientific studies had shown success in 30–70% of conversion efforts.³⁹ It consequently recommended that medical professionals ask patients whether they are "content" with their homosexual orientation and refer patients to psychiatrists for treatment.⁴⁰

The psychiatric profession's first move to cabin conversion therapy came in 1987, when the American Psychiatric Association removed Ego-Dystonic Homosexuality from the DSM-III-R.⁴¹ That change almost did not happen. The American Psychiatric Association's Advisory Committee, which reviewed the provision, originally gave it very little attention, assuming the category should remain in the diagnostic manual. As a result, the Board of Trustees initially voted to include Ego-Dystonic

36. Vernon A. Rosario, *An Interview with Judd Marmor, MD*, 7 J. GAY & LESBIAN PSYCHOTHERAPY 23, 25–27 (2003); Letter from Judd Marmor, Univ. of S. Cal. Sch. of Med., to Robert L. Spitzer, Chairman, Am. Psychiatric Ass'n Task Force on Nomenclature and Statistics (July 21, 1977) (on file with the Am. Psychiatric Ass'n, DSM-III & DSM-III-R Collection, Box 5, Folder labeled Homosexuality) [hereinafter DSM-III & DSM-III-R Collection]; Letter from John Money, Professor of Med. Psychol., John Hopkins Med. Inst. (Dec. 29, 1977) (on file with DSM-III & DSM-III-R Collection, Box 5, Folder labeled Homosexuality).

37. Lawrence Mass, *Dr. Judd Marmor on "Homosexual Behavior,"* ADVOC., Apr. 17, 1980, at 22.

38. Larry Goldsmith, *Recent AMA Report Claims Homosexuality "Curable,"* GAY COMMUNITY NEWS, Jan. 23, 1982 (on file with the National Gay and Lesbian Task Force Records, Box 164, Folder 40).

39. *Id.*; see also *Opposition Stalls AMA Report on Treating Homosexuals*, PSYCHIATRIC NEWS, Aug. 7, 1981, at 32; B.S. Herrington, *AMA Sees Homosexuals as Under-Served Group*, PSYCHIATRIC NEWS, Jan. 15, 1982, at 9, 20.

40. See Herrington, *supra* note 39, at 21.

41. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 279–96 (3d ed., rev. 1987) [hereinafter DSM-III-R].

Homosexuality in the revised DSM.⁴² The lack of debate angered members of the American Psychiatric Association Committee on Gay, Lesbian, and Bisexual Issues (GLB Committee), who protested they should be given an opportunity to make their case about the provision's removal.⁴³ Dr. Robert Spitzer, the head of the group preparing the DSM-III-R, dismissed their objections with a curt statement that the scientific issues were clear and the question was simply "a value judgment" as to whether it was "helpful to have a specific category that legitimizes treatment efforts directed at homosexuals (usually bisexual) who wish to develop a heterosexual arousal program."⁴⁴ From his perspective, Ego-Dystonic Homosexuality did not apply to all homosexuals but served as the correct diagnostic category for a subset of gays and lesbians who sought to change their sexual orientation.

The GLB Committee's persistence led the Board of Trustees to reverse itself, removing the diagnostic category six months after its initial vote and signaling a decisive shift in its view of conversion therapy.⁴⁵ By removing a specific category for homosexuals conflicted about their sexual orientation, the American Psychiatric Association indicated that gay men and lesbians seeking psychiatric help to change their sexual orientation were rare and the practice of conversion therapy was no longer a primary treatment method.⁴⁶ Ego-Dystonic Homosexuality had been a compromise between clinicians who understood homosexuality as a pathological deviation and those who viewed homosexuality as a natural variant of sexual development.⁴⁷ In eliminating the diagnostic category, the American

42. Letter from Robert L. Spitzer, Chair, Work Grp. to Revise DMS-III, to Terry S. Stein et al. (Dec. 30, 1985) (on file with DSM-III & DSM-III-R Collection, Box 4, Folder labeled Ego-Dystonic Homosexuality).

43. Letter from James P. Krajeski to Robert Spitzer, Chairman, Work Grp. to Revise DSM-III (Apr. 9, 1986) (on file with DSM-III & DSM-III-R Collection, Box 4, Folder labeled Ego-Dystonic Homosexuality); Memorandum from Bob Spitzer to Revisionists (Dec. 11, 1985) (on file with DSM-III & DSM-III-R Collection, Box labeled Administration, Folder labeled Gen. Corr. 1986); Bob Cabaj, President's Column, Ass'n of Gay & Lesbian Psychiatrists (Feb. 1986) (on file with the Charles E. Young Research Library, UCLA, Judd Marmor Papers, Collection No. 1795, Box 54, Folder 3).

44. Memorandum from Bob Spitzer, *supra* note 43.

45. Letter from Steven S. Sharfstein, Deputy Med. Dir., Am. Psychiatric Ass'n, to Peggy Hanley-Hackenbruck (Jul. 24, 1986) (on file with DSM-III & DSM-III-R Collection, Box 4, Folder labeled Ego-Dystonic Homosexuality). Spitzer received at least 140 letters opposing his committee's plan to retain Ego-Dystonic Homosexuality as a diagnostic category. *See* DSM-III & DSM-III-R Collection, Box 5, Folder labeled Opposition Letters Regarding Retention of Ego-Dystonic Homosexuality; DSM-III & DSM-III-R Collection, Box 4, Folder labeled Ego-Dystonic Homosexuality.

46. Additionally, by making this change, the American Psychiatric Association finally removed the word "homosexuality" from its diagnostic manual, ending the ambiguity that had plagued the DSM-III-R. Letter from Stein et al., *supra* note 42.

47. *Id.*

Psychiatric Association made clear that the professional consensus was that homosexuality was a normal variation in human sexuality.⁴⁸

2. *Countering Conversion Therapy's Proponents*

Conversion therapy proponents responded to the American Psychiatric Association's removal of Ego-Dystonic Homosexuality with outrage, setting the stage for conflicts between these dissenters and the medical mainstream.⁴⁹ As the debates became increasingly heated, medical professional organizations began issuing position statements on conversion therapy that condemned the practice as harmful and unscientific. Over the course of a decade, the medical mainstream shifted from merely not endorsing conversion therapy to actively repudiating the practice.

Dissenters from American Psychiatric Association's decision, which indicated that sexual orientation change should no longer be considered a primary goal for therapists, created an alternative organization for medical practitioners who supported conversion therapy. Conversion therapy proponents initially coalesced around Charles Socarides, who was one of the most vocal opponents of the 1973 declassification decision.⁵⁰ They also rallied around Joseph Nicolosi, a psychologist who promoted "reparative therapy," which used psychoanalytic theories of arrested development to explain the causes of homosexuality.⁵¹ To encourage conversion therapy and the rights of its practitioners, Nicolosi, Socarides, and Benjamin Kaufman founded the National Association of Research and Therapy of Homosexuality (NARTH) in 1992.⁵² Since then, the organization has held annual conferences, published a regular newsletter for members, and provided pro-conversion therapy research materials on its website.⁵³ NARTH's supporters became active in debates over conversion therapy,

48. Although the Board of Trustees eliminated Ego-Dystonic Homosexuality, the DSM-III-R included a provision for "Sexual Disorder Not Otherwise Specified," which listed "persistent and marked distress about one's sexual orientation" as one example. DSM-III-R, *supra* note 41, at 296; *Board Excludes New Diagnoses From Main DSM-III-R Text*, PSYCHIATRIC NEWS, July 18, 1986, at 7–8. This catch-all category at the end of the Sexual Disorders section of the DSM-III-R also included "feelings of inadequacy" with respect to the shape and size of sexual organs and distress about repeatedly treating others as "things to be used" in a series of sexual conquests. DSM-III-R, *supra* note 41, at 296.

49. Mark A. Yarhouse & Warren Throckmorton, *Ethical Issues in Attempts to Ban Reorientation Therapies*, 39 PSYCHOTHERAPY 66, 71 (2002); Kenneth J. Zucker, *The Politics and Science of "Reparative Therapy"*, 32 ARCHIVES SEXUAL BEHAV. 399, 399 (2003).

50. TANYA ERZEN, STRAIGHT TO JESUS: SEXUAL AND CHRISTIAN CONVERSIONS IN THE EX-GAY MOVEMENT 144–45 (2006).

51. *Id.* For a discussion of reparative therapy's theoretical roots, see *infra* Part II.B.2.

52. Benjamin Kaufman, *Why NARTH? The American Psychiatric Association's Destructive and Blind Pursuit of Political Correctness*, 14 REGENT U. L. REV. 423, 424 (2001–2002); Zucker, *supra* note 49, at 399.

53. Kaufman, *supra* note 52, at 424.

hoping to stop what they understood as medicine's capitulation to gay rights activists.⁵⁴ Reparative therapists characterized efforts to discredit conversion therapy as "politically motivated and nonscientific," protesting what they saw as professional organizations' unsupported bias against their work.⁵⁵

To disseminate their views, NARTH and its members turned to prominent Religious Right groups, which provided an alternative platform to the mainstream medical organizations. Evangelical leaders like James Dobson brought information about conversion therapy to the homes of millions of Americans. Dobson founded Focus on the Family in 1977, becoming one of Time Magazine's "most influential evangelicals in America" and producing an internationally syndicated radio program that had more than 230 million listeners when he retired in 2009.⁵⁶ His 2001 book, *Bringing Up Boys*, which sold more than two million copies, emphasized the need for parents to be cognizant of youth "prehomosexuality."⁵⁷ Dobson urged parents with "an effeminate boy or a masculinized girl" to read Joseph Nicolosi's *Preventing Homosexuality: A Parent's Guide* and to seek professional help.⁵⁸ Dobson also emphasized that parents should consult Exodus International or NARTH, as "most secular psychiatrists, psychologists, and counselors would . . . take the wrong approach" by identifying sexual orientation as fixed and immutable rather than something that could be changed.⁵⁹ Dobson was just one of many conservative leaders who advocated conversion therapy for youth to prevent adult homosexuality.⁶⁰

This alliance with NARTH benefited conservative organizations, which were able to draw upon conversion therapy as proof that homosexuality was a mutable characteristic and therefore undeserving of legal

54. NARTH's supporters believe this began in 1973 with the declassification of homosexuality from the DSM. JOSEPH NICOLOSI & LINDA AMES NICOLOSI, *A PARENT'S GUIDE TO PREVENTING HOMOSEXUALITY* 695 (2002); JOSEPH NICOLOSI, *HEALING HOMOSEXUALITY: CASE STORIES OF REPARATIVE THERAPY* 214 (1993); JOSEPH NICOLOSI, *REPARATIVE THERAPY OF MALE HOMOSEXUALITY: A NEW CLINICAL APPROACH* 9–12 (1991).

55. NICOLOSI & NICOLOSI, *supra* note 54, at 695; NICOLOSI, *REPARATIVE THERAPY OF MALE HOMOSEXUALITY*, *supra* note 54, at 123.

56. *The 25 Most Influential Evangelicals in America*, TIME (Feb. 7, 2005), http://content.time.com/time/specials/packages/article/0,28804,1993235_1993243_1993261,00.html; Press Release, Focus on the Family, Focus on the Family Looks to Bright Future (Dec. 30, 2009), <http://www.focusonthefamily.com/about/newsroom/news-releases/20091230-focus-on-the-family-looks-to-bright-future>.

57. JAMES DOBSON, *BRINGING UP BOYS* 115, 118 (2001).

58. *Id.* at 123; Sarah Pulliam Bailey, *Focus on the Females: James Dobson Explains His Ideas for Raising Daughters, and Life After Focus*, CHRISTIANITY TODAY (July 14, 2010), <http://www.christianitytoday.com/ct/2010/july/17.31.html>.

59. Dobson, *supra* note 57, at 123.

60. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 71; JASON CIANCOTTO & SEAN CAHILL, *YOUTH IN THE CROSSHAIRS: THE THIRD WAVE OF EX-GAY ACTIVISM* 2 (2006).

protections.⁶¹ Conversion therapy became such a useful political tool that conservative groups began endorsing and helping found conversion therapy ministries, run by lay counselors and pastors, which removed the practice even further from the medical realm.⁶² Thus, in addition to separating conversion therapists from mainstream medical practices, the deletion of Ego-Dystonic Homosexuality from the DSM made the Religious Right a central player in the debate over the etiology and (im)mutability of homosexuality.

The medical mainstream responded to NARTH and the Religious Right by issuing increasingly condemnatory statements on conversion therapy. These professional associations did not immediately denounce the practice, concerned about the lack of clinical studies on its effectiveness and the need to respect patient autonomy.⁶³ In 1993, the American Psychiatric Association rejected a position paper that declared conversion therapy “improper and unethical” as “extreme and unjustified” since it interfered with patient autonomy and choice.⁶⁴ However, in 1998, the organization adopted a statement against the practice, which read: “[The American Psychiatric Association] opposes any psychiatric treatment, such as ‘reparative’ or ‘conversion’ therapy, that is based . . . [upon a prior] assumption that the patient should change his or her homosexual orientation.”⁶⁵ Two years later, the organization issued a firmer admonition. That position paper noted the absence of scientific research substantiating reparative therapists’ claims to cure individuals of their homosexuality.⁶⁶ It thus implored “ethical practitioners [to] refrain from attempts to change individuals’ sexual orientation, keeping in mind the medical dictum to First, do no harm.”⁶⁷

The American Psychological Association similarly began taking formal positions on conversion therapy in the late 1990s, ultimately denouncing the practice in 2009. The organization first adopted a statement in 1997 at the urging of its members, who were alarmed by NARTH’s founding and

61. See *infra* Part II.B. See generally Casey Sanchez, *Memphis Area Love in Action Offers Residential Program to “Cure” Homosexuality*, S. POVERTY L. CTR. (Jan. 1, 2003), <https://www.splcenter.org/fighting-hate/intelligence-report/2003/memphis-area-love-action-offers-residential-program-”cure”-homosexuality>.

62. See *infra* Part I.B.

63. It is possible that professional associations were also hesitant to take a definitive stance on conversion therapy because they feared accusations that they had ceded to political pressure, a common critique of the 1973 declassification decision. See *supra* sources cited in note 54.

64. Jerry Wiener, *Choices*, PSYCHIATRIC NEWS, Nov. 18, 1994, at 3; “*Reparative Therapy*” *Statement to be Refined*, PSYCHIATRIC NEWS, June 17, 1994, at 6, 24.

65. AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON PSYCHIATRIC TREATMENT AND SEXUAL ORIENTATION (1998).

66. AM. PSYCHIATRIC ASS’N, POSITION STATEMENT ON THERAPIES FOCUSED ON ATTEMPTS TO CHANGE SEXUAL ORIENTATION (REPARATIVE OR CONVERSION THERAPIES) (2000).

67. *Id.*

the Religious Right's promotion of conversion therapy.⁶⁸ That resolution was the tepid declaration that "the ethics, efficacy, benefits, and potential for harm" of reparative therapies were "under extensive debate."⁶⁹ In 2007, the American Psychological Association established the Task Force on Appropriate Therapeutic Responses to Sexual Orientation to review and evaluate the scientific literature on conversion therapy.⁷⁰ It found that none of the published studies on conversion therapy met the methodological standards required to make any conclusions about efficacy or safety.⁷¹ Based on the qualitative data, the report the Task Force issued two years later concluded that conversion therapy is "unlikely to be successful and involve[s] some risk of harm"; it consequently urged the organization to issue a new resolution opposing conversion therapy.⁷² As a result, the American Psychological Association adopted a formal statement that identified the practice as ineffectual and called on mental health professionals to stop misrepresenting conversion therapy as a viable means of changing sexual orientation.⁷³

In its 2009 report, the American Psychological Association simultaneously developed a guideline for "sexual orientation identity exploration," which allows therapists to work with a client on changing her sexual behavior to reconcile her sexual identity and religious beliefs.⁷⁴ Sexual identity therapists adopt a client-centered approach, wherein counselors assess their clients' religious beliefs, identities, and motivations to understand their clients' perspectives and concerns.⁷⁵ The aim of the therapeutic work is not to lead clients to a particular sexual orientation identity, or to promote or reject celibacy, but to help clients understand their own goals, the possible short- and long-term consequences, and how to cope with their decisions.⁷⁶ Throughout the process, therapists are to emphasize acceptance and support, and above all the aim is for clients to "create a valued personal and social identity that provides self-esteem, belonging, meaning, direction, and future purpose, including the redefining

68. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 12.

69. AM. PSYCHOLOGICAL ASS'N, APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (1997).

70. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 1.

71. *Id.* at 2.

72. *Id.* at v, 7.

73. AM. PSYCHOLOGICAL ASS'N, RESOLUTION ON APPROPRIATE AFFIRMATIVE RESPONSES TO SEXUAL ORIENTATION DISTRESS AND CHANGE EFFORTS (2009).

74. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 60–62; TOM WAIDZUNAS, THE STRAIGHT LINE: HOW THE FRINGE OF EX-GAY THERAPY REORIENTED SEXUALITY 4 (2015). This form of therapy coincided with a shift in how religious organizations approached conversion therapy, splitting the practice into those who believe sexual orientation is fixed and those who view it as a mutable characteristic. *See infra* Part II.B.

75. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 63–64.

76. *Id.* at 61.

of religious beliefs, identity, and motivations and the redefining of sexual values, norms, and behaviors.”⁷⁷ Sexual identity therapy emerged as a means of providing an ethical treatment option for those distressed by the conflict between their same-sex attractions and their religious values. These guidelines sought to provide the benefits of conversion therapy without its attendant harms.

Other professional organizations also rejected conversion therapy during this period. The AMA, which had endorsed the practice in 1981, reversed course in 1994, stating that social stigma caused most of the emotional disturbance gay men and lesbians felt about their sexual orientation.⁷⁸ In 1999, the American Counseling Association declared that it opposed “the promotion of reparative therapy as a cure for individuals who are homosexual.”⁷⁹ In 2000, the National Association of Social Workers’ National Committee on Lesbian, Gay, and Bisexual Issues endorsed a position statement that conversion therapies “cannot and will not change sexual orientation.”⁸⁰ In 2009, the American Association for Marriage and Family Therapy adopted a policy stating there was “no basis” for conversion therapy.⁸¹

By 2009, all of the major professional associations of mental health professionals had issued statements opposing conversion therapy, identifying it as both unethical and unscientific. Supporting these positions were research studies and articles on the effects, efficacy, and ethics of the practice, which burgeoned after NARTH’s founding.⁸² Scientists conducted the vast majority of research on conversion therapy between 1960 and 1981.⁸³ However, beginning in 1999, as professional organizations became embroiled in debates over whether mental health professionals should

77. *Id.* at 62.

78. *AMA Alters Its Policy on Gays, Lesbians*, BOS. GLOBE, Dec. 22, 1994; David W. Dunlap, *A.M.A. Adopts New Policy on Sexuality*, N.Y. TIMES, Dec. 25, 1994, at 11.

79. Joy S. Whitman et al., *Exploring Ethical Issues Related to Conversion or Reparative Therapy*, COUNSELING TODAY, May 14, 2006. The previous year, it had considered and rejected a position statement that censured conversion therapy practitioners. Joseph Nicolosi et al., *Beliefs and Practices of Therapists who Practice Sexual Reorientation Psychotherapy*, 86 PSYCHOL. REPS. 689, 691 (2000); Warren Throckmorton, *Efforts to Modify Sexual Orientation: A Review of Outcome Literature and Ethical Issues*, 20 J. MENTAL HEALTH COUNSELING 283, 284 (1998).

80. NAT’L COMM. ON LESBIAN, GAY, AND BISEXUAL ISSUES & NAT’L ASS’N OF SOCIAL WORKERS, “REPARATIVE” AND “CONVERSION” THERAPIES FOR LESBIANS AND GAY MEN (2000).

81. *2015 Policy on Social and Family Policies*, AM. ASS’N FOR MARRIAGE & FAMILY THERAPY, http://www.aamft.org/iMIS15/AAMFT/Content/about_aamft/position_on_couples.aspx (last visited Feb. 10, 2017).

82. For a comprehensive list of studies, see *What does the Scholarly Research say About Whether Conversion Therapy Can Alter Sexual Orientation Without Causing Harm?*, WHAT WE KNOW PROJECT, <http://whatwewknow.law.columbia.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-whether-conversion-therapy-can-alter-sexual-orientation-without-causing-harm/> (last visited Jan. 5, 2016).

83. AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 27.

continue to engage in the practice, researchers once again began publishing studies on the topic.⁸⁴ The data did not show that conversion therapy never worked, but sufficient studies demonstrated that individuals suffered harm that professional organizations decided to warn against the practice. As the position statements demonstrate, conversion therapy had clearly exited the medical mainstream by 2009, relegating the practice to dissenting therapists, religious ministers, and lay counselors. The close association between NARTH and Religious Right groups also helped transfer the locus of conversion therapy to religious organizations.

B. *Conversion Therapy in Practice*

As the medical establishment reconsidered its views on homosexuality and conversion therapy throughout the late twentieth century, conversion therapy became the domain of religious practitioners, with non-licensed ministers and counselors coming to dominate the practice.⁸⁵ The theories and methods these practitioners use combine psychoanalytic theory and theology, such that conversion therapy is very much a religious phenomenon in its execution.⁸⁶ Thus, it is not just that conversion therapy is no longer part of the medical mainstream—it is also affirmatively a religious practice.

1. *Religious and Sexual Conversion*

Religious ministries promoting conversion therapy have existed since 1973, but increased in absolute numbers and relative to licensed therapists after mental health professionals turned away from conversion therapy; they now form the majority of conversion therapy practices. Conversion therapy ministries have their roots in evangelical Christianity, melding theology and psychology in their theories and methods. Frank Worthen founded the first such ministry after hearing God's voice, which called on Worthen to abandon homosexuality.⁸⁷ The born-again Worthen began

84. *Id.* at 27, Appendix B. Of the fifty-five peer-reviewed studies the American Psychological Association Task Force identifies, forty-seven were from the period of 1960 to 1981, while only eight were from 1999 to 2004. *Id.* at Appendix B.

85. Telephone Interview with Scott McCoy, Senior Policy Counsel, S. Poverty Law Ctr. (Dec. 3, 2015).

86. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 17, 25, 45; Jack Drescher, *Sexual Conversion ("Reparative") Therapies: History and Update*, in MENTAL HEALTH ISSUES IN LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITIES 88 (Billy E. Jones & Marjorie J. Hill eds., 2002); Schube, *supra* note 19, at 377; Jonathan Sacks, "Pray Away the Gay?": *An Analysis of the Legality of Conversion Therapy by Homophobic Religious Organizations*, 13 RUTGERS J. L. & RELIGION 67, 71, 74 (2011).

87. ERZEN, *supra* note 50, at 3, 22–23.

attending church and closed his business to form Love in Action.⁸⁸ The group began meeting every other week at the Church of the Open Door, a nondenominational Christian ministry, and became the first residential ex-gay program in 1979 after men and women began arriving at the sessions with suitcases.⁸⁹ In 1976, Worthen and members of the Melodyland Christian Center, an Anaheim evangelical church, founded Exodus International, an umbrella organization for religious and lay conversion therapy groups.⁹⁰ Exodus affiliates not only provided conversion therapy services, but also produced and distributed books, pamphlets, newsletters, teachers' manuals, videotapes, audiotapes, and other home study materials to help people "come out of the homosexual lifestyle."⁹¹ After its founding, Exodus expanded to include hundreds of member ministries, which included religious counseling, self-help, and lay support groups, and became the center of the ex-gay movement.⁹²

In addition to evangelical groups, other religiously based organizations proliferated to provide conversion therapy. In 1980, the New York Archdiocese created Courage, a support group to help Catholic men and women with same-sex attractions to live "chaste lives."⁹³ Courage now has more than 100 chapters worldwide and over 1,500 email subscribers.⁹⁴ Evergreen International, founded in 1989, promoted conversion therapy for Church of Jesus Christ of Latter-Day Saints (LDS) members until 2014 when it merged with North Star, another support group for same-sex attracted Mormons.⁹⁵ Additionally, in 1998, Jews Offering New Alternatives to Homosexuality (JONAH) became the first Jewish organization to provide conversion therapy.⁹⁶

There is no data on how many licensed therapists practice conversion therapy, but the available evidence suggests that the number is small in comparison to religious groups. Before closing in 2013, Exodus

88. *Id.* at 23.

89. *Id.* at 26–28. In 1995, John Smid relocated Love in Action (LIA) to Memphis, leading Worthen to open a new California ministry in the former LIA space named New Hope. *Id.* at 39.

90. *Id.* at 31–32.

91. KATHLEEN Y. RITTER & ANTHONY I. TERNDROP, *HANDBOOK OF AFFIRMATIVE PSYCHOTHERAPY WITH LESBIANS AND GAY MEN* 279 (2002); Christy M. Ponticelli, *Crafting Stories of Sexual Identity Reconstruction*, 62 *SOC. PSYCHOL. Q.* 157, 157 (1999).

92. Sandley, *supra* note 19, at 252–53.

93. *About Courage*, COURAGE, <http://couragerc.org/courage/about/> (last visited Jan. 16, 2015).

94. *Id.*

95. A. Lee Beckstead & Susan L. Morrow, *Mormon Clients' Experiences of Conversion Therapy: The Need for a New Treatment Approach*, 32 *COUNSELING PSYCHOLOGIST* 651, 653 (2004); Peggy Fletcher Stack, *Longtime Support Group for Gay Mormons Shuts Down*, *SALT LAKE TRIB.*, Jan. 14, 2014.

96. Complaint and Jury Demand at ¶ 33, *Ferguson v. JONAH*, 136 A.3d 447 (N.J. Super. Ct. Nov. 27, 2012) (No. HUD-L-5473-12). JONAH changed its name to "Jews Offering New Alternatives for Healing" in 2010. Michael Airhart, *Amid Scandals, Ex-Gay JONAH Changes Its Name*, *TRUTH WINS OUT* (July 29, 2010), <http://www.truthwinsout.org/blog/2010/07/9980/>.

International had over 260 member ministries with numerous volunteer counselors associated with each group, several of which organized residential treatment programs that housed dozens of participants.⁹⁷ By contrast, NARTH, the only group that promotes conversion therapy among mental health professionals, has only ever had 150 members in its referral directory.⁹⁸ This is a miniscule fraction of the hundreds of thousands of licensed mental health professionals in the United States.⁹⁹ Additionally, most therapists listed in the NARTH directory do not center their practice on conversion therapy, but rather offer this treatment to a small number of patients.¹⁰⁰ In 2012, the Southern Poverty Law Center counted only seventy licensed mental health professionals offering conversion therapy across the United States, which constituted 0.02% of all licensed psychiatrists, psychologists, mental health counselors, and marriage and family therapists in America.¹⁰¹ This data is also supported by empirical studies of conversion therapy, which have documented that the majority of participants received assistance from pastors, Christian counselors, or religious groups, rather than licensed professionals.¹⁰²

This is not to say that licensed mental health professionals never provide conversion therapy treatments. Some very well-known licensed psychologists practice conversion therapy, such as Joseph Nicolosi and David Pickup, which lends scientific credibility to religious and lay ministers. The licensed professionals who offer conversion therapy have a

97. Sandley, *supra* note 19, at 252–53; S.J. Creek & Jennifer L. Dunn, “Be Ye Transformed”: *The Sexual Storytelling of Ex-gay Participants*, 45 SOC. FOCUS 306, 307 (2012); Warren Throckmorton, *Initial Empirical and Clinical Findings Concerning the Change Process for Ex-Gays*, 33 PROF. PSYCHOL. 242, 243 (2002).

98. Telephone Interview with David Pruden (Oct. 7, 2015). In a 2012 article, NBC reported that NARTH had 350 therapists in its directory, citing David Pruden as its source for that number. According to Pruden, NARTH has never had this many therapists and denies making this statement to NBC. *Id.*; Isolde Raftery, *Therapists Defend Gay Conversion Counseling: “You Can’t Say Gay Once, Gay Always,”* NBC NEWS (Dec. 5, 2012), https://usnews.newsvine.com/_news/2012/12/05/15658164-therapists-defend-gay-conversion-counseling-you-cant-say-gay-once-gay-always.

99. In 2015, there were over 275,000 licensed psychiatrists, psychologists, mental health counselors, and marriage and family therapists in America. *May 2015 National Occupational Employment and Wage Estimates*, U.S. DEP’T OF LABOR (May 2015), http://www.bls.gov/oes/current/oes_nat.htm.

100. Nicolosi et al., *supra* note 79, at 693–94; Interview with Pruden, *supra* note 98.

101. Alan Duke, *Conversion Therapist: Lawsuit Won’t Stop Us*, CNN (Nov. 29, 2012), <http://www.cnn.com/2012/11/29/us/conversion-therapy-response/>. In 2012, there were 288,530 licensed psychiatrists, psychologists, mental health counselors, and marriage and family therapists in America. *May 2012 National Occupational Employment and Wage Estimates*, U.S. DEP’T OF LABOR (May 2012), http://www.bls.gov/oes/2012/may/oes_nat.htm#29-0000.

102. John P. Dehlin et al., *Sexual Orientation Change Efforts Among Current or Former LDS Church Members*, 62 J. COUNSELING PSYCHOL. 95, 102 (2015); Jo Fjelstrom, *Sexual Orientation Change Efforts and the Search for Authenticity*, 60 J. HOMOSEXUALITY 801, 805 (2013); Annesa Flentje et al., *Experiences of Ex-Ex-Gay Individuals in Sexual Reorientation Therapy: Reasons for Seeking Treatment, Perceived Helpfulness and Harmfulness of Treatment, and Post-Treatment Identification*, 61 J. HOMOSEXUALITY 1242, 1261 (2014).

decidedly religious approach to counseling,¹⁰³ providing “counseling from a ‘Biblical perspective’ and . . . integrat[ing] Biblical teachings into their sessions” on the basis that clients’ religious beliefs are crucial to change.¹⁰⁴ Additionally, other licensed professionals serve as referral sources to religious ministries that provide conversion therapy. These licensed practitioners have received disproportionate attention in debates over conversion therapy at least in part because NARTH therapists are prominent voices in political debates over LGBT rights, with members testifying as experts before judicial and legislative hearings.¹⁰⁵

Conversion therapy participants have overwhelmingly identified their “religious beliefs” as the primary reason for seeking conversion therapy.¹⁰⁶ Participants in conversion therapy tend to be members of evangelical Christian, LDS, or Orthodox Jewish communities, which view homosexuality as undesirable or morally objectionable.¹⁰⁷ For these individuals, religion is a central part of their identity, such that they prioritize their religious beliefs over their sexual desires, which they view as incompatible.¹⁰⁸ At the same time, many turn to conversion therapy because their religious teachings frame homosexuality as not only sinful but emotionally void, having heard from their families, peers, and community leaders that the “gay lifestyle” is promiscuous, diseased,

103. RITTER & TERNDRUP, *supra* note 91, at 279; McCormick, *supra* note 19, at 179; Sacks, *supra* note 86, at 74.

104. King v. Governor of N.J., 767 F.3d 216, 221 (2014); Nicolosi et al., *supra* note 79, at 697–98.

105. Howard v. Child Welfare Agency Rev. Bd., No. CV 1999-9881, 2004 WL 3154530, at *3–8 (Ark. Cir. Ct. Dec. 29, 2004), *aff’d sub nom.* Dep’t of Human Servs. v. Howard, 238 S.W.3d 1 (Ark. 2006); WAIDZUNAS, *supra* note 74, at 6–7; *Howard v. Arkansas – George Rekers Fact Sheet*, ACLU, https://www.aclu.org/lgbt-rights_hiv-aids/howard-v-arkansas-george-rekers-fact-sheet (last visited Feb. 10, 2017); *see also* Trial Transcript at 812, In re John Doe, 2008 WL 5006172 (Fla. Cir. Ct. Nov. 25, 2008) (No. 06-033881 FC 04).

106. Flentje et al., *supra* note 102, at 1253; Elan Y. Karten & Jay C. Wade, *Sexual Orientation Change Efforts in Men: A Client Perspective*, 18 J. MEN’S STUD. 84, 94 (2010); Stanton L. Jones & Mark A. Yarhouse, *A Longitudinal Study of Attempted Religiously Mediated Sexual Orientation Change*, 37 J. SEX & MARITAL THERAPY 404, 409 (2011). This is also true for minors, whose religious beliefs play a significant role in the decision to seek conversion therapy. These teenagers are typically either religious and distressed by the conflict between their religious values and sexual attractions, or their parents seek conversion therapy for their children because of the family’s religious beliefs. AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 72–73; RITTER & TERNDRUP, *supra* note 91, at 280; SAMHSA, *supra* note 10, at 2, 18; Geoffrey L. Ream & Ritch C. Savin-Williams, *Reconciling Christianity and Positive Non-Heterosexual Identity in Adolescence, with Implications for Psychological Well-Being*, 3 J. GAY & LESBIAN ISSUES IN EDUC. 19, 19, 21–22 (2005); Raftery, *supra* note 98.

107. Jones & Yarhouse, *supra* note 106, at 409; SAMHSA, *supra* note 10, at 21; AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 3.

108. AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 25; Michael Benoit, *Conflict between Religious Commitment and Same-Sex Attraction: Possibilities for a Virtuous Response*, 15 ETHICS & BEHAV. 309, 309, 311 (2005); Flentje et al., *supra* note 102, at 1253.

addictive, and unnatural.¹⁰⁹ Conversion therapy groups target their message to feed into these fears, providing literature that incorporates negative depictions of homosexuality with religious doctrine, psychotherapeutic language, and the promise of community support.¹¹⁰ Thus, it is not just that individuals are responding to exhortations from scripture, but also from the deliberate spread of misinformation.

In addition to wanting to live according to their religious faith, conversion therapy participants value their place in their religious community and fear losing their familiar and reassuring church environment.¹¹¹ The potential loss of their belief system, family, community, and core identity are such that it “is more realistic to consider changing sexual orientation than abandoning one’s religion of origin.”¹¹² There are no data on the number of people seeking conversion therapy or how many minors receive conversion therapy services.¹¹³ However, Caitlin Ryan, a researcher at San Francisco State University, found that 34% of LGBT young adults she surveyed reported having been sent to a religious leader or therapist to “cure, treat, or change [their] sexual orientation” as a teenager.¹¹⁴

Conversion therapy is as deeply rooted in religious conversion as it is sexual transformation. This is why, in addition to theological proscriptions on homosexuality, conversion therapy is so connected to religious organizations. Among evangelical groups, participants become born-again Christians, reconstituting themselves sexually as they develop their religious identity.¹¹⁵ As Worthen, the founder of the first ex-gay ministry, explained, “we do not attempt to make heterosexuals out of homosexuals. Rather, we attempt to change a person’s identity” such that the person becomes “a Christian who has a homosexual problem, rather than a homosexual who believes in Christ Jesus. It is our hope that a person struggling with homosexuality will come to a place of wholeness in

109. Beckstead & Morrow, *supra* note 95, at 662; Karten & Wade, *supra* note 106, at 98. Another reason individuals seek conversion therapy is that some are married to members of the opposite sex, and therefore may lose their life partner and family if they cannot control or stop their same-sex attractions. *Id.* at 86.

110. AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 25.

111. RITTER & TERNDROP, *supra* note 91, at 280; AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 47.

112. Douglas C. Haldeman, *When Sexual and Religious Orientation Collide: Considerations in Working with Conflicted Same-Sex Attracted Male Clients*, 32 COUNSELING PSYCHOL. 691, 694 (2004).

113. In a 2005 report, the National Gay and Lesbian Task Force identified several conversion therapy programs that targeted adolescents, but none of them are in operation today. CIANCOTTO & CAHILL, *supra* note 60, at 1, 11, 14–18.

114. Declaration of Caitlin Ryan at 5, *Welch v. Brown* 907 F. Supp. 2d 1102 (E.D. Cal. 2012), *rev’d sub nom. Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013) (2:12-CV-02484-WBS-KJN).

115. ERZEN, *supra* note 50, at 3.

Christ.”¹¹⁶ According to ethnographer Tanya Erzen, for conversion therapy participants, “[s]exual identity is malleable and changeable because it is completely entwined with religious conversion. A person becomes ex-gay as he accepts Jesus into his life and commits to him.”¹¹⁷ These individuals understand that they will continue to experience same-sex attractions and may even yield to their temptations, but root their identities in resisting temptation and reaffirming their commitment to Jesus, who forgives those who lapse so long as they repent.¹¹⁸ Participants in these religious ministries often refer to themselves as “ex-gay,” a label that represents the ongoing conversion process and a sense of identity that is in flux.¹¹⁹ In their testimonials, ex-gays focus on achieving an “identity in Christ.”¹²⁰ Success is not only measured in changes to sexual attitudes, but also in submission to Jesus and Biblical teachings.¹²¹

Conversion therapy groups often provide a loving and accepting community that can be liberating and comforting for those who are struggling to reconcile their sexual and religious identities.¹²² As one psychologist who went through conversion therapy explained, “[t]he excitement of finding other like-minded people offering hope and acceptance is intoxicating. It can surely be described as ‘coming home.’”¹²³ However, he also noted, the newness and excitement begin to fade after a honeymoon period, and the group’s tolerance for perceived failures lessened after an individual had been involved with the group for an extended period of time.¹²⁴ One of the benefits that conversion therapy organizations may offer is a solution to spiritual struggles that have serious mental health consequences, including anxiety, depression, and suicidality.¹²⁵ Conversion therapy thus provides a way of coping with a very real and harmful problem, offering relief to participants who are grateful to learn about the possibility of changing their same-sex desires.¹²⁶

Recent changes in religious authorities’ stances on homosexuality have made conversion therapy more prominent and appealing. A number of

116. Frank Worthen, *Ex-Gay: Fact, Fraud, or Fantasy?*, FREE MINISTRY, www.freeministry.org/h/articles/worthen3.htm (last visited Dec. 5, 2015).

117. ERZEN, *supra* note 50, at 13.

118. *Id.* at 3–4.

119. *Id.* at 3.

120. Creek & Dunn, *supra* note 97, at 315.

121. ERZEN, *supra* note 50, at 3.

122. Jeffrey G. Ford, *Healing Homosexuals: A Psychologist’s Journey Through the Ex-Gay Movement and the Pseudo-Science of Reparative Therapy*, 5 J. GAY & LESBIAN PSYCHOTHERAPY 69, 71–72 (2001).

123. *Id.* at 73.

124. *Id.*

125. AM. PSYCHOLOGICAL ASS’N, *supra* note 17, 47.

126. Beckstead & Morrow, *supra* note 95, at 666–67.

religious groups have adopted a view of homosexuality that differentiates between the morally neutral issue of same-sex attraction and the sinful problem of same-sex sexual behavior. This creates a space for same-sex attracted religious individuals for whom chastity becomes a moral imperative.¹²⁷ Early LDS authorities identified homosexuality as an abomination and a “sin next to murder,” but have now distinguished between same-sex attractions and same-sex activities; like other religious groups, the LDS church has tempered its condemnation for homosexuality with compassion for homosexual individuals, adopting the stance of loving the sinner but hating the sin.¹²⁸ These religious groups thus do not necessarily expel or shun those with same-sex sexual attractions, but rather embrace co-religionists who renounce their homosexuality, reaffirm their commitment to religious principles, and seek change.¹²⁹ Thus, “[r]eparative therapy offers the fundamentalist homosexual a way to acknowledge his sexual and affectional feelings without fear of rejection. Seeking reparative therapy is seen as evidence of obedience and willingness to submit to God and Scripture.”¹³⁰ This outlook helps explain why conversion therapy programs are directed towards devout individuals and are run by religious ministries. Not only do individuals participate in conversion therapy in hopes of having their sexual attractions conform to their religious beliefs, but these programs also provide a recognized avenue for integration with and acceptance by religious communities.

The theological shift permitted conversion therapy organizations to alter their definition of change, which became increasingly contested as scientists scrutinized the effectiveness of conversion therapy.¹³¹ As a result, some practitioners reframed their treatment, shifting from the promise to change sexual orientation to the more modest claim that individuals could alter their behavior. These groups explain that participants will always have to manage their attractions and consider celibacy a successful outcome.¹³² By acknowledging that physical attractions would linger and that the aim was to control behavior, religious ministries could diffuse the effect of the rising ex-ex-gay movement and media scandals revealing ex-gay ministry

127. Benoit, *supra* note 108, at 312.

128. Beckstead & Morrow, *supra* note 95, at 653; *see also* Drescher, *supra* note 86, at 78–79.

129. ERZEN, *supra* note 50, at 3–4; AM. PSYCHOLOGICAL ASS’N, *supra* note 17, at 25.

130. Ford, *supra* note 122, at 71.

131. WAIDZUNAS, *supra* note 74, at 115–16.

132. Drescher, *supra* note 86, at 80–81; Fjelstrom, *supra* note 102, at 815, 822; Roger L. Worthington, *Heterosexual Identities, Sexual Reorientation Therapies, and Science*, 32 ARCHIVES SEXUAL BEHAV. 460, 461 (2003). Nicolosi continues to maintain that it is possible to change sexual orientation, although he states that only a third of his patients develop heterosexual attractions. Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 ARCHIVES SEXUAL BEHAV. 403, 404 (2003); Raftery, *supra* note 98.

leaders' sexual escapades with same-sex partners—including the founders and leaders of Exodus International, National Coming Out of Homosexuality Day, and Homosexuals Anonymous.¹³³ This revised model characterizes behavior and identity as malleable but sexual orientation as a physiological fact.¹³⁴

However, not all conversion therapy providers differentiate between sexual orientation, behavior, and identity. Some counselors continue to claim that individuals can change both their behaviors and attractions, advertising that it is possible to become heterosexual.¹³⁵ This perspective, which identifies sexual orientation as a chosen characteristic that an individual can elect to change, undergirds much of the political opposition to gay rights.¹³⁶ These gay rights opponents claim that homosexuality's mutability renders sexual orientation unlike race or sex and thus underserving of constitutional protections that extend to identity characteristics.¹³⁷ While there are two distinct ideas around conversion, one focusing on orientation and the other on behavior, discourse around the bans does not differentiate between them and presents conversion therapy as a monolithic practice that seeks to alter sexual orientation rather than behavior.

2. *Treatment Methods*

In treating participants, conversion therapy ministries combine psychoanalytic theory with religious belief, creating a hybrid practice that deploys scientific concepts to bolster theological perspectives. The ideas, practices, and goals of conversion therapy ministries, which connect sexual to religious conversion, make clear just how removed conversion therapy is from medical practice.

Conversion therapy ministries primarily adopt a reparative therapy approach, which relies upon psychoanalytic theories of arrested development to explain the causes of homosexuality.¹³⁸ According to this model, homosexual men “suffer from a syndrome of male gender-identity deficit,” which results from a father's failure to meet his son's emotional

133. Fjelstrom, *supra* note 102, at 822; Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 221, 224 (1994); Zoë Schlanger & Elijah Wolfson, *Ex-Ex-Gay Pride*, NEWSWEEK, May 1, 2014.

134. WAIJUNAS, *supra* note 74, at 4, 115–16.

135. ERZEN, *supra* note 50, at 4.

136. *Id.* at 6–7.

137. *See infra* Part II.B.

138. ERZEN, *supra* note 50, at 144. For a discussion of psychoanalytic models of homosexuality and their evolution, see Jack Drescher, *I'm Your Handyman: A History of Reparative Therapies*, 5 J. GAY & LESBIAN PSYCHOTHERAPY 5 (1998).

needs and a mother's domineering personality.¹³⁹ Men are attracted to other men to satisfy their unmet love needs from childhood; they are seeking "to fill emotional and physical deficiencies in the relationship with the parent of the same sex."¹⁴⁰ Reparative therapists believe that by demystifying maleness and helping homosexual men develop stronger gender identifications, their patients' erotic attractions to other men will diminish and they will gradually develop opposite-sex attractions.¹⁴¹ While reparative therapy has a developmental theory for men, its explanation for women's homosexuality is almost non-existent. A small literature exists that blames mothers for creating masculine daughters, but the primary explanation for lesbianism is sexual abuse in childhood.¹⁴² Reparative therapists also view homosexual behavior as an addiction, such that conversion therapy helps clients feel "more in control and less consumed by homosexual preoccupations."¹⁴³ The theoretical framework for reparative therapy thus recycles many of the once-prominent ideas of homosexuality, which the medical mainstream slowly disavowed following the declassification.¹⁴⁴ Nicolosi re-popularized these ideas among dissenters with his 1991 book, *Reparative Therapy of Male Homosexuality*, which fuses psychoanalytic and spiritual thought, becoming a standard text for reparative therapists.¹⁴⁵ The theory behind reparative therapy is particularly appealing for those seeking sexual conversion, because it identifies homosexual needs as normal, even if their sexual expression is not, and defines homosexuality as a condition rather than an immutable orientation.¹⁴⁶ It also supports religious conservatives' arguments about homosexuality as a choice and childhood as a potentially perilous time, as

139. NICOLOSI, HEALING HOMOSEXUALITY, *supra* note 54, at 211–12. *See generally* NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY, *supra* note 54, at 34–35, 77; ERZEN, *supra* note 50, at 145–46, 156.

140. ERZEN, *supra* note 50, at 146; NICOLOSI, HEALING HOMOSEXUALITY, *supra* note 54, at 211; NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY, *supra* note 54, at 34–35.

141. Spitzer, *supra* note 132, at 404. Spitzer repudiated his article's conclusions as to the efficacy of conversion therapy in 2012. Robert L. Spitzer, *Spitzer Reassesses His 2003 Study of Reparative Therapy*, 41 ARCHIVES SEXUAL BEHAV. 757 (2012).

142. ERZEN, *supra* note 50, at 148, 154.

143. Nicolosi et al., *supra* note 79, at 697. Nicolosi and other conversion therapists also emphasize the instability and volatility of gay male relationships, identifying promiscuity as central to the "gay lifestyle." NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY, *supra* note 54, at xvii, 110, 123; *see also* ERZEN, *supra* note 50, at 179–80.

144. Stephen Vider & David S. Byers, *A Half-Century of Conflict Over Attempts to "Cure" Gay People*, TIME, Feb. 12, 2015.

145. NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY, *supra* note 54; ERZEN, *supra* note 50, at 144; Drescher, *supra* note 138, at 34. Many of his theories derive not only from psychoanalysts like Irving Bieber and Charles Socarides, but also from Elizabeth Moberly's 1983 book, *Homosexuality: A New Christian Ethic*. ERZEN, *supra* note 50, at 145; Ford, *supra* note 122, at 71.

146. ERZEN, *supra* note 50, at 146.

minors' psychosexual development is shaped by their experiences with adults.¹⁴⁷

Conversion therapy treatments bridge reparative theories with religious doctrine, emphasizing the need to both repair gender deficits and submit to the word of God.¹⁴⁸ Participants perform masculinity and femininity to cultivate gendered traits, which for men includes spending more time at the gym, wearing stereotypically male attire, and refraining from engaging in “feminine” pursuits, like playing the flute.¹⁴⁹ Women, on the other hand, are given lessons in applying makeup and hairstyling, told to wear skirts, and discouraged from “masculine” activities, such as playing baseball.¹⁵⁰ Participants are also encouraged to develop non-sexual friendships with members of the same-sex; these relationships are then monitored to ensure they do not cross any sexual boundaries.¹⁵¹ In addition to developing the gender roles that reparative theories posit are lacking, participants also engage in private and group talk therapy, which integrate religious doctrine and emphasize the need to live by Biblical proscriptions.¹⁵²

Ex-gay ministries have appropriated many of the concepts of twelve-step and recovery programs, particularly those of Alcoholics Anonymous, creating group settings in which participants confess their misdeeds and testify to their relationship with God.¹⁵³ Participants also join one another in Bible study, where the group leader and other members reinforce and share religious teachings, and may be required to set aside time for personal prayer.¹⁵⁴ This focus on living according to God's will is further reinforced with cognitive behavioral modification techniques, which aim to change thought patterns by redirecting thoughts and reframing desires.¹⁵⁵

147. See *infra* Part II.B.

148. ERZEN, *supra* note 50 at 146, 154–60; NICOLOSI, HEALING HOMOSEXUALITY, *supra* note 54, at 210–11. See generally NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY, *supra* note 54.

149. Complaint and Jury Demand, *supra* note 96, at ¶ 54; ERZEN, *supra* note 50, at 149; Fjelstrom, *supra* note 102, at 809; THIS IS WHAT LOVE IN ACTION LOOKS LIKE (Sawed-Off Collaboratory Productions 2011); *Refuge Program Rules*, BOX TURTLE BULL., <http://www.boxturtlebulletin.com/Articles/000,022.htm> (last visited Jan. 27, 2016).

150. ERZEN, *supra* note 50, at 149; Fjelstrom, *supra* note 102, at 809.

151. Complaint and Jury Demand, *supra* note 96, at ¶¶ 7–8; ERZEN, *supra* note 50, at 147; Fjelstrom, *supra* note 102, at 808.

152. ERZEN, *supra* note 50, at 163, 181; Drescher, *supra* note 86, at 80–81; Raftery, *supra* note 98.

153. ERZEN, *supra* note 50, at 163, 181–82; Creek & Dunn, *supra* note 97, at 309; Ford, *supra* note 122, at 80. Tim LaHaye, an influential evangelical minister, laid out an eighteen-step program for overcoming homosexuality. TIM LAHAYE, THE UNHAPPY GAYS: WHAT EVERYONE SHOULD KNOW ABOUT HOMOSEXUALITY 119–40 (1978).

154. Dehlin, *supra* note 102, at 99; Drescher, *supra* note 86, at 80–81; Fjelstrom, *supra* note 102, at 808, 810; Ford, *supra* note 122, at 81.

155. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 22. See generally Ariel Shildo & Michael Schroeder, *Changing Sexual Orientation: A Consumer's Report*, 33 PROF. PSYCHOL. 249, 250 (2002).

Some conversion ministries take more extreme measures, which include having participants reenact scenes of sexual abuse, beat an effigy of a parent, and snap a rubber band worn around the wrist whenever they feel sexual attraction for members of the same sex.¹⁵⁶ By contrast, the identity exploration the American Psychological Association endorses emphasizes the need for compassion and respect for both sexuality and religion, and to explore the issues that the client raises without criticism or disapproval.¹⁵⁷ This includes helping patients reframe their desires, either by separating out personal feelings and social stigma or by recasting the problem as one of spiritual challenge rather than divine condemnation.¹⁵⁸ The American Psychological Association emphasizes that therapists should be clear on the difference between sexual orientation, behavior, and identity, and that while licensed practitioners might empathize with clients' desire to change their sexual orientation, they need to manage patients' expectations and emphasize that this change is unlikely.¹⁵⁹

Regardless of the program's goal—whether it seeks to “cure” individuals of homosexuality or help participants suppress their same-sex desires—the vast majority of participants do not attain the promised outcome, although there are no empirical studies that conclusively establish conversion therapy's (in)effectiveness. More problematic is that researchers have found that many individuals suffer harm when they fail to achieve their desired ends, including depression, anxiety, shame, guilt, self-hatred, impaired relationships, and a loss of faith.¹⁶⁰ However, others—even those who found conversion therapy ineffectual—reported clear benefits, including an increased sense of belonging, social support, reduced distress, increased self-esteem, and strategies for living consistently with religious beliefs.¹⁶¹ As a result, some conversion therapy participants who ultimately rejected the reparative therapy paradigm stated that conversion therapy options should nevertheless exist.¹⁶² For some, the gains actually came from the programs' ineffectiveness, as “reorientation therapy was very much part of the process by which they came to accept their own sexual orientation and to feel freed to identify as gay or lesbian.”¹⁶³ Through conversion therapy, participants did not change their sexual attractions, but rather came to terms with the immutability of their sexual

156. Complaint and Jury Demand, *supra* note 96, at ¶¶ 8, 14.

157. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 55.

158. *Id.* at 58–59.

159. *Id.* at 55.

160. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 28, 50; ERZEN, *supra* note 50, at 131–32; Flentje et al., *supra* note 102, at 1247, 1257; Shidlo & Schroeder, *supra* note 155, at 257.

161. AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 28; Beckstead & Morrow, *supra* note 95, at 670; Flentje et al., *supra* note 102, at 1254; Shidlo & Schroeder, *supra* note 155, at 257.

162. Beckstead & Morrow, *supra* note 95, at 673.

163. *Id.*; Shidlo & Schroeder, *supra* note 155, at 257.

orientation and were able to to reconcile their sexual and religious identities.¹⁶⁴

Conversion therapy's treatment methods, which meld psychoanalysis and theology, reflect the religious nature of the practice. Indeed, individuals typically seek conversion therapy because they want help reconciling their religious and sexual identities. Religious groups are the predominant providers of conversion therapy, given that the medical establishment has denounced it as unethical. Conversion therapy bans thus characterize a religious practice as a medical one, and proscribe a treatment that mental health professionals agree they should not offer.

II. EXPRESSIVE ENDS

Since the religious dimension of conversion therapy is far removed from the medical practice that the laws address, why have LGBT rights groups made the bans such a central part of their legislative agenda and why have commentators ignored the religious aspect of conversion therapy? It is true that the laws are prospectively useful, in that they likely have some effect in curtailing the behavior of the remaining dissenters and also create a barrier to regression. However, this answer seems insufficient and unsatisfying, given the extent and expense of the campaign. The better explanation is the laws' substantial expressive power, which serve two extremely valuable purposes for the LGBT movement.

First, the bans identify conversion therapy writ large as ineffective and potentially harmful, a characterization that LGBT rights groups hope will create a broad social norm against conversion therapy. This furthers their desire to eliminate all forms of conversion therapy, no matter the practitioner.¹⁶⁵ The bans' criticisms of conversion therapy apply to all practitioners, not just licensed mental health professionals, and thus help serve as an oblique assault on all forms of conversion therapy.

Second, and as importantly, the bans undermine two interrelated arguments that religious conservatives have used to oppose gay rights claims. The laws help ratify the idea that sexual orientation is either a characteristic that no one should be forced to change, or is immutable and thus cannot be altered. LGBT rights groups have seized on the latter in their discussions of the laws, as pressing forward a claim about sexual orientation's immutability has been central to both establishing gay rights and refuting opposition arguments. Additionally, the laws indicate that the state needs to take an active role in protecting LGBT youth, a radical reformulation of typical child protection arguments, which have focused on

164. Flentje et al., *supra* note 102, at 1261.

165. See Telephone Interview with Samantha Ames, *supra* note 18.

defending minors from the dangers of LGBT adults. The normative shifts that the laws introduce are extremely consequential for contemporary LGBT rights battles, with implications for debates over antidiscrimination laws, protections for sexual minority youth, and LGBT adoption and foster care rights.

A. Attacking Conversion Therapy of All Kinds

On their face, the laws only apply to licensed mental health practitioners and conversion therapy offered to minors. However, because of the expressive function of the lawmaking process, their reach is actually far more extensive: they indirectly affect all forms of conversion therapy, including when offered by religious and lay counselors, and when the patients are adults.

1. Disarming the Opposition

Before turning to the laws' expressive elements, it is important to recognize the practical issues that have resulted in the laws' specific framing. There are legal and political considerations that have led the campaign to limit its legislative efforts to bills that address licensed mental health professionals and the treatment of minors. Given these realities, the laws could not have been drawn in a way to regulate the conduct of religious and lay ministers.

The laws' limited applicability—that they do not reach religious practitioners—has reduced the controversy around them and made it possible for legislatures to enact the statutes. In recent years, the clash between Christian beliefs and gay rights have taken center stage in American politics, with the Constitution's First Amendment protection of religion pitted directly against the Fourteenth Amendment's guarantee of equality.¹⁶⁶ Religious exemptions to gay rights laws have been the centerpiece of current controversies, with faith and non-discrimination vying for supremacy in American political consciousness.¹⁶⁷ However, debates over conversion therapy bans have avoided discussions of the religious dimension of the practice.

This is in large part because the bans on their face do not apply to religious groups, such that the laws' advocates have been able to foreclose

166. See, e.g., Tony Cook, *Gov. Mike Pence Signs "Religious Freedom" Bill in Private*, INDY STAR, Mar. 25, 2015; George Rede, *Sweet Cakes Final Order: Gresham Bakery Must Pay \$135,000 for Denying Service to Same-Sex Couple*, OREGONIAN, July 2, 2015; Sheryl Gay Stolberg, *Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples*, N.Y. TIMES, Aug. 13, 2015.

167. See generally KENT GREENAWALT, EXEMPTIONS: NECESSARY, JUSTIFIED, OR MISGUIDED? (2016).

discussions regarding the laws' impact on religion. In Washington D.C., the Gay and Lesbian Activists Alliance ended this line of questioning by stating: "Let us be clear: we do not seek to restrict freedom of speech or religion. We seek to regulate licensed therapy."¹⁶⁸ In Oregon, a coalition of faith leaders submitted a letter of support for the conversion therapy law, stating it did not infringe on religious freedom because the statute "does not apply to clergy or to individuals who provide religious instruction."¹⁶⁹ The strategy of limiting the bans to licensed mental health professionals is also the product of the legal environment. The state has clear authority to regulate individuals it licenses, while laws that directly affect religious practices are subject to strict scrutiny.¹⁷⁰ The bans' limited scope therefore makes it more likely that courts will uphold the laws.

The laws' opponents also have strategic reasons for not wanting to draw attention to the religious dimension of conversion therapy, as religious conservatives have benefited politically from associating conversion therapy with medicine. In the 1990s, the Religious Right began drawing upon scientific literature to provide secular justifications for its antigay politics, which allowed conservative groups to reach voters who distrusted religious extremism.¹⁷¹ By emphasizing the mutability of homosexuality and using the testimony of ex-gays to personalize the scientific studies it cited, the Religious Right provided a modernized argument for why gays and lesbians were undeserving of civil rights protections.¹⁷² It did so as part of a larger strategy it adopted in the 1980s, when the Religious Right turned to scientific authority to buttress its religious claims. As historian Emily Johnson has argued, conservative Christians "actively courted the mantle of scientific authority," using scientific theories to produce secular explanations that promoted the Religious Right's worldview.¹⁷³ These efforts included the production of "Intelligent Design" curricula and "Creation Science" museums as an

168. *Report on Bill 20-501 the "Conversion Therapy for Minors Prohibition Amendment act of 2014*, Attachment 2, Council of the District of Columbia, Comm. on Health (Oct. 16, 2014) (testimony of Gay and Lesbian Activists Alliance of Wash., D.C.), <http://lims.dccouncil.us/Download/29657/B20-0501-CommitteeReport1.pdf> [hereinafter D.C. Legislative History].

169. *Oregon Faith Leaders Support the Youth Mental Health Protection Act (HB 2307)*, 2015 Reg. Sess., Misc. (Or. 2015) (Floor Letter of Sen. Sara Gelsler, submitted May 7, 2015), <https://olis.leg.state.or.us/liz/2015R1/Downloads/FloorLetter/1089>; see also *OR HB 2307 Therapy Ban: Hearing on HB 2307 Before the S. Comm. on Human Servs. & Early Childhood*, 2015 Leg., 78th Sess. (Or. 2015) [hereinafter *Therapy Ban Hearing*] (Memorandum from Reverend Cecil Prescod).

170. *King v. Governor of N.J.*, 767 F.3d 216, 229–33 (3d Cir. 2014).

171. JOHN GALLAGHER & CHRIS BULL, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990S* 28 (1996); JANICE M. IRVINE, *TALK ABOUT SEX: THE BATTLES OVER SEX EDUCATION IN THE UNITED STATES* 178 (2002).

172. GALLAGHER & BULL, *supra* note 171, at 28; IRVINE, *supra* note 171, at 178.

173. Emily Suzanne Johnson, Presentation at the American Historical Association: Science, Compassion, and Ex-Gay Ministries: Understanding the Logic of Anti-Gay-Rights Activism in the 1970s 3 (Jan. 3, 2015).

alternative to the theory of evolution.¹⁷⁴ This tactical innovation allowed the Religious Right to break its connection to biblical literalism and claim “a certain degree of scientific legitimacy,” crucial in a society that values both religious convictions and the scientific method.¹⁷⁵

The success of this secular approach has rendered claims to scientific authority central to religious conservatives’ political strategy, making it difficult for conservative groups to argue that conversion therapy is a nonscientific, religious practice. As a result, in legislative committee debates opponents have mostly refrained from discussing the religious nature of conversion therapy, except when describing their own, positive experiences.¹⁷⁶ Instead, their arguments have been rooted in First Amendment free speech principles, the rights of parents to raise their children without undue government interference, and studies showing that conversion therapy can be effective.¹⁷⁷ Perhaps part of the reason why the conversion therapy bans are so threatening to the conservative movement is not because they limit access to practitioners, but because the laws withdraw scientific credibility from the religious endeavor.

The second factor that limits the bans’ scope—their application to minors—has also made the laws easier to enact by preempting objections that the bans interfere with individuals’ autonomy. While LGBT rights advocates argue that adults are harmed by conversion therapy in much the same way as children, it is the coercion that adolescents face from their

174. *Id.*; EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA’S CONTINUING DEBATE OVER SCIENCE AND RELIGION 257–61 (1997); MICHAEL LIENESCH, IN THE BEGINNING: FUNDAMENTALISM, THE SCOPES TRIAL, AND THE MAKING OF THE ANTIEVOLUTION MOVEMENT 221–24 (2007); CHRISTOPHER M. RIOS, AFTER THE MONKEY TRIAL: EVANGELICAL SCIENTISTS AND A NEW CREATIONISM 106, 109–16 (2014); RANDALL J. STEPHENS & KARL W. GIBERSON, THE ANOINTED: EVANGELICAL TRUTH IN A SECULAR AGE 21–60 (2011).

175. LIENESCH, *supra* note 174, at 221; *see also* GALLAGHER & BULL, *supra* note 171, at 28.

176. *Therapy Ban Hearing* (testimony of Robin Goodspeed); *Conversion Therapy for Minors Prohibition Amendment Act of 2013: Hearing on B20-501 Before the Comm. on Health*, 2014 Leg., 20th Council 46 (D.C. 2014) [hereinafter *Conversion Therapy for Minors Prohibition Act Hearing*] (testimony of Robin Goodspeed). *But see Legal Analysis of Oregon HB 2307 (Prohibiting Licensed Counselors from Counseling Minors Regarding Unwanted Same-Sex Attraction)*, 2015 Leg., 78th Sess. (Or. 2015) (memorandum of Alliance Defending Freedom).

177. *No on HB2307-A Engrossed: Hearing on HB 2307 Before the S. Comm. on Human Servs. & Early Childhood*, 2015 Leg., 78th Sess. (Or. 2015) (testimony of Rebecca Roth); *Therapy Ban Hearing*, *supra* note 176 (testimony of Gordon B. Morrison, Marion County Precinct Committee Person); *Testimony Opposing House Bill 2307: Hearing on HB 2307 Before the S. Comm. on Human Servs. & Early Childhood*, 2015 Leg., 78th Sess. (Or. 2015) [hereinafter *Testimony Opposing House Bill 2307*] (written testimony of Lori Porter, Director of Parents’ Rights in Education); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176, at 9 (testimony of Christopher Doyle, Director, International Healing Foundation); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176, at 32 (testimony of David Pickup); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176, at 51 (testimony of Peter Sprigg, Senior Fellow for Policy Studies, Family Research Council); *Testimony Opposing House Bill 2307*, *supra*, (email testimony of Linda Eskridge); EQUAL AND JUSTICE FOR ALL, *Heterosexual-Affirming Therapy Fact Sheet*, www.massresistance.org/docs/gen2/14b/ban-therapy-bill/docs/Heterosexual-Affirming-Facts-2014.pdf (last visited Feb. 6, 2017).

parents and community members that has convinced legislators to act.¹⁷⁸ Interestingly, the first law LGBT rights groups proposed also encompassed adults; the initial version of the California bill provided a private right of action against therapists who conducted conversion therapy without informed consent, thereby protecting adults as well as minors.¹⁷⁹ That bill required therapists to warn clients of all ages that “[s]exual orientation change efforts have not been shown to be safe or effective and can, in fact, be harmful. The risks include, but are not limited to, depression, anxiety, self-destructive behavior, and suicide.”¹⁸⁰ However, a Senate floor amendment removed this provision, limiting the ban’s reach to minors.¹⁸¹ The laws’ limited application has also helped them survive judicial scrutiny, with courts noting that children are especially vulnerable and therefore may require more protection from the state than adults.¹⁸²

2. *Expressive Function*

LGBT rights groups have strategic reasons for promoting the limited laws insofar as their scope has made the bans easier to enact and more likely to withstand judicial scrutiny. At the same time, the laws still further the movement’s broader agenda: they shape social norms through their expressive function.¹⁸³ LGBT rights groups have harnessed the expressive power of the bans to undermine conversion therapy as a whole and thus have attained many of the benefits that would attach to more sweeping laws without risking legislative pushback or judicial losses.

As a number of legal scholars have argued, law has both material and expressive consequences, such that “law matters for what it says in addition to what it does.”¹⁸⁴ The law expresses messages through its authorization,

178. Interview with Samantha Ames, *supra* note 18.

179. *Healing Arts: Sexual Orientation Change Efforts: Hearing on SB 1172 Before the S. Comm. on Bus., Professionals, & Econ. Dev.*, 2011–2012 Reg. Sess. 1 (Cal. 2012); Sandley, *supra* note 19, at 256.

180. *Sexual Orientation Change Efforts: Hearing on SB 1172 Before the S. Jud. Comm.*, 2011–2012 Reg. Sess. 4–5 (Cal. 2012).

181. *Third Reading of SB 1172 Before the S. Rules Comm.*, 2011–2012 Reg. Sess. 1 (Cal. 2012) [hereinafter *Third Reading*]; Sandley, *supra* note 19, at 256.

182. *King v. Governor of N.J.*, 767 F.3d 216, 240 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1232 n.8 (9th Cir. 2013). For a discussion of cases testing the line between the parental and state authority over child welfare, see generally SHAWN FRANCIS PETERS, *WHEN PRAYER FAILS: FAITH HEALING, CHILDREN, AND THE LAW* (2008).

183. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–25 (1996); Maggie Wittlin, Note, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419, 423–24 (2011).

184. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 373 (2000); see also Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998); Kendall Thomas, *Beyond the Privacy*

regulation, and proscription of conduct. Law shapes individuals' behavior not only because of the legal penalties that are associated with violating a regulation, but also because of the reputational consequences of contravening the social norm.¹⁸⁵ That is, law can change the social meaning of an action.¹⁸⁶ It may also alter a person's beliefs, but individuals do not need to agree with a value for the law to initiate social change.¹⁸⁷ Even if individuals object to a policy choice, by conforming to the law, they create a cultural environment that supports the law's normative commitment.¹⁸⁸ As social movement scholars have noted, this has a feedback effect, creating a culture that shapes how laws are then understood.¹⁸⁹ Thus, even if a law does not affect a specific individual's conduct, it still may have an expressive impact on that person. It is precisely because laws express values and shape social norms that ideological interest groups have pursued symbolic statutes on a range of topics, including legislation that repeals unenforceable prohibitions on miscegenation, prohibits flag-burning, and opposes the theory of evolution.¹⁹⁰ The LGBT movement has long recognized the importance of law's expressive function, as the recent fight for marriage equality demonstrates. For advocates, securing the right to *marry*—not just enjoy the benefits of marriage through civil unions—was essential because of the expressive function of the marriage label.¹⁹¹

However, even before a law is enacted, the lawmaking process has an expressive effect. Legislators send a message when they first consider a bill; by demonstrating their commitment to and prioritization of an issue,

Principle, 92 COLUM. L. REV. 1431, 1485 (1992) (arguing that statutes criminalizing same-sex sodomy legitimized homophobic violence).

185. McAdams, *supra* note 184, at 340; Wittlin, *supra* note 183, at 424.

186. RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 166 (2015).

187. Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 608 (1998); see also William M. Evan, *Law as an Instrument of Social Change*, in *THE SOCIOLOGY OF LAW: A SOCIAL-STRUCTURAL PERSPECTIVE* 555–56 (William M. Evan ed., 1980).

188. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000); Cooter, *supra* note 187, at 608; Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 962 (1991); Milton C. Regan, Jr., *How Does Law Matter?*, 1 GREEN BAG 2D 265, 271 (1998).

189. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014); Theodore Ruger, *Social Movements Everywhere*, 155 U. PA. L. REV. PENNUMBRA 18, 22–23 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1327 (2006).

190. McAdams, *supra* note 184, at 379–80.

191. Corinne Blalock, *Hollingsworth v. Perry: Expressive Harm and the Stakes of "Marriage,"* 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 217, 240–42 (2013); Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 902 (2010); Melissa Murray, *Equal Rites and Equal Rights*, 96 CALIF. L. REV. 1395, 1398–99 (2008).

legislators are signaling their approval of the values that the bill contains.¹⁹² The fact that a statute passes the two legislative chambers and is approved by the executive signals a wider acceptance of the norms the law promotes and ratifies the messages of the lawmaking process. Both before and after enactment, supporters and opponents disseminate information about the law and what it means, creating a discourse that shapes the law's ultimate message. Some laws' expressive intentions are clear while others are ambiguous, and lawmakers, advocates, and commentators can influence how citizens understand what the law signifies. The law is thus imbued with an expressive message from its inception that is completely separate from its regulation of conduct, but this message can be contested. At the period of inception, debate, and enactment, it is what those involved convey to the public that determines what citizens understand the law to mean, as well as its normative commitment.

That the lawmaking process has an expressive effect is clear from conversion therapy bans, as this is what is allowing LGBT rights groups to expand the laws' reach. To create a broad social norm against all types of conversion therapy, LGBT rights groups and their allies have used the lawmaking process and its attendant legislative hearings, political debates, and media accounts to educate the public about the practice's dangers.¹⁹³ The laws have produced an outpouring of information about conversion therapy, making it more widely available, but it is important to distinguish information from education, as education is deeply normative. The sponsor of the California bill explained that his purpose was not only "to limit deceptive therapies that are harmful to minors," but also to make "adults aware of the potential harms associated with sexual orientation change therapies."¹⁹⁴ This normative educative purpose is also evident in the statements individuals have made to legislative committees. In testifying about their personal experiences, supporters have asserted they would not have sought conversion therapy had information on its harms been available and urged lawmakers to enact the bans so others would not be similarly deceived.¹⁹⁵ When presenting their arguments to legislative committees, supporters of the bans have repeatedly emphasized that conversion therapy is dangerous and can result in anxiety, depression, shame, hopelessness, and suicide, offering statistical evidence to support

192. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 66 (1995).

193. Interview with Samantha Ames, *supra* note 18.

194. *Third Reading*, *supra* note 181.

195. See *Therapy Ban Hearing*, *supra* note 176 (testimony of Jason Zenobia); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176 (testimony of Melanie Shurka); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176 (testimony of Matthew Shurka).

their arguments.¹⁹⁶ Legislatures have also heard evidence that conversion therapy is often ineffectual and have included statements to this effect in their legislative findings.¹⁹⁷ While the legislative debates have focused on how conversion therapy impacts youth, the same arguments apply to adults. As a result, the evidence the legislative hearings has adduced, which the media has circulated into popular discourse, provides information so that the public can educate itself about conversion therapy in broad terms, not just as applied to minors or when practiced by licensed professionals.

California and other states' bans have garnered a great deal of media attention, disseminating information about the limits and dangers of conversion therapy. Indeed, news reports on conversion therapy increased by almost 800% after California first introduced a ban.¹⁹⁸ While there is no way to know whether these laws are effective in raising adults' awareness of the dangers and limits of conversion therapy, social science literature has shown that "the mere publicity of disapproval affects behavior."¹⁹⁹ At the very least, the fact that conversion therapy is being discussed indicates that those interested in learning about the practice have more information available to them.²⁰⁰ It does appear that more people are seeking

196. See *Therapy Ban Hearing*, *supra* note 176 (testimony of Samantha Ames, National Center for Lesbian Rights); *Therapy Ban Hearing*, *supra* note 176 (testimony of Alison Gill, Human Rights Campaign); *Therapy Ban Hearing*, *supra* note 176 (testimony of Kate Kaufman, TransActive Gender Center); *Therapy Ban Hearing*, *supra* note 176 (testimony of Buster Ross); *Therapy Ban Hearing*, *supra* note 176 (testimony of Paul Southwick); *Therapy Ban Hearing*, *supra* note 176 (testimony of Jason Zenobia); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176 (testimony of Andrew Barnett); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176 (testimony of Alison Gill, Human Rights Campaign); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176 (testimony of Gregory Jones); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176 (testimony of Apryl Prentiss); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176 (testimony of Matthew Shurka); *Therapy Ban Hearing*, *supra* note 176 (memorandum of Nico Quintana, Basic Rights Oregon); *Therapy Ban Hearing*, *supra* note 176 (letter from American Counseling Association); *Therapy Ban Hearing*, *supra* note 176 (memorandum of Oregon Psychological Association).

197. See 405 ILL. COMP. STAT. ANN. 48/5 (West Supp. 2016); VT. STAT. ANN. tit. 18 § 8352 (West Supp. 2016) (legislative findings); *Conversion Therapy for Minors Prohibition Act Hearing*, *supra* note 176 (testimony of Lee A. Savio Beers, American Academy of Pediatrics); *Third Reading*, *supra* note 181; *Therapy Ban Hearing*, *supra* note 176 (letter from Oregon School Psychologists Association); Letter from Kirsten Hawkins et al., D.C. Chapter of the Am. Acad. of Pediatrics, to Mary Cheh (Jan. 14, 2013).

198. A Westlaw search for news articles with the phrases "conversion therapy," "reparative therapy," or "sexual orientation change efforts" published between February 21, 2012 (the date California introduced its ban) and January 17, 2016, produced 4,321 results. A Westlaw news search for articles with the same terms published between February 20, 2008 and February 20, 2012, the four year span before California introduced its ban, produced 486 results. This constitutes a 789% increase.

199. McAdams, *supra* note 184, at 368–69.

200. Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532, 1583 (2014).

information on the topic, as Google searches for “conversion therapy” and related terms increased dramatically between 2012 and 2016.²⁰¹

Notably, however, the debates have not included information about alternatives to conversion therapy for individuals who want help reconciling their religious and sexual identities. Thus, while these individuals will learn that conversion therapy is harmful, the laws will not help them identify useful options—such as sexual identity therapy. This is perhaps unsurprising, since LGBT rights advocates consider conversion therapy to be harmful not just in its effects on individuals, but because it promotes the idea of homosexuality as something that is undesirable, such that someone would want it changed.²⁰² As a result, their goal is to undermine conversion therapy as a practice, not help religious individuals find a replacement. This underscores the normative commitment of the groups supporting the bans and how it is deploying the expressive effects of law and the lawmaking process. What is striking is that the laws appear to include an exception for sexual identity exploration,²⁰³ but this goes unmentioned in the discourse around the statutes. That message in the text is thus silenced, demonstrating how important rhetoric is to the law’s expressive effects.

The anti-conversion therapy campaign has raised the profile of this issue, garnering the attention of national political leaders and making Americans more aware of conversion therapy. In April 2015, the White House issued a statement supporting conversion therapy bans for minors.²⁰⁴ It also endorsed public information campaigns, including the It Gets Better Project, that build support for LGBT youth.²⁰⁵ Under the Obama Administration, the Substance Abuse and Mental Health Services Administration (SAMHSA) issued a report on conversion therapy, concluding the practice was inappropriate and should be ended.²⁰⁶ As noted in the introduction, 2016 Democratic presidential candidate and former Secretary of State Hillary Clinton tweeted, “It is time to put an end to conversion therapy for minors. We should be supporting LGBT kids—not trying to change them.”²⁰⁷ Of course, the attention from politicians has not been entirely supportive of the LGBT movement’s campaign. In 2014, the

201. GOOGLE TRENDS, <https://www.google.com/trends> (last visited Feb. 6, 2017) (search terms “conversion therapy,” “reparative therapy,” and “sexual orientation change efforts”).

202. Interview with Samantha Ames, *supra* note 18.

203. See, e.g., OR. REV. STAT. ANN. § 675.850(2)(a)(B)(ii) (2015).

204. David Jackson, *Obama Backs Efforts to End “Conversion Therapy,”* USA TODAY (Apr. 9, 2015, 7:20 AM), <http://www.usatoday.com/story/theoval/2015/04/09/obama-conversion-therapy-white-house-petition-leelah-alcorn/25505091/>.

205. SAMHSA, *supra* note 10, at 37.

206. *Id.*

207. Hillary Clinton (@HillaryClinton), TWITTER (Dec. 21, 2015, 11:06AM), <https://twitter.com/HillaryClinton/status/679015185575645184>.

Texas Republican Party platform stated that “homosexuality is a choice” and endorsed “therapy aimed at ‘curing’ people of being gay.”²⁰⁸ Former Texas Governor Rick Perry has told supporters that “homosexuality [is] like alcoholism: whether or not you feel compelled to do something, you have the ability not to act on your urges.”²⁰⁹ In 2016, the national Republican Party controversially included its opposition to conversion therapy bans in its national platform, although it is unclear what position the Trump Administration will take on the subject.²¹⁰

The bans have made conversion therapy part of a national conversation, garnering widespread attention. By helping to disseminate information about the practice’s potential harms, advocates hope to create a social norm against the practice. Thus, even though the laws only apply to licensed mental health professionals who treat minors, their reach is much broader. They are much more than the four corners of their pages, which explains why the LGBT movement is pursuing these laws.

B. Attacking Antigay Legal Rhetoric

The bans’ expressive effects have a significant influence on the LGBT movement beyond the question of conversion therapy, as they implicate broader questions relevant to LGBT rights. Through these laws, LGBT rights groups are able to emphasize that homosexuality is an immutable characteristic, an issue that has been central to establishing rights claims. Additionally, by reframing child protection to focus on LGBT youth, the laws reverse a longstanding historical narrative that has undermined gay rights. Conservative religious groups have opposed gay rights for decades on the basis of child protection, claiming that the state must take a disapproving stance on homosexuality lest children be seduced into the “homosexual lifestyle.” The child protection claims gain strength from conservatives’ belief in homosexuality’s mutability, with the two ideas serving as mutually reinforcing arguments. These claims continue to shape LGBT rights debates, making these bans, through their expressive effects, especially important for LGBT advocates.

208. Ben Philpott, *Is the Texas Republican Platform Bad for Business?*, KUT 90.5 (June 17, 2014), <http://kut.org/post/texas-republican-platform-bad-business>.

209. *Id.*

210. REPUBLICAN NAT’L COMM., *supra* note 13, at 37; Samantha Allen, *Why President Trump Isn’t Anti-Gay Enough for the Religious Right*, DAILY BEAST (Feb. 17, 2017, 12:00 PM), <http://www.thedailybeast.com/articles/2017/02/17/why-president-trump-isn-t-anti-gay-enough-for-the-religious-right.html>.

1. *Historical Arguments*

Conservative religious groups have used arguments of mutability and child protection to oppose a range of gay rights, including sexual orientation antidiscrimination laws, gay and lesbian teachers, multicultural school curricula, and marriage equality. While these arguments initially appeared in the discourse of the Religious Right, which coalesced in the 1970s, and reached their zenith in the 1990s, they persist today.

The related ideas about homosexuality's mutability and the need to protect children have infused debates over gay rights since the Religious Right's early antigay crusades. One of the first was Anita Bryant's 1977 voter referendum campaign to overturn Miami's antidiscrimination law, which had been amended to include protections for gays and lesbians.²¹¹ Bryant, a well-known singer, prolific author, and spokeswoman for Coca-Cola and Florida Citrus, argued the state should not protect the rights of homosexuals by contending that homosexuals posed a danger to children.²¹² Calling her organization "Save Our Children," Bryant's campaign emphasized: "Homosexuals cannot reproduce—so they must recruit. And to freshen their ranks, they must recruit the youth of America."²¹³ The fear of homosexual role models was a central part of Bryant's campaign, as Mike Thompson, the chair of the Florida Conservative Union, explained. According to Thompson, the referendum was necessary to counter "role modeling homosexuals, the ones who aren't openly recruiting, but who don't stay in the closet," identifying the problem as "the homosexual who is blatant in his profession of his preferences and who gives the impression to young people that this lifestyle is not odd or to be avoided, but just an alternative."²¹⁴

The campaign's focus on indoctrination introduced a rhetoric that would characterize later antigay campaigns. While reporters discounted Save Our Children's "homosexual recruitment" claims, they resonated with the general public as well as political leaders.²¹⁵ Florida's Democratic governor, Reuben Askew, spoke out in support of Bryant's campaign, explaining, "If I were in Miami . . . I would have no difficulty in voting to repeal that ordinance. I would not want a known homosexual teaching my

211. Gillian Frank, "The Civil Rights of Parents": Race and Conservative Politics in Anita Bryant's Campaign Against Gay Rights in 1970s Florida, 22 J. HIST. SEXUALITY 126, 127, 141 (2013).

212. ANITA BRYANT, THE ANITA BRYANT STORY 89 (1977).

213. *Id.* at 62.

214. Morton Kondracke, *Anita Bryant is Mad About Gays*, NEW REPUBLIC, May 7, 1977, at 14.

215. FRED FEJES, GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA'S DEBATE ON HOMOSEXUALITY 140 (2008); Frank, *supra* note 211, at 146.

children.”²¹⁶ Miami residents overwhelmingly voted to repeal the amendment, with 70% of voters approving the measure.²¹⁷ The Dade referendum received widespread media attention and became a matter of national debate, with *Newsweek* characterizing the vote as “a crucial test of whether the country [was] willing to extend civil-rights legislation to homosexuals.”²¹⁸

The next year, California senator John Briggs launched a statewide referendum to bar gays and lesbians from teaching in public schools, calling his organization “California Save Our Children.”²¹⁹ Briggs explained the law was necessary because homosexuality was a learned behavior: “What I am after is to remove those homosexual teachers who through word, thought or deed want to be a public homosexual, to entice young impressionable children into their lifestyle.”²²⁰ Briggs’s Proposition 6 also applied to heterosexuals who advocated, encouraged, or promoted homosexual activity, such that a teacher who merely spoke to friends in favor of gay rights could lose his or her job.²²¹ This expansive scope led to Proposition 6’s failure, with voters criticizing the measure as creating “more government and a Big Brother atmosphere.”²²²

While California voters rejected Proposition 6,²²³ the campaign reflected a national discomfort with the idea of gays and lesbians in the classroom, as their presence could influence children’s psychosexual development. Consequently, even when laws did not explicitly prohibit homosexual teachers, educators throughout the country lost their jobs when their sexuality became known, as parents and school districts complained that gay faculty would influence their students to become homosexual.²²⁴ In 1983, the West Virginia Attorney General issued an opinion that a state law allowing school districts to fire teachers for “immorality” applied by definition to gay and lesbian teachers.²²⁵ Many homosexual educators therefore stayed in the closet, afraid that revealing their sexuality would mean losing their careers and livelihoods.

216. DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 301 (1999).

217. *Id.* at 299, 303–04, 308; FEJES, *supra* note 215, at 96, 121, 123, 131.

218. Tom Mathews et al., *Battle Over Gay Rights*, *NEWSWEEK*, June 6, 1977, at 16.

219. FEJES, *supra* note 215, at 183.

220. *Id.*

221. *Id.*

222. *Id.* at 209.

223. *Id.* at 211.

224. *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444, 454 (6th Cir. 1984) (Edwards, J., dissenting); *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843, 849 (D. Md. 1973), *aff’d on other grounds*, 491 F.2d 498 (4th Cir. 1974); *see also Gish v. Bd. of Educ.*, 366 A.2d 1337, 1342 (N.J. Super. Ct. App. Div. 1976).

225. *Opinion on Right to Dismiss Teachers for Homosexual and/or Lesbian Conduct*, 1983 W. Va. Op. Att’y Gen. 46 (1983).

Evangelical leaders contributed to this national conversation by emphasizing the danger that homosexual teachers posed to children. These arguments incorporated claims about homosexuality as a mutable characteristic, as they were based on the idea that the presence of gay teachers would result in youth choosing homosexuality. Jerry Falwell, the founder of the Moral Majority, explained that allowing gays and lesbians to teach “might be an open invitation for [homosexuals] to subvert our young and impressionable children into their lifestyle.”²²⁶ Likewise, Beverly LaHaye, who founded Concerned Women for America, warned that “[e]very homosexual is potentially an evangelist of homosexuality, capable of perverting many young people to his sinful way of life.”²²⁷ In response to these fears, in 1978, Oklahoma amended its law to permit the dismissal of any teachers who “advocate[ed], solicit[ed], impos[ed], encourag[ed] or promot[ed] public or private homosexual activity.”²²⁸

The Religious Right also waged battles to protect children from homosexuality through debates over the content of instructional materials in schools.²²⁹ These curricular debates became heated in the early 1990s, after New York City introduced the multicultural “Children of the Rainbow” curriculum for first graders in its public schools.²³⁰ The Rainbow guide urged teachers to discuss the value of every type of family household, “including two-parent or single-parent households, gay or lesbian parents, divorced parents, adoptive parents, and guardians or foster parents.”²³¹ While only two of the curriculum’s 443 pages mentioned gay and lesbian families, and did not include any lessons that explained homosexuality to the children, it included in its list of recommended readings three books that became a focal point of the controversy—*Heather Has Two Mommies*, *Daddy’s Roommate*, and *Gloria Goes to Gay Pride*—for their depiction of loving gay parents.²³² Upon learning of the Rainbow curriculum, national and local conservative groups became involved in efforts to prevent its introduction, creating a vitriolic debate that centered on the language of recruitment and depicted education reformers as allowing sexual deviants to prey on youth. As one New York activist explained, “It was the first time that someone was probably trying to woo our children into a [gay] lifestyle The curriculum for the first

226. IRVINE, *supra* note 171, at 173.

227. TIM & BEVERLY LAHAYE, THE ACT OF MARRIAGE 354 (2009).

228. OKLA. STAT. tit. 70, § 6–103.15 (1978), *invalidated in part by* Nat’l Gay Task Force v. Bd. of Educ., 729 F.2d 1270 (10th Cir. 1984) (repealed 1990).

229. Rosky, *supra* note 20, at 608.

230. IRVINE, *supra* note 171, at 154.

231. *Id.*; Steven Lee Myers, *How a “Rainbow Curriculum” Turned into Fighting Words*, N.Y. TIMES, Dec. 13, 1992.

232. GALLAGHER & BULL, *supra* note 171, at 219–20; Myers, *supra* note 231.

time was systematically going to recruit them and going to make them accepting of that lifestyle.”²³³ While polls showed that 70% of New York City parents initially supported the Rainbow curriculum, the controversy led almost every school district to eliminate the multicultural guide by the end of 1992.²³⁴

The Religious Right’s protests in New York City had a nationwide effect, with communities all over the country expressing concern that children were being indoctrinated into homosexuality in schools.²³⁵ In the wake of the Rainbow controversy, several states prohibited their schools from using instructional materials that portrayed homosexuality as “an acceptable lifestyle.”²³⁶ School districts around the country became embroiled in debates over how to address sexual orientation in schools; the Sexuality Information and Education Council of the United States documented more than 500 battles in all fifty states between 1992 and 1997.²³⁷ Opposition to gay and lesbian teachers remained pervasive in the 1990s and 2000s. Indeed, Justice Scalia remarked in his 2003 dissent to *Lawrence v. Texas* that “[m]any Americans do not want persons who openly engage in homosexual conduct as . . . teachers in their children’s schools.”²³⁸ As this demonstrates, the notion that gays and lesbians are dangerous role models has had incredible staying power, rendering the expressive effects of the conversion therapy bans extremely important.

Parents were not the only ones who expressed concerns about homosexuality, with voters taking up gay rights issues throughout the 1990s and 2000s. Bryant’s success in 1977 led others to sponsor referenda around the country; religious conservative organizations proposed more than 245 referenda and initiatives by 2009.²³⁹ In 1992, one of these initiatives garnered nationwide attention: Colorado’s Amendment 2, which prohibited the state from protecting gays, lesbians, and bisexuals from discrimination on the basis of their sexual orientation.²⁴⁰ During the

233. IRVINE, *supra* note 171, at 174.

234. *Id.* at 154–55; *see also* Myers, *supra* note 231.

235. STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA’S PUBLIC SCHOOLS* 82–84 (2010).

236. TEX. HEALTH & SAFETY CODE ANN. § 85.007(b)(2) (West 2010 & Supp. 2016); *see also* ALA. CODE § 16-40A-2(c)(8) (2012); ARIZ. REV. STAT. ANN. § 15-716(C) (2014). Utah enacted a similar law in 2001. UTAH CODE ANN. § 53A-13-101(1)(c)(iii) (LexisNexis 2016).

237. IRVINE, *supra* note 171, at 166; Ruth Mayer, *1996-97 Trends in Opposition to Comprehensive Sexuality Education in Public Schools in the United States*, SIECUS REP., Aug.-Sept. 1997, at 20; Allan J. Mayer et al., *A Tide of Born-Again Politics*, NEWSWEEK, Sept. 15, 1980, at 28.

238. 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

239. AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* 6 (2012).

240. AM. CIVIL LIBERTIES UNION, *BRIEFING BOOK: ANTI-GAY BALLOT INITIATIVES* 38 (1993) (on file with ONE National Gay and Lesbian Archives, ACLU of Southern California Lesbian & Gay Rights Chapter Records, Collection no. 2007-013, Box 19, Folder 2) [hereinafter ACLU]; *Activist: Group Made Up Abuse Stats*, COLO. SPRINGS GAZETTE-TELEGRAPH, Sept. 3, 1992.

Amendment 2 campaign, the initiative's sponsor, Colorado for Family Values (CFV), made child protection a critical message. Like Bryant's 1977 campaign, which claimed children would become homosexual through indoctrination, CFV cast the danger as children being taught that homosexual "lifestyle" was "health[y] and normal."²⁴¹ According to this theory, children might be tempted into homosexuality once it was no longer a stigmatized behavior.²⁴² In its printed campaign materials, CFV proclaimed that children were already being taught that homosexuality was desirable, making the danger more immediate and conveying the urgency of the initiative. One pamphlet loudly announced: "Homosexual indoctrination in the schools? IT'S HAPPENING IN COLORADO!"²⁴³

Connected to the rhetoric of child protection was the idea that homosexuality was a mutable characteristic that individuals could choose. CFV repeatedly emphasized that it respected and sought to protect the rights of what it called "legitimate minorities," which were characterized by immutable characteristics like race or sex, but was opposed to "special rights" for gays and lesbians, who had chosen their sexuality.²⁴⁴ To buttress this claim, CFV pointed to social scientific evidence that homosexuality was a learned behavior, not a biological trait with genetic origins.²⁴⁵ It also emphasized the effectiveness of conversion therapy, which demonstrated that homosexuality could be overcome.²⁴⁶ Through "compassionate therapy" and religious counseling, the group maintained, gays and lesbians could change their behavioral patterns, demonstrating that homosexuality

241. ACLU, *supra* note 240, Appendix of CFV Advertising; Memorandum from No Special Rights Committee, Speaking Points on the Abnormal Behavior Initiative (on file with the Denver Public Library, Equality Colo. Records, MSS WH1781, Box 21, Folder 20) [hereinafter Equality Colo. Records].

242. Videotape: Television Advertisements (Colorado for Family Values) (on file with History Colorado, Colorado for Family Values Collection, Collection no. MSS 1699) [hereinafter CFV Records]; ACLU, *supra* note 240, Appendix of CFV Advertising; Colorado for Family Values, *Child, ADRESPECT*, www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=27&ClientID=11064 (last visited Feb. 11, 2017).

243. Letter from Danni Lederman, Fund Raising Coordinator of Colo. Legal Initiatives Project, to Colo. Legal Initiatives Project supporters on CFV Statements (Jan. 15, 1992) (on file with GLBT Historical Soc'y, Phyllis Lyon/Del Martin Papers, Collection No. 1993-13, Box 98, Folder 1) [hereinafter Lyon/Martin Papers]; *see also* ACLU, *supra* note 240, Appendix of CFV Advertising.

244. ACLU, *supra* note 240, Appendix of CFV Advertising; CFV, How Voting "Yes!" on Amendment 2 Protects Colorado's True Minorities (on file with Equality Colo. Records, Box 15, Folder 2); CFV, Civil Right Should be Based on Real Need – Not How People Have Sex! (on file with Equality Colo. Records, Box 15, Folder 2).

245. CFV, Why Special "Gay Rights" Measures Destroy Civil Rights (on file with Equality Colo. Records, Box 15, Folder 2). For a discussion of this social science literature, see Marie-Amélie George, *The Custody Crucible: The Development of Scientific Authority about Gay and Lesbian Parents*, 34 L. & HIST. REV. 487, 522–24 (2016).

246. Information about the Colorado for Family Values Petition (on file with Equality Colo. Records, Box 15, Folder 2); Pamphlet of No Special Rights Committee, What's Wrong with "Gay Rights?": You Decide! (on file with Equality Colo. Records, Box 15, Folder 2).

was not an immutable, biological characteristic.²⁴⁷ CFV described its “deep[est] purpose” as “bring[ing] a message of hope” to homosexuals.²⁴⁸ In taking this approach, the group provided an important counter to the gay rights movement, which had stressed the immutability of sexual orientation to argue for heightened judicial scrutiny of discriminatory laws.²⁴⁹ The measure passed by 53% of the vote, with CFV’s victory emboldening a number of other organizations to sponsor initiatives that mirrored Amendment 2.²⁵⁰ Between 1992 and 1996, groups around the country made forty-six different attempts to enact initiatives modeled on Amendment 2, relying upon the twin claims of child protection and homosexuality’s mutability to justify the laws.²⁵¹ Most were preempted through state legislative action, did not obtain enough signatures to be placed on the ballot, or were ruled invalid by courts.²⁵² However, Idaho and Oregon both came close to enacting versions of Amendment 2 in 1994, with the initiatives failing by only 1% of the vote in both states.²⁵³ After the Supreme Court’s 1996 ruling in *Romer v. Evans*, which held that such measures were unconstitutional,²⁵⁴ the Religious Right turned its ballot initiative efforts to same-sex marriage bans.²⁵⁵

Same-sex marriage became a matter of national debate in 1996, after a Hawaii court ruled that the state constitution protected same-sex couples’ right to marry.²⁵⁶ In the years that followed, legislatures and voters enacted laws prohibiting same-sex marriage, with child protection and immutability a common refrain in the debates.²⁵⁷ In 1998, citizens in Hawaii and Alaska became the first to ban gay marriage by popular vote following ballot campaigns that emphasized the danger same-sex marriage posed to

247. Information About the Colorado for Family Values Petition, *supra* note 246; Pamphlet of No Special Rights Committee, *supra* note 246.

248. TONY MARCO, SPECIAL CLASS PROTECTIONS FOR GAYS: A QUESTION OF BEHAVIOR AND CONSEQUENCES 2 (1991) (on file with CFV Records, Box 1, Folder 18).

249. ARLENE STEIN, THE STRANGER NEXT DOOR: THE STORY OF A SMALL COMMUNITY’S BATTLE OVER SEX, FAITH, AND CIVIL RIGHTS 21 (2001).

250. *Id.* at 27.

251. Lisa Keen, *Voters Say “No” to Ballot Initiatives*, WASH. BLADE, June 21, 1996; STONE, *supra* note 239, at 23–25.

252. Keen, *supra* note 251.

253. GALLAGHER & BULL, *supra* note 171, at 242; William M. Lunch, *Oregon: Identity and Politics in the Northwest*, in GOD AT THE GRASSROOTS: THE CHRISTIAN RIGHT IN THE 1994 ELECTION 227 (Mark J. Rozell & Clyde Wilcox eds., 1995).

254. 517 U.S. 620, 632–36 (1996).

255. STONE, *supra* note 239, at 11–12.

256. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996), *rev’d*, 994 P.2d 556 (Haw. 1999). In 1993, the Hawaii Supreme Court indicated that the state might be required to issue marriage licenses to same-sex couples. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

257. CARLOS A. BALL, SAME-SEX MARRIAGE AND CHILDREN: A TALE OF HISTORY, SOCIAL SCIENCE, AND LAW 76 (2014).

schoolchildren.²⁵⁸ In both states, the laws' sponsors argued that grade school children would be taught "that homosexual marriage was normal."²⁵⁹ Other anti-marriage initiative campaigns repeated this claim, which proved effective at swaying voters. In 2004, the Oregon Defense of Marriage Coalition created an advertisement featuring Clark Brody, the former Deputy Superintendent of Public Education. Brody claimed schools would have to promote same-sex relationships as equal to heterosexual ones, which would be "confusing for our students."²⁶⁰ As Michael Klarman has argued, "This ad capitalized on the fear of many parents who might have been willing to accept their children as gay if they turned out to be so but nonetheless preferred that they be straight and thus opposed schools' possibly influencing the children's choice by treating homosexuality as acceptable."²⁶¹ The advertisement, which preyed upon parents' heterosexism, demonstrated the limits of the tolerance gays and lesbians had attained. Oregon was one of thirteen states in which voters elected to ban same-sex marriage in 2004.²⁶²

The voter initiative campaign that best exemplifies how arguments about child protection had become the pillar of anti-marriage advocacy took place in California in 2008. After the state supreme court overturned a restrictive marriage law enacted through a voter initiative in 2000, Protect Marriage sponsored a state constitutional amendment to limit marriage to opposite-sex couples.²⁶³ The group emphasized child protection in the official ballot pamphlet, which explained that Proposition 8 "protects our children from being taught in public schools that 'same-sex marriage' is the same as traditional marriage," and warned that, without the ban, "TEACHERS COULD BE REQUIRED to teach young children there is no difference between gay marriage and traditional marriage."²⁶⁴ One of the group's most effective commercials, entitled *It's Already Happened*, featured a pigtailed girl breathlessly telling her mother: "Guess what I learned in school today? . . . [A] prince [can marry] a prince, and I can marry a princess!"²⁶⁵ The commercial explicitly connected the lessons children would learn in school about same-sex marriage to its effect on

258. MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 66–67 (2013); STONE, *supra* note 239, at 33.

259. KLARMAN, *supra* note 258, at 67; *see* STONE, *supra* note 239, at 33.

260. Def. of Marriage Coal., *Students*, ADRESPECT, <http://www.adrespect.org/common/adlibrary/adlibrarydetails.cfm?QID=2028&ClientID=11064> (last visited Feb. 10, 2017).

261. KLARMAN, *supra* note 258, at 108.

262. DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE 175 (2006).

263. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment* CAL CONST. art I, § 7.5.

264. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 930 (N.D. Cal. 2010) (emphasis omitted).

265. *VoteYesonProp8, Yes on 8 TV Ad: It's Already Happened*, YOUTUBE (Oct. 7, 2008), <https://www.youtube.com/watch?v=0PgicqgFYP4>.

their future sexual orientations. A post-election report concluded this ad was especially effective in persuading parents with school-age children to vote in favor of Proposition 8.²⁶⁶

The Ninth Circuit characterized the child protection rhetoric of Proposition 8 as a repetition of decades-old antigay messaging, which ballot measure sponsors had “presented to voters in terms designed to appeal to stereotypes of gays and lesbians as predators, threats to children, and practitioners of a deviant ‘lifestyle’” since Anita Bryant’s Miami referendum in 1977.²⁶⁷ However, Protect Marriage’s messaging was slightly different, insofar as it was rooted more deeply in heterosexism rather than strict homophobia: Proposition 8’s sponsors encouraged Californians to claim affection for their LGBT family members, friends, and neighbors, while legitimating voters’ reservations about having gay or lesbian children.²⁶⁸ Although child protection arguments succeeded in convincing voters, courts ultimately rejected them and struck down the bans.²⁶⁹

These historical examples are just some of the instances in which religious conservatives used child protection, and its related question of immutability, to oppose gay rights. From the Religious Right’s first efforts to repeal a gay rights ordinance in the late 1970s to recent opposition to marriage equality, the fear that children would be indoctrinated into homosexuality unless the state took a disapproving stance against gays and lesbians was a central theme of antigay rights campaigns. Conversion therapy bans, by identifying homosexuality as an immutable characteristic, presenting the LGBT movement as the protectors of children, and emphasizing the state’s responsibility to sexual minority youth, reverse this more than forty-year opposition narrative.

266. BALL, *supra* note 257, at 112; DAVID FLEISCHER, THE PROP 8 REPORT: WHAT DEFEAT IN CALIFORNIA CAN TEACH US ABOUT WINNING FUTURE BALLOT MEASURES ON SAME-SEX MARRIAGE 32–35 (2010). California voters with children under the age of eighteen voted for the ban by a margin of almost two to one. KLARMAN, *supra* note 258, at 121.

267. Perry v. Brown, 671 F.3d 1052, 1094–95 (9th Cir. 2012), *vacated and remanded sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

268. STONE, *supra* note 239, at 146.

269. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015); United States v. Windsor, 133 S. Ct. 2675, 2694 (2013); Latta v. Otter, 771 F.3d 456, 474 (9th Cir. 2014); Baskin v. Bogan, 766 F.3d 648, 662 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352, 383 (4th Cir. 2014); Bishop v. Smith, 760 F.3d 1070, 1079–81 (10th Cir. 2014); Kitchen v. Herbert, 755 F.3d 1193, 1226 (10th Cir. 2014); Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 474 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 874, 899 (Iowa 2009); Griego v. Oliver, 316 P.3d 865, 887 (N.M. 2013). *But see* DeBoer v. Snyder, 772 F.3d 388, 405 (6th Cir. 2014); Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 867 (8th Cir. 2006); Conaway v. Deane, 932 A.2d 571, 630–34 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006); Andersen v. King Cty., 138 P.3d 963, 982–83 (Wash. 2006).

2. *Contemporary Battles*

The idea that homosexuality is a choice that children will elect if not taught that being gay or lesbian is socially unacceptable continues to be pervasive in arguments against LGBT rights. The ubiquity and success of these arguments demonstrates why gay rights proponents have such a significant stake in the expressive effects of conversion therapy bans and the normative commitments they foster. LGBT rights groups, in discussing conversion therapy bans, stress homosexuality's immutability and the need to protect LGBT youth. In deploying the laws for these expressive ends, they counter not only a historical narrative, but also a contemporary rhetoric that continues to shape battles over LGBT rights.

Child protection and immutability are central to arguments against the federal Employment Non-Discrimination Act (ENDA), which has been introduced in every Congress but one since 1994.²⁷⁰ The law would protect individuals from discrimination in employment based on sexual orientation and gender identity. The Traditional Values Coalition (TVC), a prominent Christian lobbying organization, has launched a campaign against the bill entitled "ENDA Hurts Kids."²⁷¹ The campaign website asks parents: "Do you want men dressed as women teaching your kids?" before explaining that ENDA's enactment would result in "she-male activists and cross-dressing teachers" holding children "hostage in the classroom."²⁷² There, "every homosexual, bisexual, and transgender teacher will have free reign to indoctrinate our children into accepting these 'alternative lifestyles' as normal and good."²⁷³ TVC's campaign is ongoing, with the organization regularly issuing statements claiming that ENDA "experiments dangerously with the well-being of millions of children."²⁷⁴

This focus on protecting children in schools implicates other LGBT rights issues, including sexual orientation- and gender identity-based anti-bullying policies. Religious conservatives posit that anti-bullying policies that specifically prohibit bullying based on sexual orientation or gender identity are a means of furthering the "gay agenda" in public education.²⁷⁵ These regulations have typically been enacted in response to reports of

270. Stuart Biegel, *Unfinished Business: The Employment Non-Discrimination Act (ENDA) and the K-12 Education Community*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 357, 359, 367–68 (2011).

271. Rosky, *supra* note 20, at 663.

272. *Id.*

273. *Id.*

274. TRADITIONAL VALUES COAL., ENDA HURTS KIDS: THE IMPACT ON CLASSROOMS, http://www.dawnstefanowicz.org/documents/ENDA_HURTS_KIDS.pdf.

275. Biegel, *supra* note 270, at 365; Jason A. Wallace, Note, *Bullicide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 751–52 (2011); Daniel B. Weddle & Kathryn E. New, *What Did Jesus Do?: Answering Religious Conservatives Who Oppose Bullying Prevention Legislation*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 325, 325–27 (2011).

LGBT youth suicides, which are often directly linked to the torment these adolescents experienced at the hands of their peers.²⁷⁶ According to the Gay, Lesbian, & Straight Education Network (GLSEN), nearly three-quarters of LGBT youth report being verbally harassed at school, and more than one-third report being physically assaulted by their schoolmates.²⁷⁷ Bullied LGBT students are more likely to miss school, have lower GPAs, and experience higher levels of depression than their non-bullied peers.²⁷⁸ Other research has likewise found that LGBT youth are “170% more likely to be assaulted at school and 240% more likely to miss school due to fear that they would be unsafe” than their heterosexual counterparts.²⁷⁹ Since LGBT students experience safer environments in schools with anti-bullying policies that specifically protect sexual orientation and gender identity expression, as compared to schools with generic anti-bullying rules, GLSEN and other LGBT rights groups have lobbied for states to enact comprehensive and enumerated regulations.²⁸⁰ In doing so, they have focused on redefining child protection to include LGBT adolescents. Anti-bullying policies that specifically protect LGBT students also identify the perpetrators of the harm as those who are prejudiced against sexual minority youth. This is a significant shift from religious conservatives’ discourse of child protection, which identifies the danger as coming from gays and lesbians.

However, it is these comprehensive policies that have drawn the ire of the Religious Right, rendering it even more important for advocates to address the issues of child protection and immutability. According to the American Family Association, anti-bullying legislation that specifies protections based on sexual orientation is “just another thinly veiled attempt to promote the homosexual agenda. No one is in favor of anyone getting bullied for any reason, but these anti-bullying policies become a mechanism for punishing Christian students who believe that homosexual behavior is not something that should be normalized.”²⁸¹ Focus on the Family has criticized anti-bullying laws for the same reasons, protesting that these initiatives “cross[] the line in a lot of ways beyond bullying into

276. Lisa C. Connolly, Note, *Anti-Bullying in Schools—Are Anti-Bullying Statutes the Solution?*, 87 N.Y.U. L. REV. 248, 249 (2012).

277. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, 2013 NATIONAL SCHOOL CLIMATE SURVEY 22–23 (2013) [hereinafter GLSEN].

278. *Id.* at 47–49; see also *LGBT Youth*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 12, 2014), <http://www.cdc.gov/lgbthealth/youth.htm>.

279. Letter from Mark S. Friedman to U.S. Comm’n on Civil Rights (May 26, 2011), http://www.eusccr.com/Friedman_Letter%20USCCR%205-26-11.pdf.

280. GLSEN, *supra* note 277, at 76.

281. Kim Severson, *Christian Group Finds Gay Agenda in an Anti-Bullying Day*, N.Y. TIMES (Oct. 15, 2012), <http://www.nytimes.com/2012/10/15/us/seeing-a-homosexual-agenda-christian-group-protests-an-anti-bullying-program.html>.

indoctrination, just promoting homosexuality and transgenderism.”²⁸² In response to nationwide protests from conservative organizations, state legislatures have increasingly enacted general anti-bullying laws that do not identify any prohibited characteristics or have attempted to include exemptions for religious beliefs or moral convictions.²⁸³ In the name of protecting Christian youth from the homosexual agenda, religious conservatives have successfully countered the anti-bullying efforts of LGBT rights groups, indicating the extent to which child protection and immutability continue to serve as central axes in the battles over LGBT rights.

Additionally, although the Supreme Court has resolved the question of marriage equality, the fear of gay adults’ effect on children still shapes same-sex couples’ abilities to create families, with child welfare agencies continuing to discriminate against gay and lesbian parents. In 2015, Senator Mike Enzi and Congressman Mike Kelly sponsored the Child Welfare Provider Inclusion Act, which would create religious exemptions to antidiscrimination laws for adoption and foster care agencies.²⁸⁴ In response, the Human Rights Campaign worked with supporters to introduce the Every Child Deserves a Family Act in May 2015.²⁸⁵ The bill would withhold federal funding from public child welfare agencies that discriminate on the basis of sexual orientation, gender identity, or marital status.²⁸⁶ In November 2015, Utah judge Scott Johansen demonstrated the need for the law when he removed a foster child from the home of a lesbian couple, explaining it was “not in the best interest of children to be raised by same-sex couples.”²⁸⁷ Thus, despite the Supreme Court’s recent ruling guaranteeing marital rights, LGBT individuals continue to face

282. Katy Hall, *Christian Groups Take Issue with Anti-Bullying Laws*, HUFFINGTON POST, Apr. 5, 2012; see also Electa Draper, *Focus on Family Says Anti-Bullying Efforts in Schools Push Gay Agenda*, DENVER POST, Aug. 28, 2010.

283. Wallace, *supra* note 275, at 751; Hall, *supra* note 282; *Michigan Senate Approves House Version of Anti-Bullying Bill, Drops Religious Language*, HUFFINGTON POST, Nov. 29, 2011; *Tennessee Anti-Bullying Law Change Could Allow Students to Speak Out Against Gays for Religious Reasons*, HUFFINGTON POST, Jan. 4, 2012.

284. Press Release, Rep. Kelly, Sen. Enzi Introduce the Child Welfare Provider Inclusion Act (Mar. 4, 2015), <https://kelly.house.gov/press-release/discrimination-against-faith-based-care-providers-makes-it-harder-some-children-get>.

285. *Every Child Deserves a Family Act*, HUMAN RIGHTS CAMPAIGN, http://hrc.org/resources/every-child-deserves-a-family-act?_ga=1.258903882.1360467264.1448463036 (last updated Jan. 4, 2017).

286. Every Child Deserves a Family Act, H.R. 2449, 114th Cong. (2015); Every Child Deserves a Family Act, S. 1382, 114th Cong. (2015).

287. Richard Pérez-Peña, *Utah Judge Drops Order on Lesbians’ Foster Child*, N.Y. TIMES (Nov. 13, 2015), <https://www.nytimes.com/2015/11/14/us/utah-lesbian-couple-foster-child-ruling.html>. Judge Johansen rescinded the order the next day, after the state Division of Child and Family Services joined the women in filing a motion for reconsideration. Christine Hauser, *Utah Judge Orders Lesbian Couple to Give Up Foster Child*, N.Y. TIMES (Nov. 12, 2015), https://www.nytimes.com/2015/11/13/us/utah-lesbian-couple-foster-child-heterosexual-family.html?_r=0.

discrimination in family law, with child protection and immutability arguments playing central roles in these rights battles.

Given this legal background, the bans provide an important means of stressing homosexuality's immutability and the need to protect the rights of LGBT youth. Notably, the laws do not on their face take a clear stance on whether homosexuality is an immutable characteristic. Since the laws only prohibit conversion therapy for minors, their message could be equally understood to mean that minors should not attempt to change their sexual orientation, but that it is an appropriate endeavor for adults. The bans do present homosexuality as a benign variation in human development, rather than an aberration that requires fixing. LGBT rights groups, however, have identified the laws as also taking a stance on homosexuality's immutability, shifting the laws' message to create a strategically useful expressive effect.²⁸⁸ Through this discourse, advocacy groups are bolstering a social and legal norm that identifies homosexuality as an immutable characteristic.

Perhaps as importantly, the laws identify LGBT youth as a population the state needs to protect and one that is vulnerable to harm. The extent to which the state should protect this group, and from whom they need to be defended, is a matter that is deeply debated. The question is whether LGBT rights groups can extend the state's normative commitment to a marginalized population, so as to reshape how communities approach sexually non-conforming youth. The bans on conversion therapy signal that the state has a duty to the bullied students, which could influence governmental and social responses. These laws demonstrate an emerging legal response to LGBT youth welfare claims, which may yet translate into a corresponding social norm. At the same time, LGBT rights groups are identifying themselves as the protectors of youth, rather than religious conservatives.²⁸⁹

This expressive end is more attenuated than the social norm against conversion therapy, but is nevertheless extremely important. Beginning in the 1970s and continuing today, religious conservatives have used arguments about immutability and child protection to stymie gay rights advocates. Conversion therapy bans provide an opportunity for LGBT rights groups to send a message about homosexuality's immutability and reframe the child protection narrative to focus on the needs of LGBT youth. These expressive effects, as well as the social norm that advocates are

288. See, e.g., Sunnive Brydum, *New Jersey Lawmakers Want to Ban Ex-Gay Therapy*, ADVOC., June 28, 2013; Kate Kendell, *Leelah: "My Death Needs to Mean Something."* NAT'L CTR. FOR LESBIAN RIGHTS (Jan. 6, 2015), <http://www.nclrights.org/my-death-needs-to-mean-something/>.

289. Some scholars have criticized this approach as problematic because of its paternalism. Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357, 362-63 (2013).

building against conversion therapy, highlight the important expressive power not just of laws, but the lawmaking process. This underscores that it is how laws are discussed and the ways in which their messages are mediated that has an effect on social norms.

III. MOVEMENT IMPLICATIONS

The ongoing debates about gay and lesbian foster and adoptive parenting, anti-bullying initiatives, and ENDA are being waged over the welfare of children, with gay rights opponents repeating the same arguments about child indoctrination that have proved successful for decades. Through the expressive effects of conversion therapy bans, LGBT rights advocates are changing the discourse about which children need protecting and who poses the danger to those children. They have also used conversion therapy laws to emphasize that homosexuality is an immutable characteristic. However, this approach is in some respects problematic, as it reinforces an identity model that many scholars have criticized as ill-advised and exclusionary. This Part explains how the anti-conversion therapy campaign can reframe its discourse to support a more expansive vision of LGBT rights and increase the scope of legal protections for LGBT individuals.

A. *The Identity Paradigm*

Conversion therapy bans promote a specific vision of sexual identity, one in which sexual orientation is immutable, stable, and embodied through sexual behavior. This tripartite identity paradigm is one that has become prevalent in LGBT rights litigation, in which “individuals who engage in same-sex sexual conduct can be legally classified by a fixed and clearly demarcable gay, lesbian, or bisexual sexual identity.”²⁹⁰ This is true even though sexual identity can be and often is fluid for individuals, and sexual conduct is not necessarily central to everyone’s identity formation.²⁹¹ The model does not necessarily claim that homosexuality is ingrained at birth, but rather that sexual orientation is deeply rooted and that it forms a constitutive part of gay and lesbian identity.²⁹² Sexual orientation is

290. Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 101 (2002).

291. *Id.* at 101, 114–15; Steven Seidman, *Introduction to QUEER THEORY/SOCIOLOGY* 11–12, 19 (Steven Seidman ed., 1996).

292. Levit, *supra* note 25, at 57; Samuel A. Marcossan, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 700–01 (2001); *see also* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 27 (2015) (arguing that this revised version of immutability is limited in protecting individuals from discrimination and calling for employment discrimination law to extend its protection beyond immutable characteristics).

immutable not because of its cause, but because it is both extremely difficult to alter and so central to a person's identity that no one should be asked to change that part of themselves.²⁹³ In short, whether sexual orientation is in fact immutable, many individuals experience it as such and it forms a constitutive part of their identity.²⁹⁴ Gays and lesbians consequently form a "quasi-ethnicity" based on a shared "fixed, natural essence, a self with same-sex desires," which provides the basis for claims of status-based discrimination.²⁹⁵ This model highlights parallels between race-, sex-, and sexual orientation-based discrimination, emphasizing how all are based on irrational prejudices, unfounded stereotypes, and unjust assumptions.²⁹⁶ The claim as to immutability tends to obfuscate the two other parts of the identity paradigm, that sexual orientation is fixed and expressed through conduct.

Immutability arguments, in addition to countering opposition rhetoric, support heightened scrutiny under the Equal Protection Clause.²⁹⁷ The characterization of homosexuality as an immutable trait, or at least one that is so integral to identity that it cannot be changed without incredible hardship and suffering, renders sexual orientation akin to race or sex, which the Supreme Court has described as "an immutable characteristic determined solely by the accident of birth."²⁹⁸ Courts have been divided as to whether homosexuality constitutes an immutable characteristic and thus have applied different standards of scrutiny. In overturning same-sex marriage bans, several jurisdictions applied heightened scrutiny after finding that homosexuality was immutable.²⁹⁹ Other courts, applying rational basis review after determining homosexuality was not immutable, upheld the laws.³⁰⁰ With the Supreme Court recently characterizing homosexuality as immutable in dicta, remarking that the petitioners' "immutable nature dictates that same-sex marriage is their only real path to this profound commitment," LGBT rights groups received important support for their argument about heightened scrutiny.³⁰¹ Being able to

293. Edward Stein, *Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 632 (2014).

294. Marcossou, *supra* note 292, at 700–01.

295. Katyal, *supra* note 290, at 110; *see also* ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 59–60, 62 (1996).

296. Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1508–09 (2009).

297. Levit, *supra* note 25, at 57–58, 60–61.

298. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

299. *Baskin v. Bogan*, 766 F.3d 648, 657 (7th Cir. 2014); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 479 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009); *Griego v. Oliver*, 316 P.3d 865, 884 (N.M. 2013).

300. *Conaway v. Deane*, 932 A.2d 571, 614 (Md. 2007); *Andersen v. King Cty.*, 138 P.3d 963, 974 (Wash. 2006).

301. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015); *see also Kerrigan*, 957 A.2d at 432; *Varnum*, 763 N.W.2d at 893; *Griego*, 316 P.3d at 884.

identify sexual orientation as a fundamental and immutable characteristic is important under Equal Protection to secure protections against discrimination.³⁰²

While this immutable identity paradigm existed long before the modern LGBT movement, it became the focal point for gay rights litigation in the wake of the Supreme Court's 1986 decision in *Bowers v. Hardwick*.³⁰³ That opinion, which upheld Georgia's criminalization of consensual sodomy, addressed homosexuality as the performance of a type of sexual conduct rather than an expression of identity.³⁰⁴ To constrain the impact of the decision, litigators changed their approach—instead of focusing their arguments on protecting privacy and sexual conduct, they emphasized that unfavorable treatment against gays and lesbians constituted discrimination based on their identity.³⁰⁵ The move in argumentation required litigators to present a universal model of gay and lesbian personhood, one that cast the engagement in same-sex sexual conduct as an indicator of a person's essence.³⁰⁶

While the framing shift from sexual conduct to sexual identity may seem to be a distinction without a difference, it had a significant legal effect.³⁰⁷ The identity paradigm proved extremely effective in securing rights, with the legal status of gays and lesbians undergoing a dramatic change when courts shifted from characterizing homosexuality as sexual conduct to understanding same-sex sexuality as a fundamental element of identity.³⁰⁸ Indeed, Supreme Court decisions protecting gay rights have turned on the dignitary harm that gays and lesbians suffer as a result of discrimination, framing the legal violation in terms of group-based subordination.³⁰⁹ Likewise, popular support for gay rights has tended to depend on questions of mutability, with those who believe that homosexuality is innate more likely to endorse sexual orientation-based legal protections.³¹⁰

The legal arguments about immutability and a fixed gay identity have become central to the wider LGBT movement, demonstrating the broad

302. Clarke, *supra* note 292, at 8.

303. 478 U.S. 186 (1968); Katyal, *supra* note 290, at 108.

304. *Bowers*, 478 U.S. at 191; Katyal, *supra* note 290, at 108.

305. See Cain, *supra* note 24, at 1617; Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 511–12 (1994).

306. Katyal, *supra* note 290, at 108.

307. See Clarke, *supra* note 292, at 45–46; Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1607 (2015).

308. See Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 247–53 (2014).

309. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596–97 (2015); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); Zachary Herz, *The Marrying Kind*, 83 TENN. L. REV. 83, 142–43 (2015).

310. WAIDZUNAS, *supra* note 74, at 6.

impact of the legal strategy. Within the LGBT community, immutability arguments are so pervasive “that dissent from the idea that LGB people’s sexual orientations are innate and immutable is, in many contexts, treated as tantamount to opposing LGB rights.”³¹¹ In 2012, when Cynthia Nixon described being gay as a personal choice in an interview with the *New York Times*, the gay community reacted with outrage.³¹² One activist described her comments as “irresponsible and flippant,” suggesting they would justify parents’ abuse of their gay children, while others expressed concern that similar views would prevent gays and lesbians from attaining legal rights.³¹³ Nixon quickly issued a statement clarifying that she did not mean her bisexuality was a choice, only that she had chosen to be in a gay relationship, a decision most members of the LGBT community could not make because of their innate attraction to members of the same sex.³¹⁴ This episode highlights the primacy of the immutable-gay-identity argument, which has crowded out dissent within both the social movement and its legal counterpart.³¹⁵

Despite its ubiquity and success in securing rights, many scholars have criticized the legal strategy as unduly confining, exclusionary, and legally fraught. Requiring individuals’ sexual identities to be immutable implies that being LGBT would otherwise be invalid, with civil rights depending on an empirical premise that scientists may later prove incorrect.³¹⁶ Scholars have also claimed that pursuing immutability may have subverted the movement’s interests, which should have challenged gendered and sexual categories rather than essentializing them.³¹⁷ These objections are

311. Stein, *supra* note 293, at 598; see also Tia Powell & Edward Stein, *Legal and Ethical Concerns about Sexual Orientation Change Efforts*, 4 HASTINGS CTR. REP. S32 (Sept.–Oct. 2014).

312. Alex Witchel, *Life After “Sex,”* N.Y. TIMES MAG. (Jan. 19, 2012), www.nytimes.com/2012/01/22/magazine/cynthia-nixon-wit.html.

313. Associated Press, *Actress’ Claim to be Gay By Choice Riles Activists*, XFINITY (Jan. 27, 2012), <http://williamsinstitute.law.ucla.edu/press/in-the-news/actress-claim-to-be-gay-by-choice-riles-activists/>.

314. Lucas Grindley, *Cynthia Nixon: Being Bisexual “Is Not a Choice,”* ADVOC. (Jan. 30, 2012), <http://www.advocate.com/news/daily-news/2012/01/30/cynthia-nixon-being-bisexual-not-choice>.

315. Popular culture reflects this shift, with the Macklemore song “Same Love” featuring Mary Lambert singing “I can’t change, even if I tried, even if I wanted to” and Lady Gaga asserting “I was born this way” in one of the best-selling singles of all time. WAIDZUNAS, *supra* note 74, at 240.

316. KENJI YOSHINO, COVERING 48 (2006); Clifford Rosky, *Same-Sex Marriage Litigation and Children’s Right to be Queer*, 22 GLQ 541, 547 (2016); Schmeiser, *supra* note 296, at 1520–21.

317. Katyal, *supra* note 290, at 118; Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 L. & SEXUALITY 1, 7 (2003); Levit, *supra* note 25, at 56; Edward Stein, *Reply to Martha Nussbaum and Ian Hacking*, 21 L. & PHIL. 349, 352 (2002). In this vision of LGBT rights advocacy, lawyers would pursue claims of intersectional discrimination instead of presenting claims of identity-based discrimination in the alternative; challenge the necessity of government forms that require individuals to identify as male or female rather than claiming that a specific individual should be considered one sex as opposed to another; and push for broad intimate association rights that protect polyamorous couples. See Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269,

part of a larger set of queer critiques of LGBT legal strategies, which have included emphasizing conformity, stressing domesticity, and identifying how gays and lesbians were like their heterosexual counterparts in all but sexual object choice.³¹⁸

Connected to this is criticism that the movement's approach has had limited strategic payoffs, such that its reification of gender and sexual norms has facilitated tolerance and not acceptance.³¹⁹ In this view, the movement's strategy has made transgender rights advocacy more difficult, with some claiming that the recent spate of anti-trans legislation sweeping American states is a product of the movement's failure to reframe sexual and gender norms.³²⁰ Opponents of transgender rights emphasize that human beings exist along the binary of male and female, with no possible variation.³²¹ Peter Sprigg, a Senior Fellow at the Family Research Council, has derided transgender rights for its emphasis on fluidity, stating "the current transgender ideology. . . tell[s] us you can be both genders, you can be no gender, you can be a gender that you make up for yourself."³²² That opponents of transgender rights view sexual and gender fluidity as absurd indicates the extent to which the LGBT movement needs to shift the dialogue around sexual orientation to focus on autonomy, flexibility, behavior, and choice. Indeed, fluidity is particularly important for transgender rights, as advocates are not just seeking protections for men and women who have transitioned, but also those who are in the process of transitioning or who are genderqueer, meaning they identify as neither or both genders. Arguments about immutability do not require sexual orientation to be stable, nor do they necessitate sexual orientation to be expressed in specific forms. Immutability is only one part of the identity paradigm and can be separated from the tripartite structure that identity currently embodies, with legal benefits to disaggregating innate orientation and fixed desire.

275 (2015); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1675, 1748 (2014); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 737 (2008).

318. GEORGE CHAUNCEY, *WHY MARRIAGE?: THE HISTORY SHAPING TODAY'S DEBATE* 111 (2004); KLARMAN, *supra* note 258, at 51; PINELLO, *supra* note 262, at 51–52; Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 245 (2006); Levit, *supra* note 25, at 23.

319. WAIDZUNAS, *supra* note 74, at 240–41; SUZANNA DANUTA WALTERS, *THE TOLERANCE TRAP: HOW GOD, GENES, AND GOOD INTENTIONS ARE SABOTAGING GAY EQUALITY* 2–3, 248 (2014).

320. Chase Strangio, Staff Attorney, ACLU LGBT & AIDS Project, Presentation to the Columbia Law School Sexuality and Gender Law Clinic (Apr. 5, 2016).

321. See, e.g., Katy Steinmetz, *Everything You Need to Know about the Debate over Transgender People and Bathrooms*, TIME (July 28, 2015), <http://time.com/3974186/transgender-bathroom-debate/>.

322. Todd Starnes, *Parents Furious over School's Plan to Teach Gender Spectrum, Fluidity*, FOX NEWS (May 15, 2015), www.foxnews.com/opinion/2015/05/15/call-it-gender-fluidity-schools-to-teach-kids-there-s-no-such-thing-as-boys-or-girls.html.

As these criticisms make clear, the identity paradigm has been problematic. However, immutability is extremely important in countering longstanding opposition rhetoric and in making affirmative claims under Equal Protection jurisprudence. The anti-conversion therapy campaign, by using the bans to emphasize immutability and discounting sexual identity therapy, reinforces the contours of the mainstream LGBT rights movement. In this way, it is part of the iterative process shaping the direction of the movement itself, which thus far has ignored the criticisms of the immutability and identity paradigms.

B. Reframing the Anti-Conversion Therapy Campaign

Although the anti-conversion therapy campaign emphasizes immutable identity at the expense of the fluidity and choice advocates, it does not have to do so. In fact, the campaign can be reformulated so as to identify sexual orientation as immutable and yet still promote the law's need to respect and protect consensual sexual expressions and behaviors. Many of the criticisms around movement strategy assume that LGBT rights groups must elect one approach or another. However, the conversion therapy bans provide the opportunity to do both.

The anti-conversion therapy campaign can begin this effort by nuancing its definition of conversion therapy and the harm the practice perpetuates. This is particularly important since, although the laws only address minors, the campaign focuses on all forms of conversion therapy. By distinguishing between efforts to change sexual orientation and behavior, the campaign can contribute to a more complicated understanding of sexual identity. The campaign should oppose efforts to change sexual orientation. However, it must also recognize that sexual expression is a choice, and one deserving of respect. This also means the campaign must distinguish between the sexual identity therapy that licensed mental health professionals offer in supportive and nonjudgmental environments and behavioral modification rooted in moralistic and stigmatizing assumptions about homosexuality, rather than simply dismiss sexual identity therapy by licensed mental health professionals.

This recommendation is particularly fraught, as the LGBT rights movement has a complicated history with the medical profession.³²³ For

323. George, *supra* note 245, at 488. *See generally* Marie-Amélie George, *Agency Nullification: Defying Bans on Gay and Lesbian Foster and Adoptive Parents*, 51 HARV. C.R.-C.L. L. REV. 363 (2016). For transgender individuals, the relationship with the medical profession continues to be extremely problematic, as doctors serve as gatekeepers for required services. *See* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 30–32 (2003) (discussing the ethical quandary of representing transgender clients, whose legal claims depend on a strategic use of the “medical model of transsexuality” when transgender rights more broadly would benefit from a disaggregation of rights and medical procedures).

much of the twentieth century, gays and lesbians worked to reduce medical professionals' authority over their lives. However, since the declassification of homosexuality as a mental illness in 1973, mental health professionals have lobbied to promote gay and lesbian rights. With the help of psychiatrists, psychologists, and social workers, gays and lesbians were able to secure custody rights, adoption and foster care rights, and marriage equality.³²⁴ Given that mental health professionals have been essential allies in the gay and lesbian rights movement for more than four decades, it may be appropriate to trust mental health professionals to recognize and respect the difference between sexual identity and conversion therapy.³²⁵ As part of this, the campaign will need to change the expressive message of the laws to differentiate between the types of therapies. It is, of course, much more difficult to communicate a nuanced message and may reduce the expressive momentum of the campaign, but this new approach would have significant benefits for the wider LGBT movement.

LGBT rights advocates and their allies will also need to change the language of the legislation they sponsor, which identifies behaviors and sexual expression as identical to sexual orientation.³²⁶ The laws state that "sexual orientation identity exploration" does not constitute a prohibited practice, but do not define what this phrase means and often qualify this provision by stating that the therapy cannot seek to change orientation or identity.³²⁷ Additionally, sexual orientation and gender identity are not defined, so it is unclear whether therapy can seek to change behavior or attractions without running afoul of the law.³²⁸ Licensed therapists need to be confident about what therapeutic practices they can provide. The reasonable reading of the law is that it excludes sexual identity therapy, but the language is ambiguous.

Another way to remedy this problem would be to include a model informed consent provision, which would clarify for practitioners what the

324. Marie-Amélie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL'Y REV. (forthcoming 2017) (on file with author).

325. To the extent licensed professionals fail to follow supportive procedures and instead offer behavioral modification therapy rooted in stigma and shame, they would be subject to malpractice liability. See Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. (forthcoming 2017) (on file with author).

326. See *supra* sources cited in note 8.

327. See *supra* sources cited in note 8.

328. While some mental health professionals challenging the California ban provided conversion therapy, others may have been offering sexual identity therapy. Compare First Amended Complaint for Declaratory Judgment & Preliminary and Permanent Injunctive Relief at ¶ 35, *Pickup v. Brown*, 42 F. Supp. 3d 1347 (E.D. Cal. 2012) (No. 12-02497), 2015 WL 6592939 (characterizing therapeutic efforts as aiming to change, reduce, and eliminate "unwanted same-sex sexual attractions, behaviors, or identity"), with Complaint for Injunctive and Declaratory Relief at ¶ 54, *Welch v. Brown*, 58 F. Supp. 3d 1079 (E.D. Cal. 1079) (No. 2:12-2484), 2012 WL 4762008 (describing Dr. Duk as helping minors bring their "sexual conduct and desires into conformity with [their] religious traditions, cultural norms, and moral standards," but without discussion of his approach or methods).

law permits and prohibits. This consent provision should inform individuals that: 1) being lesbian, gay, bisexual, or transgender is not a disease or developmental disorder, but rather is part of the natural spectrum of sexual identity; 2) all leading mental health organizations agree that sexual orientation likely cannot be changed; 3) data shows that attempts to change sexual orientation have resulted in serious psychological harm for many individuals; 4) patients should not expect to eliminate or reduce their same-sex sexual desires; 5) therapists will not help individuals change their sexual orientation, nor will they endeavor to reduce or eliminate same-sex sexual attractions; 6) therapists will work with their clients in managing sexual behaviors; and 7) counseling will adopt a nonjudgmental and non-stigmatizing approach to same-sex sexuality.³²⁹ The informed consent provision needs to identify what results a client can reasonably expect from the counseling and the potential psychological risks involved in sexual identity therapy.

This informed consent provision would not only help set limits on what services therapists offer, but would also help frame the therapy for clients in the supportive, non-homophobic approach that the medical professions recommend. How information is presented shapes individuals' later choices and behaviors with their counselors, which is why it is important to set patients' expectations at the beginning.³³⁰ Additionally, by making clear the legality of sexual identity therapy, the laws help return the practice to the realm of licensed mental health professionals and may steer individuals away from ministries providing conversion therapy. This has the particular benefit of helping the individuals who are currently harmed when they enter into religious ministries that stress sexual orientation change.³³¹

The debates over whether conversion therapy is effective turn on the question of whether sexual identity can be flexible, as otherwise change would not be possible. For many members of the LGBT community, sexual flexibility is both real and good—but only if individuals embrace their queer identity.³³² Indeed, this is one of the sources of frustration for many bisexuals, who are often excluded from LGBT discourse.³³³ Conversion therapy and the ex-gay movement create a paradox for the left, which values both autonomy and anti-subordination principles. In the same way,

329. See AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 63.

330. Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 840–41 (2007).

331. See generally Benoit, *supra* note 108.

332. Paul L. Vasey & Drew Rendall, *Sexual Diversity and Change Along a Continuum of Bisexual Desire*, 32 ARCHIVES SEXUAL BEHAV. 453, 455 (2003).

333. Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 455 (2012); Stein, *supra* note 293, at 599–600; Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 362 (2000).

sexual identity therapy directly challenges the movement's politics. There is room to both oppose the stigma and homophobia that makes people unwilling to accept their same-sex attractions and respect individuals' choices about their sexual identities. However, the movement's current formulation, which has focused almost exclusively on immutability, makes it difficult to incorporate these conceptions of identity. It is important to create a space for people who have fluid, rather than static, identities and who have been left out of Equal Protection jurisprudence.

Many within the LGBT community are skeptical of individuals who say they feel same-sex desires but want help sublimating them, identifying them as victims of their homophobic social environments or deriding their self-deception.³³⁴ Likewise, individuals who seek conversion therapy because their same-sex attractions conflict with their religious beliefs do not want to associate with the LGBT movement. It is nevertheless troubling that there is no place for them in a movement that ostensibly embraces sexual variation and values inclusivity. These individuals feel they must identify as either homosexual or heterosexual, but the LGBT movement could make space to accommodate a spectrum of self-identities, including those who understand themselves as heterosexual with same-sex attractions, have no sexual orientation identity, or adopt a unique self-identity.³³⁵ Providing an environment that encompasses all of these possibilities not only realizes the potential of queer theory, but may also make conversion therapy less of an imperative for these religious individuals, who are often seeking a community.³³⁶

The LGBT rights movement has enjoyed considerable success recently, creating the opportunity to expand its reach and to reincorporate the queer critiques that became marginalized during the struggle to establish basic civil rights protections and attain marriage equality. This does not mean abandoning conversion therapy bans, which play an important role in supporting LGBT rights advocacy, but rather shifting the discourse around conversion therapy itself. Ex-gays identify their underlying sexual orientation as immutable but claim that it is their sexual choices that matter. This characterization, which identifies sexual decision-making as more important than sexual orientation, is a view of sexuality that ironically helps promote the LGBT movement's goals.³³⁷ Instead of identifying ex-

334. Erik Eckholm, "Ex-Gay" Men Fight Back Against View that Homosexuality Can't Be Changed, N.Y. TIMES (Oct. 31, 2012), <http://www.nytimes.com/2012/11/01/us/ex-gay-men-fight-view-that-homosexuality-cant-be-changed.html>; *The History of the Ex-Gay Ministries*, TRUTH WINS OUT, <http://www.truthwinsout.org/history-of-the-ex-gay-ministries/> (last visited Jan. 30, 2016).

335. See AM. PSYCHOLOGICAL ASS'N, *supra* note 17, at 50; Haldeman, *supra* note 112, at 695, 706.

336. Ford, *supra* note 122, at 71–72.

337. WAIDZUNAS, *supra* note 74, at 9.

gays as individuals whose disassociation of same-sex attraction and sexual identity constitutes a false consciousness, the laws' proponents can use debates around conversion therapy as an opportunity to recognize how the LGBT movement can create a space for more sexual identities and incorporate queer theorists' arguments about sexual choice, fluidity, and privacy. Conversion therapy bans do not need to propound a binary view of sexual orientation, but rather can use the laws as an opportunity to reposition the LGBT movement as one that supports all types of sexual variations and consensual sexual decisions.

Opening the legal door to recognizing the need to respect consensual sexual choices, rather than basing rights on identity categories, would benefit many within the LGBT movement. Beyond establishing legal protections for those who have fluid gender identities, it may also sever the link between rights and middle-class respectability, thereby eliminating the imperative to cover.³³⁸ Although the LGBT movement has been focused on immutable identity, the shift to a paradigm of choice is not much of a logical leap. As Ed Stein has argued:

[M]uch of what is *ethically relevant* about being an LGBT person is *not* innate and *not* immutable. Actually engaging in sexual acts with a person of the same sex, publicly or privately, identifying as an LGBT person, marrying or otherwise establishing a household with a person of the same sex, and raising children as an openly LGBT person are *choices*—choices that one might not make.³³⁹

Reorienting the movement and legal strategies towards choice would create a more inclusive and protective framework.

The struggle to recognize sexual orientation as an immutable characteristic has been essential to legal advocacy, but it now needs to become the floor, not the ceiling, for the rights movement. A shift in the legal movement's focus to protecting sexual choice will likely have a destabilizing effect, and the immutability claim that the bans reinforce will serve as a bulwark against backlash and a barrier to regression. The anti-conversion therapy laws, by emphasizing both immutability and expression, will serve the important role of consolidating movement gains, while also making room for the movement's future.

338. Yoshino, *supra* note 15, at 839, 850–63.

339. Edward Stein, *Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond*, 84 UMKC L. REV. 871, 889 (2016).

IV. CONCLUSION

Changing the approach to conversion therapy bans so as to emphasize that mental health professionals should work with conflicted same-sex attracted individuals to reconcile their religious and sexual identities seems at odds with the LGBT movement's goals. However, by emphasizing the distinction between sexual orientation, behavior, and identity, LGBT rights groups have the opportunity to not only help these devout individuals, but also reshape the direction of the LGBT movement.

The campaign as it is currently formulated reflects a broader legal strategy that has reaped significant rewards, securing the decriminalization of consensual sodomy and marriage equality rights. Indeed, the very fact that legislatures are considering and enacting conversion therapy bans and making the welfare of LGBT youth a subject of national conversation is a testament to how successful that strategy has been. Perhaps the laws' most potent expression is of how far into mainstream political discourse LGBT individuals have come. At the same time, the bans present an opportunity to reconsider the contours of the LGBT movement and ask whether it is time to reincorporate the vision of social change that litigators eschewed in favor of concrete legal victories.³⁴⁰ Conversion therapy programs have been extremely harmful, and the powerful testimony as to their danger has helped forge a broader consensus against efforts to change individuals' sexual orientation. This moment of political unity provides an opening to press for more profound legal change.

The expressive elements of conversion therapy bans operate on multiple levels, from reflecting and reinforcing movement strategy to creating a new rhetoric to counter a historical opposition narrative and a social norm against conversion therapy. The laws thus establish that the expressive elements of the lawmaking process can be extremely valuable for rights advocates, with the potential to transform social norms and support a wide-reaching agenda. Their very potency is what makes it essential for advocates to refine their goals, reframing their approach to conversion therapy so as to create room for the LGBT rights movement strategy to grow.

340. Importantly, the focus on sexual expression does not mean abandoning the claim to immutability, which provides an essential rebuttal to religious liberty claims.