

ZACHARY M. JOHNSON*

**A Matter of Speech or a Matter of Safety?
International Bans on Conversion Therapy and
the Constitutionality of Germany’s Partial Ban
for Juveniles**

For Your Consideration	210
I. Conversion Therapy and Its Global Presence	211
II. Attempts at Prohibition: Successful International Models and Failed Domestic Attempts	215
A. International Success	215
1. Brazil	216
2. Ecuador.....	218
3. Malta.....	220
4. Taiwan.....	222
5. Germany	223
B. Domestic Failure.....	225
1. States and Municipalities	225
2. Federal.....	232
III. Constitutional Considerations for Enacting the German Ban in the United States.....	233
A. First Amendment Challenges	233
1. Freedom of Speech.....	233
2. Freedom of Religion.....	236
3. The German Ban	237
B. Proper Levels of Judicial Review	238

* J.D. Candidate 2022, University of Oregon School of Law, studying criminal law. I would like to thank the countless individuals who helped make this Comment possible. I am grateful to the staff at the *Oregon Review of International Law* who helped put the finishing touches on the flow and footnotes, as well as Professor Rebekah Hanley for serving as the first reviewer of this Comment and several rough drafts thereafter. Finally, to the individuals forced and coerced into the violence of conversion therapy, this work is dedicated to you. You have not been forgotten.

1. Content-Neutrality..... 239
 2. Viewpoint-Neutrality 241
 C. Fourteenth Amendment Parental Rights..... 241
 D. Concluding on the German Ban 244
 IV. The Future of Conversion Therapy Bans as More Nations
 Seek Prohibition..... 246

FOR YOUR CONSIDERATION

Thomas is a thirteen-year-old boy living in Florida. One afternoon, Thomas’ parents witness him eating lobster. Knowing that the consumption of lobster is a sin explicitly prohibited in the Bible,¹ Thomas’ parents consult with their local pastor, who suggests that Thomas be sent to a faith-based camp that will offer him counseling and therapy for his interest in lobster. The pastor assures Thomas’s parents that their son’s love of lobster can be changed with proper counseling and therapy. Despite protest, Thomas, being a juvenile, is informed that he will be leaving for the camp the following morning.

Upon arrival at the camp, Thomas is required to reveal deeply personal information about his interest in and history with lobster. Throughout his stay, he is forced to sleep with lobsters in his bed, beaten repeatedly by camp staff, submitted to electroshock therapy, and made to perform arduous physical labor. One of the worst tasks involves carrying a backpack full of nearly fifty pounds of rocks, sometimes for hours at a time, without any rest. Thomas is told by his pastor that each of these actions are meant to cure his illness.

After several months of treatment, Thomas returns home to his parents, who believe their son has been cured of his appetite for lobster. They promptly send payment to the camp and thank the organization for its work. However, Thomas’ love of lobster has not changed; weeks later, his parents discover him eating lobster once again. Infuriated, they inform Thomas that he will be returning to the camp once more. He is distraught over this news.

Knowing that he will be forced to return and endure abuse at the camp, Thomas commits suicide the night before his departure.

He was thirteen years old.

¹ *Leviticus* 11:10–12.

I

CONVERSION THERAPY AND ITS GLOBAL PRESENCE

Conversion therapy, sometimes referred to as “reparative therapy” or “sexual orientation change efforts,” involves the pseudo-medical process of “converting” individuals with non-heterosexual sexual orientations or non-cisgender gender identities to align with cisgendered heterosexuality.² Bluntly, conversion therapy is a process that attempts to turn queer individuals straight and delegitimize transgender and gender nonconforming individuals.³ Though historically rooted in arguments of faith and promoted by religious practitioners, contemporary conversion therapy is performed by licensed medical practitioners and unlicensed spiritual and psychological counselors throughout the world.⁴

The practice of conversion therapy disproportionately affects juveniles. Depending upon the jurisdiction, parents may legally force their children into conversion therapy programs; many juveniles are therefore unable to decline conversion therapy once their parents initiate the process. Nearly 700,000 LGBTQ+ individuals have experienced conversion therapy in the United States.⁵ Half of those Americans were juveniles.⁶ It is estimated that an additional 77,000 children will undergo conversion therapy in the United States over the

² There is an extensive list of terms used to describe the practice of conversion therapy; in legal settings, the term “sexual orientation change efforts” (SOCE) has recently prevailed. I have selected “conversion therapy” intentionally. Many alternative terms, SOCE included, conflate sexuality and gender identity and use language that sanitizes the violence of the practice. Identifying the practice as “conversion therapy” directly acknowledges the reality of the practice and what practitioners are purporting to offer. However, when words like “therapy” or “treatment” are used in this article, the mere use of the words does not point to the legitimacy of the practice. For further explanation of terms such as “cisgender,” “gender identity,” and “sexual orientation,” see *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. COUNCIL FOUND., <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [https://perma.cc/S8A9-5NRV]; Joanna McIntyre, *Explainer: What Does It Mean to Be ‘Cisgender’?*, CONVERSATION (Sept. 28, 2018), <https://theconversation.com/explainer-what-does-it-mean-to-be-cisgender-103159> [https://perma.cc/MPA9-DJMT].

³ *Conversion Therapy*, S. POVERTY L. CTR., <https://www.splcenter.org/issues/lgbt-rights/conversion-therapy> [https://perma.cc/P35K-U554].

⁴ See Mendos, *infra* note 9.

⁵ Christy Mallory et al., *Conversion Therapy and LGBT Youth*, UCLA SCH. OF L.: WILLIAMS INST. (June 2019), <https://williamsinstitute.law.ucla.edu/publications/conversion-therapy-and-lgbt-youth/> [https://perma.cc/NK6K-XBX5].

⁶ *Id.*

next several years.⁷ Globally, research presents an even more shocking image of the practice. According to a 2020 report from OutRight International, seventy-four percent of juveniles who experienced conversion therapy stated that the therapy was involuntarily or coercively performed.⁸

The coerciveness of conversion therapy is matched only by the quackery on which it is founded. As the practice lacks any meaningful scientific justification or methodological uniformity, practitioners have employed a wide variety of purportedly therapeutic techniques in carrying out conversion therapy.⁹ In the United States, conversion therapy may range from simple counseling, wherein individuals are forced to speak openly about their sexuality or gender identity to a licensed professional, to repeated physical, sexual, and psychological abuse; in some instances, survivors have attested to involuntary medication and forced labor.¹⁰ The story of Thomas featured earlier,

⁷ *Id.*

⁸ Amie Bishop, *Harmful Treatment: The Global Reach of So-Called Conversion Therapy*, OUTRIGHT ACTION INT’L 42–43 (2019), https://outrightinternational.org/sites/default/files/ConversionFINAL_1.pdf [<https://perma.cc/U3MJ-4GL3>].

⁹ *Id.* at 46. See also Lucas Ramon Mendos, *Curbing Deception: A World Survey on Legal Regulation of So-Called “Conversion Therapies,”* INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N 23 (2020), https://ilga.org/downloads/ILGA_World_Curbing_Deception_world_survey_legal_restrictions_conversion_therapy.pdf [<https://perma.cc/WM2M-S8KL>] (noting that conversion therapy was initially practiced in the late 1800s through bicycle riding, castration, and lobotomy), 24 (describing the systemic use of involuntary hormonal treatment as a conversion therapy mechanism throughout the 1900s and specifically during the Holocaust in Germany and apartheid in South Africa), 25–27 (describing the rise of electroshock therapy in the 1980s, noting the widespread use of the practice in India, South Africa, China, and Lebanon, as well as the continued use of the practice in Malaysia, Indonesia, and Iran), 27 (detailing the use of Metrazol shock therapy, which induces seizures; noting that the practice is still used in Iran; and describing the practice of masturbatory reconditioning, used primarily by religious practitioners in the United States but also in Spain and Peru), 28 (describing the use of hypnosis as a conversion therapy technique in Russia and Indonesia), 29 (detailing the use of internment camps in the United States, Kenya, Russia, and Iran, where LGBTQ+ individuals are subjected to forced labor, deprived of food, humiliated, and forced to engage in sexual relations with one another, with examples of such camps being found), 36–37 (describing how religious practitioners in the United States used nudity and “touch therapy” as forms of conversion therapy), 37 (describing the use of bioenergetics, a practice that purports to release mental stress through intense, repeated physical exertion).

¹⁰ See Rachel Savage, *LGBT+ Conversion Therapy Survivors Share Stories on TikTok*, REUTERS (Aug. 18, 2020, 8:00 AM), <https://www.reuters.com/article/us-usa-lgbt-tech/lgbt-conversion-therapy-survivors-share-stories-on-tiktok-idUSKCN25E226> [<https://perma.cc/F9RT-AG6J>]; Tim Fitzsimons, *‘Doesn’t Surprise Me’: Conversion Therapy Survivors on Another Ex-Therapist Coming Out*, NBC NEWS (Sept. 4, 2019, 2:29 PM), <https://www.nbcnews.com/feature/nbc-out/doesn-t-surprise-me-conversion-therapy-survivors-another-ex-therapist-n1049781> [<https://perma.cc/Q6EV-6DJM>].

particularly the violence he endured, was modeled after real-life stories shared by conversion therapy survivors in the United States.¹¹

Internationally, where conversion therapy may be government-sponsored and anti-LGBTQ+ ideologies may be openly promoted by state leaders, conversion therapy may include involuntary electroconvulsive therapy, forced confinement, public stripping and humiliation, and extreme physical abuse and torture.¹² Lacking any medical or scientific evidence to support the practice,¹³ conversion therapy has thrived upon its ability to be redefined whenever needed. The amorphous nature of the practice, coupled with its purportedly religious justifications, have proved extremely powerful in perpetuating conversion therapy throughout the world.

Vehement denouncement from medical and psychological associations throughout the world has done little to stop the contemporary spread of conversion therapy. In the United States, despite being publicly and repeatedly opposed by over twenty public health agencies since the 1990s,¹⁴ conversion therapy remains legal in twenty-nine states.¹⁵ Efforts to ban conversion therapy have relied

¹¹ *Gay Teen Describes Experience in So-Called Gay Conversion Camp*, ABC NEWS (Mar. 9, 2017), <https://abcnews.go.com/2020/video/gay-teen-describes-experience-called-gay-conversion-camp-46028864> [<https://perma.cc/BVG8-Q796>]; *Gay Teen Describes Traumatizing Experiences at Gay Conversation Camps*, ABC NEWS (Mar. 11, 2017), <https://www.youtube.com/watch?v=TJrl5U-Sr8U> [<https://perma.cc/S8A9-5NRV>].

¹² Bishop, *supra* note 8, at 46–47; see also Josina Bothe, *It's Torture Not Therapy: A Global Overview of Conversion Therapy: Practices, Perpetrators, and the Role of States*, INT'L REHAB. COUNCIL FOR TORTURE VICTIMS 6–12 (2020), https://irct.org/uploads/media/Its_torture_not_therapy_a_global_overview_of_conversion_therapy.pdf [<https://perma.cc/U7S5-88XK>].

¹³ Ryan Thoreson, *Albanian Psychologists Prohibit Anti-LGBT "Conversion Therapy,"* HUM. RTS. WATCH (May 20, 2020, 12:00 AM), <https://www.hrw.org/news/2020/05/20/albanian-psychologists-prohibit-anti-lgbt-conversion-therapy> [<https://perma.cc/5MWK-HQFG>].

¹⁴ *Policy and Position Statements on Conversion Therapy*, HUM. RTS. COUNCIL FOUND., <https://www.hrc.org/resources/policy-and-position-statements-on-conversion-therapy> [<https://perma.cc/SR7Y-Z3UB>].

¹⁵ *Equality Maps: Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [<https://perma.cc/Q6QH-74BU>] [hereinafter *Equality Maps*]. Three states—North Carolina, Wisconsin, and Michigan—have enacted legislation that bans the allocation of state and federal funding to conversion therapy providers. These actions, while meaningful, are not considered conversion therapy bans for the purposes of this Comment. See, e.g., Beth LeBlanc, *Whitmer Bans State, Federal Funding for Conversion Therapy on Minors*, DETROIT NEWS (June 15, 2021, 8:47 AM), <https://www.detroitnews.com/story/news/local/michigan/2021/06/14/whitmer-bans-state-federal-funding-conversion-therapy-minors/7688741002/> [<https://perma.cc/L5L6-SMX2>].

mostly upon state and municipal governments, with attempts at passing a federal ban thus far unsuccessful. These failures at the federal level are illustrated most notably in the thrice-introduced Therapeutic Fraud Prevention Act.¹⁶ Even when state legislatures and city councils pass bans, conversion therapy supporters and practitioners challenge—often successfully—the legislation based upon First and Fourteenth Amendment arguments.¹⁷

Globally, the human rights atrocities associated with conversion therapy have ignited intense criticism of the practice.¹⁸ However, limited research, disparate international case law, and ineffective legislative action, coupled with the still-taboo topics of sexual orientation and gender identity, have created a complex environment in which conversion therapy has thrived. At the time of writing, only five nations—Brazil, Ecuador, Germany, Malta, and Taiwan—have banned conversion therapy explicitly.¹⁹ Other nations, such as Albania, have passed quasi-bans that regulate the practice for licensed professionals but overlook unlicensed, and often more dangerous, practitioners completely.²⁰ Several additional nations are actively working to draft their own conversion therapy bans, while others are using their court systems to outlaw the practice.²¹ However, differing opinions regarding the extent to which such bans should be targeted—for example, banning the practice only for juveniles or banning the practice outright—have stalled the work of many nations, including the United States.

This Comment argues that the recently passed German ban on conversion therapy for juveniles would likely be deemed constitutional in the United States; accordingly, Congress should consult the German

¹⁶ H.R. 3570, 116th Cong. (2019); S. 2008, 116th Cong. (2019). *See infra* notes 114–16.

¹⁷ *See, e.g.*, *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1367 (E.D. Cal. 2012), *aff'd*, 728 F.3d 1042 (9th Cir. 2013), *aff'd*, 740 F.3d 1208 (9th Cir. 2014) (“Plaintiffs assert that the parental right at issue in this case, of choosing a particular mental health therapy for one’s children, is a fundamental right that California cannot infringe without satisfying strict scrutiny.”).

¹⁸ *See, e.g.*, *Mendos*, *supra* note 9.

¹⁹ *Fitzsimons*, *infra* note 69.

²⁰ *Thoreson*, *supra* note 13.

²¹ Tim Fitzsimons, *U.N. Calls for Global End to Conversion Therapy, Says It ‘May Amount to Torture’*, NBC NEWS (June 13, 2020, 8:34 AM), <https://www.nbcnews.com/feature/nbc-out/u-n-calls-global-end-conversion-therapy-says-it-may-n1230851> [<https://perma.cc/63KA-B8GR>]; Bhavyata Kapoor, *India’s High Court Bans Conversion Therapy: A Much Needed Law*, JURIST (June 22, 2021, 12:30 AM), <https://www.jurist.org/commentary/2021/06/bhavyata-kapoor-india-high-court-bans-conversion-therapy/> [<https://perma.cc/T2WS-B88H>].

ban before introducing additional drafts of the Therapeutic Fraud Prevention Act.²² The substantiation for this argument is twofold. First, First Amendment protections for free speech and religious expression are not implicated in the banning of conversion therapy for juveniles because such bans concern only the regulation of conduct, not speech. Second, Fourteenth Amendment parental rights are not implicated in the banning of conversion therapy for juveniles because parents maintain no constitutional right to subject their children to harmful practices.

To advance this argument, Part II explores the five models of conversion therapy bans passed internationally, identifying the legal successes, failures, and practicality of each in the American legal system. Part III discusses conversion therapy bans in the United States, commenting on the constitutional challenges that state and municipal bans have encountered. This Part also details federal efforts at passing a conversion therapy ban, namely the Therapeutic Fraud Prevention Act. This Part also discusses how the German conversion therapy ban could be implemented in the United States and the legal challenges that might arise from the passing of similar legislation at the federal level. Part IV reflects upon the future of conversion therapy as an increasing number of nations move toward prohibiting the practice.

II

ATTEMPTS AT PROHIBITION: SUCCESSFUL INTERNATIONAL MODELS AND FAILED DOMESTIC ATTEMPTS

A. International Success

The five nations that have banned conversion therapy—Brazil, Ecuador, Germany, Malta, and Taiwan—have each approached prohibition differently.²³ The categorical distinctions between these bans carry important legal and public policy repercussions for each government. Moreover, these differing formulations of law raise diverse legal challenges from opponents.

²² This Comment does not explore adults seeking out conversion therapy on their own volition, nor does it analyze the constitutionality of complete conversion therapy bans. Whether adults, when provided with informed consent, should be allowed to access conversion therapy on their own volition is a different topic of discussion.

²³ *Fitzsimons*, *infra* note 69.

1. Brazil

Brazil banned conversion therapy in 1999 when the Federal Council of Psychologists—similar to the United States Department of Health and Human Services—passed a resolution formally prohibiting the practice.²⁴ The resolution categorically denounced the classification of non-heterosexual sexual orientations as a “disease . . . disorder . . . perversion . . . or psychic disorder.”²⁵ Moreover, the resolution also noted the innate coerciveness and violence of conversion therapy, stating that “psychologists will not perform any action that favors the pathologization of homoerotic behaviors or practices, nor will they adopt coercive act[s] intending to guide homosexuals towards unsolicited treatments.”²⁶

Legal challenges to the resolution have thus far been unsuccessful, considering that the Federal Council of Psychologists has explicit constitutional power to control the public and private practice of psychology and to amend the professional guidelines governing licensed psychologists.²⁷ However, in 2017, a federal judge briefly overturned the ban, finding in favor of an evangelical Christian psychologist whose license was revoked after she marketed conversion therapy to her patients.²⁸ The ruling, in which the judge explicitly classified homosexuality as a “disease,” overturned the resolution and allowed psychologists in Brazil to begin marketing conversion therapy as a legitimate curative practice to their patients.²⁹ On appeal from the Federal Council of Psychologists, the same judge reversed his initial ruling, restoring the nation’s conversion therapy ban.³⁰

²⁴ See Resol. No. 001/99, de 22 de Março de 1999, CONSELHO FEDERAL DE PSICOLOGIA (Braz.) [hereinafter Resol. 001/99].

²⁵ *Id.* at 1.

²⁶ *Id.* at 2.

²⁷ See Resol. No. 01/2018, de 29 de Janeiro de 2018, CONSELHO FEDERAL DE PSICOLOGIA (Braz.) [hereinafter Resol. 01/2018] (citing Brazilian Law No. 5,766 of December 20, 1971, and Decree No. 79,822 of June 17, 1977).

²⁸ Dom Phillips, *Brazilian Judge Approves ‘Gay Conversion Therapy’, Sparking National Outrage*, GUARDIAN (Sept. 19, 2017), <https://www.theguardian.com/world/2017/sep/19/brazilian-judge-approves-gay-conversion-therapy> [<https://perma.cc/N8AW-C9CH>].

²⁹ John Paul Brammer, *Brazil Judge Rules Homosexuality a Disease, Approves ‘Conversion Therapy’*, NBC NEWS (Sept. 20, 2017, 1:22 PM), <https://www.nbcnews.com/feature/nbc-out/brazil-judge-rules-homosexuality-disease-approves-conversion-therapy-n803016> [<https://perma.cc/CPA8-F7EU>].

³⁰ Mateus Rodrigues & Raquel Morais, *Juiz Federal do DF Altera Decisão que Liberou ‘Cura Gay’ e Reafirma Normas do Conselho de Psicologia*, DISTRITO FEDERAL (Dec. 15, 2017, 3:13 PM), <https://g1.globo.com/df/distrito-federal/noticia/juiz-federal-do-df-altera-decisao-que-liberou-cura-gay-e-restabelece-normas-do-conselho-de-psicologia.ghtml> [<https://perma.cc/JWZ6-9F3U>].

Shortly thereafter, in 2018, the Council expanded the scope of the original resolution to prohibit the practice of conversion therapy for gender identity in addition to sexual orientation.³¹ This amendment increased protections offered to LGBTQ+ Brazilians, specifically transgender and transsexual citizens.³² In providing justification for the bill, the Council cited an expansive list of organizations, including domestic entities, like the Brazilian Ministry of Health; international conventions focused on gender and sexuality, such as the Yogyakarta Principles; and pseudo-governmental organizations, like the United Nations, all of which already denounced the practice.³³ The resolution recognized the importance of honoring individual gender identities and acknowledged the discrimination and violence that LGBTQ+ Brazilians suffered: “It is forbidden for psychologists, in their professional practice, to propose, carry out or collaborate, under a pathological perspective, with private, public, institutional, community or promotional events or services aimed at conversion therapies, reversal, readjustment or reorientation of the gender identity of transgender people and transsexual people.”³⁴

The Brazilian ban would likely be unsuccessful in the United States for several reasons, most notably due to the scope of the resolutions and the behavior that they regulate. Both resolutions bar psychologists in their professional practice from promoting conversion therapy or collaborating with other professionals or organizations that promote conversion therapy.³⁵ Enforcement of the Brazilian ban therefore depends upon a finite description of “professional practice,” which neither of the resolutions provide.³⁶ The language of the resolutions stringently limits the professional behavior of psychologists; moreover, it does nothing to regulate similar behavior from other medical professionals or religious practitioners in their promotion or advertisement of conversion therapy.³⁷ As such, both resolutions would be prime for First Amendment challenges based on freedom of speech and association arguments. Opponents might also advance an

³¹ See Resol. 01/2018, *supra* note 27, at 3.

³² *Id.* at 2–3.

³³ *Id.* at 1–2.

³⁴ *Id.* at 3.

³⁵ *Id.*; Resol. 001/99, *supra* note 24, at 2.

³⁶ See Resol. 01/2018, *supra* note 27, at 3.

³⁷ *Id.*

overbreadth challenge, citing the resolutions' regulation of the nonprofessional and private behavior of psychologists.³⁸ Accordingly, a conversion therapy ban similar to the Brazilian model would likely be overturned in the United States.

2. Ecuador

Conversion therapy was banned in Ecuador in 2014 through an amendment to the Ecuadorian Criminal Code Section 151; this amendment formally categorized the practice as torture.³⁹ For years, LGBTQ+ activist groups had documented the horrors of Ecuadorian conversion therapy clinics, which catered predominantly to lesbian women.⁴⁰ Their investigations revealed a systemic focus on emotional and psychological abuse originating from the conversion therapy clinics, many of which were unregulated and led by unlicensed practitioners.⁴¹ Following years of international outcry, pressure from LGBTQ+ activist groups, and a successful Change.org online petition that gathered over 100,000 signatures, conversion therapy was banned in Ecuador only after Minister of Health Carina Vance carried out a series of government raids on conversion therapy clinics, rescuing dozens of lesbian women held against their will.⁴²

³⁸ See Resol. 001/99, *supra* note 24, at 2 (“Psychologists will not comment, nor will they participate in public pronouncements in the mass media in order to reinforce the existing social prejudices in relation to homosexuals.”); see also *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014) (noting that “for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine”); *Lowe v. SEC*, 472 U.S. 181, 232 (1985).

³⁹ See Código Orgánico Integral Penal § 151, SAN-2014-0138, 12 de Octubre de 2014, ASAMBLEA NACIONAL (Ecuador) [hereinafter Código § 151].

⁴⁰ Charlotte Hill, *Ecuadorian Ex-Gay Torture Clinics Raided, Shut Down Following Online Campaign*, PRWEB (Jan. 24, 2012), <http://www.prweb.com/releases/2012/1/prweb9132448.htm> [<https://perma.cc/A6C3-C39A>]; see also Rafael Romo, *Ecuadorian Clinics Allegedly Use Abuse to ‘Cure’ Homosexuality*, CNN (Jan. 25, 2012, 1:13 PM), <https://www.cnn.com/2012/01/25/world/americas/ecuador-homosexual-abuse/index.html> [<https://perma.cc/F2LG-QJ4C>].

⁴¹ Anastasia Moloney, *Gays in Ecuador Raped and Beaten in Rehab Clinics to ‘Cure’ Them*, REUTERS (Feb. 8, 2018, 7:32 AM), <https://www.reuters.com/article/ecuador-lgbt-rights/feature-gays-in-ecuador-raped-and-beaten-in-rehab-clinics-to-cure-them-idUSL8N1P03QO> [<https://perma.cc/B3BT-3EHN>].

⁴² *Rights Groups Hail Ecuador’s Crackdown on Lesbian ‘Torture Clinics,’* MSNBC (Jan. 25, 2012, 6:42 PM), https://web.archive.org/web/20120610071713/http://worldnews.msnbc.msn.com/_news/2012/01/25/10237126-rights-groups-hail-ecuadors-crackdown-on-lesbian-torture-clinics [<https://perma.cc/8ZHQ-ULK4>].

By recategorizing conversion therapy as torture, and therefore a federal crime, the Ecuadorian government was able to criminally punish conversion therapy practitioners with prison sentences of seven to ten years.⁴³ Through the imposition of such penalties, the government acknowledged the systemic violence that conversion therapy perpetuated upon LGBTQ+ individuals and deterred future practitioners from continuing the practice.

The Ecuadorian ban would likely be unsuccessful in the United States based on obstacles occurring during enactment, rather than legal challenges. In fact, regulating conversion therapy by classifying the practice under a nation's torture statute reflects an innovative approach to prohibition.⁴⁴ An amendment to federal law that defines conversion therapy as torture would likely be the simplest and most efficient mechanism through which a ban might be orchestrated.

The failure of the Ecuadorian model in the United States would likely arise from the differing structure of each country's legislative branch. The Ecuadorian political system is composed of countless parties, many of which win seats in the legislature during every election.⁴⁵ For example, in the most recent national election, representatives from sixteen different political parties were elected to the legislature, with no singular party maintaining a majority control of the body; effective policymaking in Ecuador, therefore, requires political party cooperation and alliance-building.⁴⁶ This emphasis upon party cooperation allowed for coalitions of support to be constructed within the Ecuadorian legislature, with several parties uniting to pass the Section 151 amendment. Amendments to the United States Code, especially to redefine a serious criminal offense like torture, would ignite vibrant political debate and likely severe opposition. Two-party political polarization in the United States, most notably in Congress, would likely prevent a similar amendment to the federal torture statute,

⁴³ See Código § 151, *supra* note 39.

⁴⁴ See Christopher Romero, *Praying for Torture: Why the United Kingdom Should Ban Conversion Therapy*, 51 GEO. WASH. INT'L L. REV. 201, 201 (2019) (“[K]nowingly practicing conversion therapy on an individual to change their sexual orientation from homosexual to heterosexual should be considered torture and cruel, inhuman or degrading treatment under international and United Kingdom's domestic law.”).

⁴⁵ *Ecuador: Local Government*, BRITANNICA, <https://www.britannica.com/place/Ecuador/Local-government> [<https://perma.cc/X4FY-4R86>].

⁴⁶ *Id.*

especially considering that conversion therapy remains legal in twenty-nine states.⁴⁷

3. *Malta*

The Parliament of Malta banned conversion therapy in 2016 with the passage of the Act for the Affirmation of Sexual Orientation, Gender Identity and Gender Expression.⁴⁸ Malta became the first nation in the European Union to enact a conversion therapy ban, passing it unanimously in parliament and with widespread support from Maltese health organizations.⁴⁹ The Maltese ban prohibits the offering, practice, and advertisement of conversion therapy as well as the referral of patients between practitioners.⁵⁰ Violating the law may result in hefty fines and up to one year in prison.⁵¹ In determining the proper punishment for practitioners who violate the law, judges must consider whether the individual was a licensed professional and whether the conversion therapy was practiced upon a “vulnerable person,” described as someone “under the age of sixteen years; or suffering from a mental disorder; or [particularly at risk]” based upon several additional court-determined factors.⁵² Licensed practitioners are punished more harshly for their violations, as are those who practice upon “vulnerable persons.”⁵³

The Maltese model is particularly attentive to the complex considerations involved in banning conversion therapy. The legislation explicitly establishes that individuals are entitled to, and are thus protected in expressing, “a sexual orientation, a gender identity, and a gender expression” without conflating the meanings of each.⁵⁴ The

⁴⁷ *Equality Maps*, *supra* note 15.

⁴⁸ See Att dwar l’Affermazzjoni tal-Orjentazzjoni Sesswali, l’Identità tal-Ġeneru u l’Espressjoni tal-Ġeneru [Act for the Affirmation of Sexual Orientation, Gender Identity and Gender Expression], Act No. LV, Dec. 9, 2016, MINISTRY OF JUSTICE AND HOME AFFAIRS (Malta) [hereinafter *Maltese Ban*].

⁴⁹ *Malta Bans ‘Gay Cure’ Conversion Therapy*, BBC (Dec. 6, 2016), <https://www.bbc.com/news/world-europe-38230937> [<https://perma.cc/T6GG-FNES>]; Tim Diacono, *Malta Set to Ban Gay Conversion Therapy as Bill Passes Final Hurdle*, MALTATODAY (Nov. 21, 2016, 8:28 PM), https://www.maltatoday.com.mt/news/national/71851/malta_set_to_ban_gay_conversion_therapy_as_bill_passes_final_hurdle#.X_Ujhi9h0cj [<https://perma.cc/8T45-LTAN>]; Liam Stack, *Malta Outlaws ‘Conversion Therapy,’ a First in Europe*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/world/europe/malta-outlaws-conversion-therapy-transgender-rights.html> [<https://perma.cc/TF59-E7CY>].

⁵⁰ See *Maltese Ban*, *supra* note 48, at A1875–77.

⁵¹ *Id.*

⁵² See *Maltese Ban*, *supra* note 48, at A1877.

⁵³ *Id.*

⁵⁴ *Id.*

intentionality of the drafters appears in the specificity and compartmentalization of the law. Unlike other international models, the Maltese ban prohibits different categories of behavior based on practitioner and patient identity.⁵⁵ The ban cleverly circumvents having to discuss faith-oriented practitioners by instead focusing upon a licensed-unlicensed dichotomy. This dichotomy applies the law uniformly to all conversion therapy practitioners without once mentioning religion. The law also separates LGBTQ+-identifying individuals from having their identities associated with a “disorder, disease, illness, deficiency, disability and, or shortcoming” without simultaneously belittling those with mental illness.⁵⁶ Through its creation of a “vulnerable persons” category, the Maltese ban also acknowledges the unique violence that conversion therapy perpetuates upon juveniles. The increased punishments that practitioners face in engaging with “vulnerable persons” reflect the increased care that must be focused upon protecting juveniles from conversion therapy.

Even though Malta has a parliamentary legislature, unlike Ecuador, only two political parties comprise nearly the entire body.⁵⁷ Similar concerns of political polarization that rendered the Ecuadorian model ineffective in the United States are less relevant with the Maltese model, since the ban was passed in a legislative body similarly dominated by a two-party, majority-rule construction. Ironically, the failure of the Maltese model in the United States would likely arise from the aforementioned intentionality and compartmentalization of the ban. More specifically, the Maltese ban would likely be unsuccessful in the United States based on the legislation’s disparate punishment standards.

Providing increased punishment for practitioners who engage with “vulnerable persons” would likely present no constitutional issue, since sentencing guidelines for numerous crimes in the United States consider the effect of the crime upon vulnerable populations.⁵⁸ However, punishing unlicensed conversion therapy practitioners with lower fines

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Parliamentary Groups: Thirteenth Legislature (2017-2022)*, PARLAMENT TA' MALTA, <https://parlament.mt/en/13th-leg/political-groups/> [<https://perma.cc/AEC2-H6QU>].

⁵⁸ See UNITED STATES SENTENCING COMMISSION, 2018 GUIDELINES MANUAL ANNOTATED 93 (2018) (stating that prison sentencing guidelines may be increased if the crime was committed against someone unusually vulnerable due to age, physical, or mental condition, or who is otherwise susceptible to the criminal conduct).

and shorter prison sentences simply because they are unlicensed raises serious constitutional questions regarding justice and equity. Discrepancies in punishment based on licensure would almost certainly result in Fourteenth Amendment Equal Protection Clause challenges were a similar ban passed in the United States. Despite the ban making no mention of faith-based conversion therapy practitioners, the licensed-unlicensed dichotomy would likely bring about litigation, particularly from licensed professionals who would be punished more severely than unlicensed practitioners for providing the same services.

4. *Taiwan*

Efforts to pass a conversion therapy ban in Taiwan began in 2016, when the Ministry of Health and Welfare, guided by the Taiwanese Society of Psychiatry, formally recognized the practice as meritless and illegitimate.⁵⁹ Originally planned as an amendment to the nation's Physicians Act, which governs licensed physicians practicing in Taiwan, the ban would have enforced hefty fines and potential licensure suspensions for practitioners who engaged in conversion therapy.⁶⁰ Following widespread backlash from anti-LGBTQ+ organizations and extensive consultation with medical professionals in Taiwan, the Ministry amended the ban to punish practitioners under the Taiwanese Code of Criminal Procedure.⁶¹ The Ministry found that by punishing conversion therapy under the Physicians Act, such regulation inadvertently intertwined conversion therapy with medicine, despite the Ministry's deliberate attempt at separation.⁶² Fearing confusion from Taiwanese citizens, the Ministry amended the ban to limit the association of conversion therapy with any sort of legitimate medical treatment.⁶³ The Ministry instead chose to attach criminal liability to

⁵⁹ See George Liao, *MOHW: Conversion Therapy Could Be Banned as Early as March*, TAIWAN NEWS (Jan. 2, 2017, 8:51 PM), <https://www.taiwannews.com.tw/en/news/3062115> [<https://perma.cc/NL5-KYLQ>].

⁶⁰ Joe Morgan, *Taiwan Publishes Bill to Ban 'Gay Cure' Therapy*, GAY STAR NEWS (Jan. 3, 2017), <https://www.gaystarnews.com/article/taiwan-publishes-bill-ban-gay-cure-therapy/> [<https://perma.cc/4VY5-5VFS>].

⁶¹ Shanghaiist, *Taiwan Finalizes Conversion Therapy Ban*, MEDIUM (Feb. 24, 2018), <https://medium.com/shanghaiist/taiwan-finalizes-conversion-therapy-ban-adb417e5ff44> [<https://perma.cc/9BZL-CQU9>].

⁶² *Id.*

⁶³ *Id.*

the practice of conversion therapy under a statute related to the illegal use of force.⁶⁴

The Taiwanese ban would likely be unsuccessful in the United States based on the differing administrative powers of the Taiwanese Ministry of Health and Welfare and its United States counterpart, the Department of Health and Human Services (HHS). While the Ministry maintains the power to revise Taiwan's criminal code and thereby enforce a ban on conversion therapy without legislative approval,⁶⁵ the HHS would likely be unable to enforce a similar system. The Ministry attached criminal liability to conversion therapy by expanding the legal definition of illegal uses of force⁶⁶ Similar amendment or redefinition of the United States Code—in particular, the criminal coercion statute—could likely be enacted only by Congress, as government agencies may only draft regulations that effectuate the laws drafted by Congress.⁶⁷ Were the HHS to issue similar guidance to American practitioners and attach criminal liability to conversion therapy under the criminal coercion statute, courts would look to the legislative intent of the statute in assessing constitutionality. Moreover, the Administrative Procedure Act, which governs federal agencies and their regulatory and rulemaking functions, would likely prohibit the HHS from enforcing such a system, as the department would have no constitutional authority to amend the criminal code absent explicit legislative action.⁶⁸

5. Germany

Originally planned as a complete conversion therapy ban, Germany outlawed conversion therapy for juveniles in May 2020.⁶⁹ This narrowed legislation came as a result of severe backlash from German religious and anti-LGBTQ+ groups that threatened legal action against

⁶⁴ 中華民國刑法 [Criminal Code of the Republic of China] (promulgated by the Ministry of Justice) (“A person who by violence or threats causes another to do a thing which he has no obligation to do or who prevents another from doing a thing that he has the right to do shall be sentenced to imprisonment for not more than three years, short-term imprisonment, or a fine of not more than nine thousand dollars.”).

⁶⁵ Shanghaiist, *supra* note 61.

⁶⁶ *Id.*

⁶⁷ *Laws & Regulations*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/laws-regulations> [<https://perma.cc/56CQ-H633>].

⁶⁸ See generally Administrative Procedure Act, 5 U.S.C. subch. II § 551 et seq. (1946).

⁶⁹ Tim Fitzsimons, *Germany Is 5th Country to Ban Conversion Therapy for Minors*, NBC NEWS (May 8, 2020, 12:00 PM), <https://www.nbcnews.com/feature/nbc-out/germany-5th-country-ban-conversion-therapy-minors-n1203166> [<https://perma.cc/T73J-LYK4>].

the complete ban.⁷⁰ Citing various public policy considerations for limiting the scope of the ban, German Minister of Health Jens Spahn explained that the interests of self-determination and autonomy for adults voluntarily seeking out conversion therapy outweighed the government's interests in banning conversion therapy completely.⁷¹ Simultaneously, he explained the state's interest in preventing children from being forced into conversion therapy, noting that "it is very important that [LGBTQ+ youth] should find support in the existence of this law: a clear signal that the state does not want [conversion therapy] to happen [to them]."⁷² Many German LGBTQ+ rights organizations and progressive politicians were unsatisfied by the ban, arguing that it should be expanded to include individuals aged 19-26.⁷³

The German ban prohibits conversion therapy for all juveniles and "persons of legal age, whose consent was obtained without their volition (e.g., coercion, threat, deception, error), for example, if the practitioner does not inform them of the treatment's harmfulness."⁷⁴ Additionally, the ban outlaws the advertisement and arrangement of conversion therapy.⁷⁵ Practitioners who violate the ban may be punished with a prison sentence of up to one year.⁷⁶ In contrast, advertisers of the practice and practitioners who simply refer patients to other conversion therapy providers may be punished with a fine of up to €30,000.⁷⁷ Parents and legal guardians may also be punished "in cases of gross violation of their duty of care or their educational responsibilities" for coercing or forcing children in their care into

⁷⁰ *Id.*; *Minister Defends Germany's Limited Gay Therapy Ban*, REUTERS (May 7, 2020, 8:20 AM), <https://www.reuters.com/article/us-germany-equality-lgbt/minister-defends-germanys-limited-gay-therapy-ban-idUSKBN22J2F5> [<https://perma.cc/43BE-D7HG>].

⁷¹ Fitzsimons, *supra* note 69. As mentioned earlier, *supra* note 22, debate regarding the legality of complete conversion therapy bans is vibrant and complex. Whether adults have a right to seek out activities that are inherently harmful to their physical and mental health is a discussion that transcends legal, ethical, and scientific discussion. Compare THOMAS SZASZ, *IDEOLOGY AND INSANITY: ESSAYS ON THE PSYCHIATRIC DEHUMANIZATION OF MAN* (reprint ed. 1991), with Kristin Carr, *The Right to Self-Harm: Legal Issues Concerning Involuntary Psychiatric Commitment for Self-Injury*, AM. U. HONORS CAPSTONE (2004), and Ronald Bayer, Book Note, 255 SCIENCE 480 (1992) (reviewing HOWARD M. LEICHTER, *FREE TO BE FOOLISH* (1991)).

⁷² Fitzsimons, *supra* note 69.

⁷³ *Id.*

⁷⁴ Press Release, Bundesministerium für Gesundheit, Act to Protect Against Conversion Treatments (May 7, 2020), <https://www.bundesgesundheitsministerium.de/en/press/2020/conversion-treatments.html> [<https://perma.cc/Z2UC-YVW2>].

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

conversion therapy.⁷⁸ The ban also carves out protections for practitioners providing care to individuals with “disorders of sexual preference” (like pedophilia) and practitioners helping “a person better express their self-perceived gender identity or their desire to acquire a more feminine or masculine physique.”⁷⁹ Uniquely, the ban also established a free and anonymous counseling service, funded through the Federal Centre for Health Education, for LGBTQ+ individuals who were previously affected, voluntarily or involuntarily, by conversion therapy.⁸⁰

The ban also contains specific provisions regarding religious conversion therapy practitioners. Noting that the ban “will only apply [to religious practitioners] if the [practitioner] deliberately attempts to influence someone’s sexual orientation or their self-perceived gender identity,”⁸¹ the legislation attempts to circumvent potential free speech and religious challenges by regulating conduct, not speech. Rather than forbid religious institutions from discussing their opinions of sexuality and gender identity with their congregations, the German ban is triggered only when those viewpoints are used as the basis for attempting to alter a juvenile’s sexual orientation or gender identity through conversion therapy.⁸² Considering that conversion therapy, as with most therapies, usually occurs in a one-on-one setting, the ban limits the ability for religious practitioners to perform conversion therapy on juveniles in isolated situations without simultaneously limiting the ability of religious leaders to publicly communicate about conversion therapy more broadly. As discussed later, it is the careful wording of this provision, coupled with the overall structure and functionality of the ban, that warrants the German model most likely to succeed in the United States.

B. Domestic Failure

1. States and Municipalities

Twenty-one states—as well as the territories of Puerto Rico and the District of Columbia—have passed conversion therapy bans.⁸³

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *See id.*

⁸³ *Equality Maps, supra* note 15.

Additionally, nearly one hundred municipalities have banned the practice.⁸⁴ With the exception of the District of Columbia, whose legislature recently expanded the scope of its ban to include adults under the care of a legal guardian or conservator, and one municipal ban in New York City, all other conversion therapy bans in the United States apply only to juveniles.⁸⁵ The limited applicability of domestic conversion therapy bans is a result of nationwide legal challenges launched by religious and conservative interests groups that succeeded—via threats of legal action or actual litigation—in limiting bans passed in many states.⁸⁶ Legal challenges to conversion therapy bans have relied heavily upon First Amendment arguments regarding free speech and religious expression⁸⁷ as well as Fourteenth Amendment arguments regarding parental rights.⁸⁸ With the vast majority of conversion therapy bans arising from legislative action or executive order rather than citizen initiative, the scope of state and municipal bans has focused almost exclusively on licensed practitioners.⁸⁹ This narrow

⁸⁴ *Id.*

⁸⁵ Jordan Fischer, *D.C. Could Be 2nd City in U.S. to Ban Conversion Therapy for Some Adults*, WUSA9 (Dec. 6, 2018, 6:08 PM), <https://www.wusa9.com/article/news/local/dc-could-be-2nd-city-in-us-to-ban-conversion-therapy-for-some-adults/65-621820192> [<https://perma.cc/5CYP-M8RS>].

⁸⁶ See, e.g., Jeffrey C. Mays, *New York City Is Ending a Ban on Gay Conversion Therapy. Here's Why.*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/nyregion/conversion-therapy-ban-nyc.html> [<https://perma.cc/8H25-VNKY>]; Jonathan Stempel, *Florida Bans on Conversion Therapy for Children Voided by U.S. Appeals Court*, REUTERS (Nov. 20, 2020), <https://www.reuters.com/article/us-usa-conversion-therapy/florida-bans-on-conversion-therapy-for-children-voided-by-u-s-appeals-court-idUSKBN28029C> [<https://perma.cc/PQ3B-Z8LT>].

⁸⁷ See, e.g., *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237, 1248 (S.D. Fla. 2019), *rev'd and remanded*, 981 F.3d 854 (11th Cir. 2020) (“Plaintiffs’ first two claims allege that the ordinances unconstitutionally discriminate on the basis of viewpoint, or in the alternative, unconstitutionally discriminate on the basis of content. The parties vigorously contest whether the ordinances implicate the First Amendment’s Free Speech Clause, and if so, what level of scrutiny is appropriate – rational basis review, some form of heightened but intermediate review, or strict scrutiny.”).

⁸⁸ See, e.g., *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1367 (E.D. Cal. 2012), *aff'd*, 728 F.3d 1042 (9th Cir. 2013), and *aff'd*, 740 F.3d 1208 (9th Cir. 2014) (“Plaintiffs assert that the parental right at issue in this case, of choosing a particular mental health therapy for one’s children, is a fundamental right that California cannot infringe without satisfying strict scrutiny.”).

⁸⁹ See, e.g., H.B. 19-1129, 71st Gen. Assemb., 2019 Reg. Sess. (Colo. 2019) (defining “conversion therapy” as “any practice or treatment by a licensed physician specializing in the practice of psychiatry that attempts or purports to change an individual’s sexual orientation or gender identity.”); H.B. 6695, 2017 Reg. Sess. (Conn. 2017) (regulating only licensed “health care providers” and defining the category as a “practitioner of the healing arts . . . an occupational therapist . . . an alcohol and drug counselor . . . a registered nurse

regulation provides only minimal protection to juveniles in the United States.

California’s conversion therapy ban, upheld by the Ninth Circuit in *Pickup v. Brown*, and a municipal ban in Florida, recently overturned by the Eleventh Circuit in *Otto v. City of Boca Raton*, help illuminate some of the legal challenges, processes of judicial review, and conflicting constitutional interests that arise from the enactment of conversion therapy bans.

In *Pickup*, plaintiffs⁹⁰ sought injunctive relief from California Senate Bill 1172 (SB 1172), which prohibited licensed mental health practitioners from engaging in conversion therapy on juveniles.⁹¹ Plaintiffs argued that SB 1172 violated their First Amendment free speech and religious expression rights as well as their Fourteenth Amendment parental rights.⁹² Pivotal in the court’s assessment of SB 1172 was whether the bill regulated speech or conduct; that analysis determined the appropriate level of judicial review for deciding the constitutionality of the bill.⁹³ The court ultimately selected rational basis review, concluding that SB 1172 was rationally related to the state’s interest in protecting the “physical and psychological well-being of minors.”⁹⁴ Finding that the “provision of healthcare and other forms

or advanced practice registered nurse . . . a nurse’s aide . . . a board certified behavior analyst . . . a psychologist . . . a marriage and family therapist . . . a clinical social worker or master clinical social worker . . . a professional counselor . . . a genetic counselor . . . a pharmacist . . . a hypnotist registered with the Department of Consumer Protection . . . or any person licensed, certified or registered under comparable provisions of law outside of the state but providing professional services under such license, certification or registration in the state.”); S.B. 1028, 2018 Reg. Sess. (Md. 2018) (regulating only “mental health or child care practitioners” and defining that category as “a practitioner licensed or certified under [state law] or any other practitioner licensed or certified under [state law] who is authorized to provide counseling by the practitioner’s licensing or certifying board.”).

⁹⁰ Interestingly, plaintiffs in *Pickup* included several juveniles who argued “that [the ban] violated [their] First Amendment rights by preventing them from being able to receive or hear about [conversion therapy].” 42 F. Supp. 3d at 1362.

⁹¹ *Id.* at 1352.

⁹² *Id.* at 1349.

⁹³ *Id.* at 1358 (“[W]hat SB 1172 proscribes is actions designed to effect a difference, not recommendations or mere discussions of [conversion therapy]. This fact distinguishes SB 1172 from [prior case law], as SB 1172 does not, on its face, penalize a mental health professional’s exercise of judgment in simply informing a minor patient that he or she might benefit from [conversion therapy]; it also does not prohibit speech necessary to the therapist’s practice.”). *Id.* at 1362 (finding that “SB 1172 passes the rational basis test.”).

⁹⁴ *Id.* at 1355 (“California has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth,

of treatment is not expressive conduct,” and considering the state’s interest in regulating the medical profession, the court dismissed the First Amendment challenges.⁹⁵

On the Fourteenth Amendment parental rights challenge, the court reasoned that “fundamental parental interest is not without limitation,” holding that “limitations to parental rights may exist where ‘harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.’”⁹⁶ Dismissing the Fourteenth Amendment challenge, the court declared that “there is no fundamental or privacy right to choose a specific mental health treatment the state has reasonably deemed harmful to minors.”⁹⁷

The ruling was upheld on appeal to the Ninth Circuit.⁹⁸ Agreeing with the district court that rational basis review was proper, the appeals court began by examining the types of speech used by medical professionals.⁹⁹ Distinguishing between (1) public dialogue, (2) information shared in furtherance of the doctor-patient professional relationship, and (3) overall professional conduct, the court established that SB 1172 regulated only the third, “where the state’s power is great, even though such regulation may have an incidental effect on speech.”¹⁰⁰ “Most, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment.”¹⁰¹ Moreover, in finding that SB 1172 only regulated conduct, the court wrote that the bill “does nothing to prevent licensed therapists from discussing the pros and cons of [conversion therapy] with their patients. [SB 1172] merely prohibits licensed mental health providers from engaging in

and in protecting its minors against exposure to serious harms caused by [conversion therapy].”).

⁹⁵ *Id.* at 1360–62.

⁹⁶ *Id.* at 1368.

⁹⁷ *Id.* at 1368–69.

⁹⁸ *See* Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).

⁹⁹ *Id.* at 1218 (citations omitted) (“The Federal courts have never recognized a freestanding exception to the First Amendment for state professional regulations. Indeed, authoritative precedents have established that neither professional regulations generally, nor even a more limited subclass of such rules, remain categorically outside of the First Amendment’s reach. To justify its purported speech/conduct dichotomy in the context of the professions, the panel instead invokes our [previous] decisions . . . as well as scattered citations of non-authoritative cases.”).

¹⁰⁰ *Id.* at 1229.

¹⁰¹ *Id.*

[conversion therapy] with minors.”¹⁰² On the Fourteenth Amendment parental rights challenge, the court held that “the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has reasonably deemed harmful.”¹⁰³

In *Otto*, the district court directly acknowledged the harm perpetuated by conversion therapy: “[T]his case is about whether Defendants can prohibit the licensed therapists from administering [conversion] therapy to minors where the available medical and subject matter literature concludes that the therapy is harmful to minors.”¹⁰⁴ In *Otto*, plaintiffs¹⁰⁵ sought injunctive relief from city and county ordinances that together prohibited licensed mental health practitioners from engaging in conversion therapy on juveniles.¹⁰⁶ Plaintiffs argued that the ordinances violated their First Amendment free speech rights as well as several provisions of the Florida Constitution.¹⁰⁷

The court stated that First Amendment case law “acknowledges the fundamental importance of freedom of speech . . . but also recognizes that the freedom of speech must occasionally be restricted or limited to accommodate other important governmental interests.”¹⁰⁸ However, in contrasting *Pickup* and *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), a similar Third Circuit case, with the facts of *Otto*, the court concluded that the ordinances in question were likely subject to intermediate scrutiny, because “the ordinances, as applied to [the p]laintiffs, likely cannot be construed as regulating conduct only or as mere incidental burdens on speech.”¹⁰⁹ Unable to rule on the proper level of judicial review, the court analyzed the plaintiffs’ claims under three levels of review: rational basis, intermediate scrutiny, and strict

¹⁰² *Id.*

¹⁰³ *Id.* at 1236.

¹⁰⁴ See *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237, 1241 (S.D. Fla. 2019), *rev’d and remanded*, 981 F.3d 854 (11th Cir. 2020).

¹⁰⁵ Unlike the plaintiffs in *Pickup*, the plaintiffs in *Otto* were two licensed marriage and family therapists whose conversion therapy consisted solely of “talk therapy.” *Id.* at 1242–43.

¹⁰⁶ *Id.* at 1243–44.

¹⁰⁷ *Id.* at 1245.

¹⁰⁸ *Id.* at 1248.

¹⁰⁹ *Id.* at 1251–52.

scrutiny.¹¹⁰ In doing so, the court discussed at length the plaintiffs’ objection that banning conversion therapy inherently encroaches upon the beliefs of conversion therapy practitioners:

The ordinances do regulate the practices of licensed medical providers in trying to change a child’s sexual orientation. This practice is what is regulated, not any particular viewpoint on the subject. And, the “proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace.” The rationale of preventing harm to minors by prohibiting a type of therapy could be construed as viewpoint neutral. If the Court concludes that [conversion therapy] may be regulated, then the perspective that [conversion therapy] is beneficial also may be regulated. To find otherwise would swallow the subdivision of viewpoint-discrimination from content-discrimination.

In addition, the ordinances do not prohibit or affect the expression of Plaintiffs’ views regarding the benefits of [conversion therapy], sexual orientation or any issue related to it. The ordinances do not ban change, or the expression of the viewpoint that change in sexual orientation is possible. The ordinances do ban efforts, through a medical intervention, by a licensed provider, to therapeutically change a minor’s sexual orientation. Presented with a minor client seeking to change his or her sexual orientation or gender identity, Plaintiffs may commend and recommend conversion therapy. Plaintiffs cannot perform [conversion therapy] in Palm Beach County or the City Boca Raton.¹¹¹

Ruling upon the constitutionality of the ban, the court concluded that “if either rational basis review or intermediate review were applied to the ordinances, the ordinances would survive [U]nder strict scrutiny . . . the Court is unconvinced that plaintiffs have demonstrated that they are substantially likely to succeed on the merits.”¹¹²

The ruling of the district court was overturned on appeal to the Eleventh Circuit.¹¹³ Disagreeing with the district court that the ordinances regulated only conduct, the appeals court stated that the local governments could not “evade the First Amendment’s ordinary presumption against content-based speech restrictions by saying that

¹¹⁰ *Id.* at 1254–56. For additional discussion of speech-conduct dichotomy considerations for conversion therapy practitioners, see Warren Geoffrey Tucker, *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 (2015); Clay Calvert et al., *Conversion Therapy and Free Speech: A Doctrinal and Theoretical First Amendment Analysis*, 20 WM. & MARY J. WOMEN & L. 525 (2014).

¹¹¹ *Id.* at 1268–69 (citations omitted).

¹¹² *Id.* at 1270.

¹¹³ See *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020).

the plaintiffs’ speech is actually conduct.”¹¹⁴ Thus, the court analyzed the ordinances using strict scrutiny, noting that “[w]e cannot see how the regulations here can be applied without considering the content of the banned speech.”¹¹⁵ The court ruled that “[t]he ordinances discriminate on the basis of content—at a minimum. They also discriminate on the basis of viewpoint.”¹¹⁶ Disagreeing with the district court’s lengthy discussion of viewpoint regulation, the court wrote that “the plaintiffs’ counseling practices are grounded in a particular viewpoint about sex, gender, and sexual ethics. The defendant governments obviously hold an opposing viewpoint—one that they surely have the right to promote.”¹¹⁷ Concluding upon the importance of protecting free speech, the court wrote that “[t]his decision allows speech that many find concerning—even dangerous [T]he First Amendment does not allow communities to determine how their neighbors may be counseled about matters of sexual orientation or gender.”¹¹⁸

In 2018, the Supreme Court formally abrogated *Pickup and King* by ruling that “professional speech is not a separate category of speech exempt from the rule that content-based regulations of speech are subject to strict scrutiny.”¹¹⁹ That ruling, aggravated by differing perspectives on the legitimacy and success of conversion therapy and the continued ability for juveniles to be transported interstate to receive conversion therapy involuntarily at the hands of their parents demonstrates the importance of passing a federal ban on conversion therapy.

¹¹⁴ *Id.* at 861.

¹¹⁵ *Id.* at 861, 863. (“Whether a doctor violated that law turned solely on the content of the message conveyed to the patient. Here too. Whether therapy is prohibited depends only on the content of the words used in that therapy, and the ban on that content is because the government disagrees with it. And whether the government’s disagreement is for good reasons, great reasons, or terrible reasons has nothing at all to do with it. All that matters is that a therapist’s speech to a minor client is legal or illegal under the ordinances based solely on its content. . . . The First Amendment does not protect the right to speak about banned speech; it protects speech itself, no matter how disagreeable that speech might be to the government. And what good would it do for a therapist whose client sought [conversion] therapy to tell the client that she thought the therapy could be helpful, but could not offer it? It only matters that some words about sexuality and gender are allowed, and others are not.”).

¹¹⁶ *Id.* at 864.

¹¹⁷ *Id.* (citations omitted).

¹¹⁸ *Id.* at 871.

¹¹⁹ Nat’l Inst. of Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2366–67 (2018).

2. Federal

The Therapeutic Fraud Prevention Act (the Act) was most recently introduced in both the U.S. House of Representatives and Senate in June 2019.¹²⁰ The bill was previously introduced in the House in 2015 and 2017, and the Senate in 2016 and 2017, dying at the committee or subcommittee level each year but gaining additional cosponsors with each reintroduction.¹²¹ Though the House and Senate versions vary slightly, the overall Act, if passed, would represent a complete ban on conversion therapy, though only for services offered in exchange for compensation.¹²² Moreover, the Act would ban the advertisement of conversion therapy, particularly focusing on ads that attest to the success or harmlessness of the practice.¹²³ Enforcement of the Act would be entrusted to the Federal Trade Commission under section 18(a)(1)(B) of the Federal Trade Commission Act, which defines unfair or deceptive acts or practices.¹²⁴ The Federal Trade Commission, in coordination with the Attorney General and state agencies, would therefore be responsible for launching civil actions against those who violate the Act.¹²⁵

An important distinction between the Act and other international models is the stated government interest underlying each ban. In Malta, the interest was promoting self-determination and the free expression of one's sexuality and gender identity, particularly for vulnerable populations.¹²⁶ In Taiwan, a ban was enacted to formally delegitimize conversion therapy and separate the practice from the medical community.¹²⁷ In Germany, the government sought to protect juveniles from forced conversion therapy and ensure that adults could not coerce their children into receiving conversion therapy.¹²⁸ In the United States, the Act states that it is "in the interest of the Nation to prevent lesbian, gay, bisexual, transgender, and gender nonconforming people and their families from being defrauded by persons seeking to profit by offering this harmful and wholly ineffective therapy."¹²⁹ In focusing upon the

¹²⁰ Compare H.R. 3570, 116th Cong. (2019), with S. 2008, 116th Cong. (2019).

¹²¹ See H.R. 2450, 114th Cong. (2015); H.R. 2119, 115th Cong. (2017); S. 2880, 114th Cong. (2016); S. 980, 115th Cong. (2017).

¹²² See H.R. 3570, 116th Cong. § 3(1)(A) (2019); S. 2008, 116th Cong. § 3(1) (2019).

¹²³ See H.R. 3570, 116th Cong. § 4(a)(2) (2019); S. 2008, 116th Cong. § 4(a)(2) (2019).

¹²⁴ See H.R. 3570, 116th Cong. § 4(a)(2) (2019); S. 2008, 116th Cong. § 4(a)(2) (2019).

¹²⁵ See H.R. 3570, 116th Cong. § 4(b)(1) (2019); S. 2008, 116th Cong. § 4(b)(1) (2019).

¹²⁶ *Malta Bans 'Gay Cure' Conversion Therapy*, *supra* note 49.

¹²⁷ Shanghaiist, *supra* note 61.

¹²⁸ Press Release, *supra* note 74.

¹²⁹ See *supra* notes 121–24.

financial interests of the LGBTQ+ community and therefore regulating only conversion therapy conducted for compensation, the Act overlooks the foundational reason for conversion therapy bans: to promote free expression of personal identity while protecting already at-risk LGBTQ+ populations, primarily juveniles.¹³⁰

III

CONSTITUTIONAL CONSIDERATIONS FOR ENACTING THE GERMAN BAN IN THE UNITED STATES

In ruling upon the legality of conversation therapy bans, American courts employ various approaches in weighing the constitutional rights of plaintiffs against the interests of the government. As shown in *Pickup* and *Otto*, two prominent considerations that courts must weigh are the constitutional rights of practitioners and parents and the appropriate level of judicial review.¹³¹ Although many bans are similarly written and enacted, courts consistently arrive at different conclusions regarding constitutionality based on these considerations. The German ban effectively considers both constitutional issues.

A. First Amendment Challenges

1. Freedom of Speech

As explained in *Pickup*, the regulation of conduct that occurs during medical or therapeutic treatment should not implicate First Amendment concerns regarding free speech, particularly when the government deems a certain treatment or procedure harmful.¹³² States maintain a

¹³⁰ This Comment does not explore the efficacy of the Act as written. Whether or not the bill, if passed, would be helpful in protecting LGBTQ+ juveniles is another matter of discussion. It is also important to acknowledge Congress's limited power to pass legislation under the Commerce Clause. However, limitations on congressional power do not justify the Act's singular reliance upon the financial interests of LGBTQ+ citizens, its complete overlooking of the complexities of sexual orientation and gender identity, and its ignorance of the violence associated with conversion therapy.

¹³¹ See, e.g., *Pickup v. Brown*, 42 F. Supp. 3d 1347 (E.D. Cal. 2012), *aff'd*, 728 F.3d 1042 (9th Cir. 2013), *aff'd*, 740 F.3d 1208 (9th Cir. 2014); *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237 (S.D. Fla. 2019), *rev'd and remanded*, 981 F.3d 854 (11th Cir. 2020).

¹³² *Pickup*, 740 F.3d at 1231 (“[Because] SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend or recommend against [conversion therapy], we conclude that any effect it may have on free speech interests is merely incidental. Therefore, we hold that SB 1172 is subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest. . . . Without a doubt, protecting the well-being of minors is a legitimate state interest.”).

long-recognized interest in keeping their citizens safe; an extension of that interest involves the government's right to reasonably regulate public health, even when such action affects speech incidentally.¹³³ Governments regulate public health in a multitude of ways, though perhaps most relevantly here through the licensure of medical professionals. The regulation of public health inherently interacts with individual First Amendment rights. For example, the Supreme Court has recognized that medical professionals, themselves maintaining constitutional protections on speech, may advocate for and support medical treatments or ideologies that defy common medical knowledge or theory.¹³⁴ Here, such protections would allow practitioners to speak about conversion therapy as a practice, advocate for its purported success as a technique, and refer patients to conduct independent analysis of the practice. Nevertheless, there are a multitude of limits placed upon the speech and conduct of medical professionals in the regulation of public health and safety.¹³⁵

Conversion therapy bans do not limit conversation about conversion therapy but rather seek to prohibit the practice from being carried out. Two important distinctions arise when a practitioner shifts from speaking about conversion therapy to performing the actual practice on a client: setting and action. For example, as the setting in which speech about conversion therapy becomes more intimate, shifting from a professional development conference to a one-on-one patient-practitioner conversation in an office or clinic, protections on speech are lessened.¹³⁶ In both of those instances, however, the practitioner is only discussing, not practicing, conversion therapy, and would likely be protected by the First Amendment. Similarly, it is important to note

¹³³ See *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 884, 967–68 (1992) (citations omitted) (“All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”).

¹³⁴ See *Nat’l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

¹³⁵ See *Otto*, 353 F. Supp. 3d at 1254 (“The speech of medical providers is routinely limited through prescription drug laws, medical malpractice lawsuits, accreditation requirements, and other means. . . . [C]ase law demonstrates a simultaneous judicial commitment to protecting the conversation between doctors and their patients, and a recognition of the government’s ability to regulate the practice of medicine and to protect patients from harmful practices. Quite simply, ‘[t]here is a difference, for First Amendment purposes, between regulating professionals’ speech to the public at large versus their direct, personalized speech with clients.’”) (quoting *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011)).

¹³⁶ *Id.*

the shifting action that occurs between speech and practice as well as the diminished constitutional protection of the latter.¹³⁷ Speaking about conversion therapy, even one-on-one with a client, is different from performing the actual practice. The former would likely be protected by the First Amendment whereas the latter could be regulated with limited constitutional interference, even though some elements of conversion therapy may require speech.¹³⁸ The mere fact that conversion therapy is incidentally related to or partially carried out through speech does not mean it is protected by the First Amendment.¹³⁹

Legal analyses of conversion therapy bans reveal a speech-conduct dichotomy that courts must effectively parse through to reach a final ruling. This dichotomous relationship is not unique to conversion therapy ban analysis; such a distinction has been the focus of expansive academic and legal writing, particularly by constitutional lawyers and researchers.¹⁴⁰

Considering that conversion therapy is not limited to speech—contrarily, it appears that there is a preference throughout the world for more physical orchestrations of the practice—regulation of the practice is, therefore, tied to conduct rather than speech. Even when plaintiffs argue—successfully on appeal in *Otto*, for example—that they are participating only in “talk therapy” conducted entirely through speech, one must look at the underlying action involved. Attempting to distinguish between forms of therapy based upon the level of speech involved in each overlooks the conduct of therapy itself. Whether an individual is exposed to electroshock conversion therapy or conversion “talk therapy,” the underlying goal of both is identical: to change the individual’s sexual orientation or gender identity. Simply because one form requires more words than the other does not mean the practice

¹³⁷ *Id.*

¹³⁸ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (“The State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.”).

¹³⁹ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (“It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”).

¹⁴⁰ *See, e.g.*, Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1216–20 (2011) (analyzing the speech-conduct dichotomy in First Amendment jurisprudence); Stephen J. Wermiel, *The Ongoing Challenge to Define Free Speech*, 43 HUM. RTS. 82 (2017) (explaining several “breaking points” of First Amendment speech-conduct distinction and regulation).

itself is expressive in nature and protected by the First Amendment.¹⁴¹ Would electroshock therapy be considered speech if the practitioner talked with the patient throughout the entire procedure? Analyzing conversion therapy bans through the speech-conduct dichotomy, it is clear that conversion therapy in any form is conduct, regardless of the level of speech involved.¹⁴²

2. *Freedom of Religion*

The regulation of conversion therapy should not implicate First Amendment concerns regarding religious expression for the same reason it should not implicate concerns regarding freedom of speech. The arguments run parallel: simply because certain conduct incidentally involves speech does not mean it should automatically receive First Amendment free speech protection; similarly, simply because certain conduct incidentally involves religion does not mean it should automatically receive First Amendment religious freedom protection. That religious practitioners participate in conversion therapy does not mean the conduct underlying the practice has any relation to religion.

That an act is referenced, promoted, or forbidden in a religious text does not mean governmental regulation of that act implicates a First Amendment concern regarding freedom of religion. For example, bigamy,¹⁴³ rape,¹⁴⁴ incest,¹⁴⁵ stoning,¹⁴⁶ slavery,¹⁴⁷ and genocide¹⁴⁸ are all condoned in the Bible and yet prohibited by state and federal law in the United States. Multiple religions denounce the use of vaccinations, and yet many states promulgate vaccination mandates.¹⁴⁹ Some religions profess a complete denial of modern medicine, and yet courts have attached criminal liability to parents who withhold lifesaving medical

¹⁴¹ See *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62 (2006).

¹⁴² See *Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2014) (“Plaintiffs may express their views to anyone, including minor patients and their parents, about any subject, including [conversion therapy], insofar as [a ban] is concerned. The *only* thing that [they] *cannot* do is avoid professional discipline for practicing [conversion therapy] on a minor patient.”) (emphasis added).

¹⁴³ *Genesis* 4:19–25.

¹⁴⁴ *Deuteronomy* 22:28–29.

¹⁴⁵ *Genesis* 19:31–32.

¹⁴⁶ *Exodus* 21:28.

¹⁴⁷ *Genesis* 9:18–27; *Ephesians* 6:5–7.

¹⁴⁸ *1 Samuel* 15:3.

¹⁴⁹ Miriam Krule, *Why Is There a Religious Exemption for Vaccinations?*, SLATE (Feb. 5, 2015, 3:23 PM), <https://slate.com/technology/2015/02/religious-exemption-for-vaccines-christian-scientists-catholics-and-dutch-reform-church.html> [<https://perma.cc/34UG-UC63>].

care from their children based upon religious beliefs.¹⁵⁰ One might find the story of Thomas featured at the beginning of this Comment absurd, and yet the consumption of lobster is prohibited in the same book of the Bible that purportedly condemns homosexuality.¹⁵¹ The incidental overlapping of real world conduct and religious scripture does not inherently provoke any issues of religious exercise; as such, regulating conduct that bears an incidental relationship to religion but, nevertheless, advances a state's interest in protecting its citizenry should be upheld. Moreover, the Supreme Court has ruled that when a state deems a particular act contrary to public health, it may regulate such behavior even if it is incidentally related to religious practices.¹⁵²

3. *The German Ban*

The German ban contains specific protections for religious beliefs that individuals might have about conversion therapy. The ban does not attempt to regulate any individual's opinion on conversion therapy; it allows individuals to continue expressing their support of the practice.¹⁵³ The ban punishes only practitioners who "deliberately attempt[] to influence someone's sexual orientation or their self-perceived gender identity."¹⁵⁴ The ban notes that only practices "aimed at deliberately changing or suppressing [a person's] sexual orientation or self-perceived gender identity . . . are to be banned in the future."¹⁵⁵ By limiting the scope of regulation only to the actual conduct of conversion therapy, the German ban provides a narrowly tailored ban while allowing protected speech about the practice to continue.¹⁵⁶ Similar to the ban in *Pickup*, the German ban prohibits only "actions designed to effect a difference, not recommendations or mere discussions of

¹⁵⁰ Christopher B. Daly, *Parents Who Relied on Faith Healing Are Convicted in Son's Death*, WASH. POST (July 5, 1990), <https://www.washingtonpost.com/archive/politics/1990/07/05/parents-who-relied-on-faith-healing-are-convicted-in-sons-death/efbcd5eb-e0ab-437e-91c0-8d6f2e7f99de/> [<https://perma.cc/23MX-KVQU>]; Samantha Raphelson, *Michigan Child's Death Puts Spotlight on Clash Between Medicine and Religion*, NPR (Aug. 31, 2018, 12:06 PM), <https://www.npr.org/2018/08/31/643407967/michigan-childs-death-puts-spotlight-on-clash-between-medicine-and-religion> [<https://perma.cc/B2PL-SX8Z>].

¹⁵¹ Compare Leviticus 11:10–12, with Leviticus 18:22.

¹⁵² See Emp. Div. Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

¹⁵³ Press Release, *supra* note 74.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

[conversion therapy].”¹⁵⁷ Therefore, the ban “does not on its face penalize [an individual’s] exercise of judgment in simply informing a minor patient that he or she might benefit from [conversion therapy]; it also does not prohibit speech necessary to the [individual’s] practice.”¹⁵⁸

B. Proper Levels of Judicial Review

The competing public policy considerations that judges must reconcile in ruling upon conversion therapy bans cannot be understated. Recent academic discussion has acknowledged some of those competing interests and has attempted to explain their influence on judges.¹⁵⁹ Courts’ weighing of conflicting interests—primarily those of practitioners and parents against the state—has manifested clearly in their selection of different levels of judicial review for assessing conversion therapy bans. *Pickup* and *Otto* illustrate some of the discrepancies in courts’ understanding of the behavior that conversion therapy bans actually prohibit.¹⁶⁰ Thus far, courts have split their analyses between rational basis review and strict scrutiny; though not dispositive, the level of judicial review selected by a court often effectively determines whether a conversion therapy ban is upheld.

Courts should select rational basis review in their constitutional analyses of conversion therapy bans because the bans (1) regulate conduct, not speech; (2) are content-neutral; and (3) are viewpoint-neutral. As such, the constitutionality of the German ban should be assessed using rational basis review as well. Finding that the first element has been met based upon earlier discussion of the speech-conduct dichotomy,¹⁶¹ the constitutionality of the German ban hinges upon its content-neutrality and viewpoint-neutrality.

¹⁵⁷ *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1358 (E.D. Cal. 2012), *aff’d*, 728 F.3d 1042 (9th Cir. 2013), *aff’d*, 740 F.3d 1208 (9th Cir. 2014).

¹⁵⁸ *Id.*

¹⁵⁹ See Ryann M. Aaron, *Outing Anti-Gay Teaching in Schools: How the Constitutional Successes of Conversion Therapy Bans Provide Viable Arguments to Defend Bans on Heteronormative Education*, 16 RUTGERS J.L. & RELIGION 580 (2014); Calvert et al., *supra* note 110, at 534, 550.

¹⁶⁰ See generally *Pickup*, 42 F. Supp. 3d 1347; *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237 (S.D. Fla. 2019), *rev’d and remanded*, 981 F.3d 854 (11th Cir. 2020).

¹⁶¹ Eberle, *supra* note 140.

I. Content-Neutrality

Content-neutrality and viewpoint-neutrality are inherently intertwined.¹⁶² In assessing the overall neutrality of conversion therapy bans, courts have noted the inherently viewpoint-specific nature of the practice.¹⁶³ Conversion therapy exists only to reinforce cisgendered heterosexuality. If viewed as a legitimate form of therapy, then, like all other therapies, conversion therapy is meant to correct a perceived wrong or negative aspect complicating an individual's mental health.¹⁶⁴ Conversion therapy practitioners must be under the impression that individuals who do not identify with cisgendered heterosexuality need correction or improvement, or they simply would not perpetuate the practice. Proponents of conversion therapy often state this premise in court, arguing that the prohibition of conversion therapy, absent the prohibition of any and all therapy regarding sexuality or gender identity, represents viewpoint-oriented regulation, and thus conversion

¹⁶² *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 59 (1983) (Brennan, J., dissenting) (“Generally, the concept of content neutrality prohibits the government from choosing the subjects that are appropriate for public discussion.”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995) (“[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. . . . [T]he distinction is not a precise one.”); *Matal v. Tam*, 137 S. Ct. 1744, 1750 (2017) (“The test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed.”).

¹⁶³ *Otto*, 981 F.3d at 864 (citation omitted) (“[T]he ordinances discriminate on the basis of content—at a minimum. They also discriminate on the basis of viewpoint. After all, the plaintiffs’ counseling practices are grounded in a particular viewpoint about sex, gender, and sexual ethics. The defendant governments obviously hold an opposing viewpoint—one that they surely have the right to promote. But they cannot engage in ‘bias, censorship or preference regarding [another] speaker’s point of view’ (quoting *Messer v. City of Douglasville*, 975 F.2d 1505, 1509 (11th Cir. 1992)). That the [state] did precisely that becomes even more obvious when considering the ‘exception’ outlined in both ordinances. The exception expressly allows ‘counseling that provides support and assistance to a person undergoing gender transition.’ No such carveout exists for sexual orientation. The ordinances thus codify a particular viewpoint—sexual orientation is immutable, but gender is not—and prohibit the therapists from advancing any other perspective when counseling clients. That viewpoint may be widely shared in the communities that passed the ordinances, but widespread agreement is beside the point; the question is whether a speaker’s viewpoint determines his license to speak. Here, the answer is yes.”).

¹⁶⁴ *Therapy*, AM. PSYCH. ASS’N, <https://www.apa.org/topics/therapy> [<https://perma.cc/Z8YP-S78H>].

therapy bans are unconstitutional.¹⁶⁵ The appeals court in *Otto* agreed with such reasoning.¹⁶⁶

Conversion therapy bans are narrowly tailored to prohibit one form of conduct. Many bans, like those in *Pickup*, *Otto*, and Germany, carve out protections for practitioners seeking to aid individuals in better understanding their sexual orientation or gender identity.¹⁶⁷ Attempting to change someone's identity through conversion therapy because of personal or religious beliefs is categorically different from seeking to provide further understanding of the complexities of gender and sexuality through therapy. The aforementioned argument falters in its illogical, all-or-nothing approach to banning conversion therapy. Arguing that all therapy regarding gender and sexuality must be banned if conversion therapy is banned conflates the underlying conduct involved in each.

Banning one form of conduct that a state deems harmful to the citizenry without banning the “flip side” of that same conduct does not implicate content-specific regulation.¹⁶⁸ For example, many states ban the recreational use of marijuana while permitting sale and manufacture of the substance for medical uses; in doing so, a state signals to its citizenry that the recreational use of marijuana represents a potential harm to public health and safety, but use of the substance as recommended by a medical professional offers benefits to society.¹⁶⁹ This same understanding also applies to conversion therapy: in banning conversion therapy, a state signals to its citizenry that the practice represents a potential harm to public health and safety, yet therapy designed to help an individual better understand their sexual orientation or gender identity is permitted, as such conduct offers benefits to society. Both restrictions focus on underlying public health and safety considerations rather than the interests of those engaging in the conduct. Conversion therapy bans, including the German ban, cannot be labeled as content-specific simply because they restrict one form of

¹⁶⁵ *Otto*, 353 F. Supp. 3d at 1263 (“Plaintiffs also argue that Defendants’ failure to outright ban all [conversion therapy] or conversations about [the practice] vitiates Defendants’ interest in preventing the identified harm However, the limits of the [conversion therapy] ban . . . do[] not defeat the [government’s] compelling interest here.”).

¹⁶⁶ *See Otto*, 981 F.3d at 864–65.

¹⁶⁷ *See generally* *Pickup v. Brown*, 42 F. Supp. 3d 1347 (E.D. Cal. 2012), *aff’d*, 728 F.3d 1042 (9th Cir. 2013), and *aff’d*, 740 F.3d 1208 (9th Cir. 2014); *Otto*, 353 F. Supp. 3d 1237; Press Release, *supra* note 74.

¹⁶⁸ *See Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002).

¹⁶⁹ *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 5 n.1 (2005).

the practice without similarly restricting all other forms of related therapy.

2. *Viewpoint-Neutrality*

One of the only differences between the German ban and the bans under review in *Pickup* and *Otto* is the scope of prohibition. Whereas the bans challenged in *Pickup* and *Otto* only apply to licensed practitioners, the German ban “applies to everyone, not just to professionals.”¹⁷⁰ Enforcement of a ban regardless of licensure eliminates potential arguments on behalf of licensed practitioners that the ban lacks viewpoint-neutrality because it overlooks unlicensed practitioners. This also prevents religious practitioners from claiming, as they did in *Otto*, that the ban regulates a “particular position the speaker wishes to express,” in this case, that their religion supports the practice of conversion therapy.¹⁷¹ By extending the scope of the ban beyond professional licensure, the German ban categorically overcomes potential viewpoint-neutrality challenges, as the ban encompasses a complete prohibition of the practice, regardless of whether the underlying viewpoint for carrying out the practice is of professional, personal, scientific, medical, or religious origin.

For many of the reasons that the conversion therapy ban was upheld in *Pickup* under a rational basis review, an American court would also likely uphold the German ban, as the ban represents a content-neutral and viewpoint-neutral regulation of conduct.

C. Fourteenth Amendment Parental Rights

Parents, like those in *Pickup*, have argued that conversion therapy bans violate their fundamental parental rights under the Fourteenth Amendment.¹⁷² Overlooking the agency-snatching nature of such a proposition, one need not address its quality to dismiss the underlying argument.¹⁷³ Additionally, undercutting these claims are numerous

¹⁷⁰ Press Release, *supra* note 74.

¹⁷¹ *Otto*, 535 F. Supp. 3d at 1237.

¹⁷² *Pickup*, 42 F. Supp. at 1367 (“Plaintiffs assert that the parental right at issue in this case, of choosing a particular mental health therapy for one’s children, is a fundamental right that California cannot infringe without satisfying strict scrutiny.”).

¹⁷³ *Troxel v. Granville*, 530 U.S. 57, 92–93 (2000) (Scalia, J. dissenting) (citations omitted) (“Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from

Supreme Court decisions that state just the opposite: Fourteenth Amendment parental rights protections do not permit parents to subject their children to harmful practices or dangerous situations.

The Fourteenth Amendment provides robust protections to parents in the “custody, care, and nurture” of their children.¹⁷⁴ Such protections limit state interference in the selection,¹⁷⁵ forum,¹⁷⁶ and location¹⁷⁷ of their children’s education; regulation and restriction of social interaction,¹⁷⁸ and religious indoctrination.¹⁷⁹ Parental rights have been repeatedly expanded by the Supreme Court since its landmark ruling in *Meyer v. Nebraska*, 262 U.S. 390 (1923); today, even parents deemed unfit to raise their own children still maintain certain Fourteenth Amendment parental rights.¹⁸⁰ Moreover, the Supreme Court has explicitly upheld the rights of parents to raise their children in unconventional environments, ruling that the Fourteenth Amendment outweighs the state’s interest in protecting and educating children when parents “sincerely [believe] . . . [that it] would endanger their own salvation and that of their children [to comply] with the law.”¹⁸¹

Equally important to the Fourteenth Amendment parental rights scheme, however, are situations in which the state interest in protecting public safety outweighs parental interests. The Supreme Court has placed limitations on the rights of parents in raising their children, particularly when parental action places a child at risk of harm.¹⁸² For

an era rich in substantive due process holdings that have since been repudiated. The sheer diversity of today’s opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance. While I would not now overrule those earlier cases . . . neither would I extend the theory upon which they rested to this new context. Judicial vindication of ‘parental rights’ under a Constitution that does not even mention them requires . . . not only a judicially crafted definition of parents, but also . . . judicially approved assessments of ‘harm to the child’ and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents.”).

¹⁷⁴ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹⁷⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁷⁶ *Pierce v. Soc’y of Sisters of the Holy Names Jesus & Mary*, 268 U.S. 510 (1925).

¹⁷⁷ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁷⁸ *Troxel*, 50 U.S. at 57.

¹⁷⁹ *Prince*, 321 U.S. at 166.

¹⁸⁰ *Santosky v. Kramer*, 455 U.S. 745, 770 (1982).

¹⁸¹ *Yoder*, 406 U.S. at 205.

¹⁸² *Prince*, 321 U.S. at 166 (“[N]either rights of religion nor rights of parenthood are beyond limitation.”).

example, parents maintain no right to place their children in physical, emotional, or psychological danger, even when religious practices or beliefs are implicated.¹⁸³ Moreover, parental rights are lessened as decision-making extends beyond the private sphere, particularly in spaces of public education and public health, where the government maintains significant regulatory interests.¹⁸⁴

Parents are simply not entitled to harm their children under the guise of parenting; behavior that places a child's safety at risk is not constitutionally protected.¹⁸⁵ Conversion therapy represents just that: a harmful practice denounced by countless domestic and international public health agencies.¹⁸⁶ In assessing Fourteenth Amendment objections to conversion therapy bans, both the *Pickup* and *Otto* courts acknowledged this reality. Fourteenth Amendment parental rights are implicated only when the state's regulatory interests are outweighed by the substantive due process rights of the parents. As the *Pickup* court noted, however, "the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has reasonably deemed harmful."¹⁸⁷ Whether sexual abuse, forced physical labor, electroshock therapy, public stripping and flagellation, or any of the myriad

¹⁸³ *Id.* at 169–70. ("The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political, or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.")

¹⁸⁴ See, e.g., *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190–91 (9th Cir. 2006) (finding that the right of parents "to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs"—the right to privacy here asserted—"does not entitle them to prohibit public schools from providing students with information that the schools deem to be educationally appropriate" and affirming "that the *Meyer-Pierce* due process right of parents to make decisions regarding their children's education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions . . ."); *Prince*, 321 U.S. at 168 ("The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities . . .").

¹⁸⁵ *Prince*, 321 U.S. at 169–70.

¹⁸⁶ See *Policy and Position Statements on Conversion Therapy*, *supra* note 14.

¹⁸⁷ *Pickup v. Brown*, 740 F.3d 1208, 1236 (9th Cir. 2014).

of incredibly violent acts marketed as conversion therapy constitute “at risk” behavior for children does not warrant further discussion.¹⁸⁸

The German ban not only addresses parental rights, it firmly quashes their purported relation to the practice of conversion therapy. It represents the only ban that directly challenges parental authority, attaching potential criminal liability to parents who attempt to subject their children to conversion therapy through a “gross violation of their duty of care or their educational responsibilities.”¹⁸⁹ These violations include deception, coercion, or threats.¹⁹⁰ Such a regulatory scheme attests to the foundational holdings of the Supreme Court regarding the extent to which parents may harm their children in the name of upholding parental rights. The German ban, unlike other models, highlights an often-overlooked party complicit in the perpetuation of conversion therapy: parents and legal guardians.

Maintaining its focus on delegitimizing conversion therapy, the German ban intertwines public safety with prohibition. This focus on regulation of the public sphere fits squarely within American courts’ understanding of the public-private parental rights dichotomy.¹⁹¹ By identifying conversion therapy as a threat to public health and safety, rather than simply a private decision made by parents, the German ban avoids any argument that it regulates protected childrearing behavior. By attaching liability to parents who force their children into conversion therapy, the German ban labels the practice as inherently dangerous and forces parents to reconsider the harmfulness of their childrearing techniques.

D. Concluding on the German Ban

The German model represents the most effective conversion therapy ban currently enacted for several reasons. First, it roots the underlying state interest in prohibiting conversion therapy in the regulation of public health and safety, primarily for juveniles.¹⁹² Rather than simply denounce conversion therapy and allow unlicensed and religious practitioners to continue the practice privately, the German ban instead thrusts conversion therapy into the public sphere, prohibiting all

¹⁸⁸ See Bishop, *supra* note 8; Mendos, *supra* note 9; Savage, *supra* note 10; Fitzsimons, *supra* note 10.

¹⁸⁹ Press Release, *supra* note 74.

¹⁹⁰ *Germany Passes Law Banning ‘Gay Conversion Therapy’ for Minors*, BBC (May 8, 2020), <https://www.bbc.com/news/world-europe-52585162> [<https://perma.cc/6QCW-WE92>].

¹⁹¹ See *Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187 (9th Cir. 2006).

¹⁹² Press Release, *supra* note 74.

practitioners, regardless of identity, from carrying out the practice. This is a sound example of effective public policymaking that affirmatively responds to the First Amendment arguments mentioned earlier in this Comment.

Second, the German ban is the only model that acknowledges parents' complicity in perpetuating conversion therapy. Prohibiting conversion therapy for licensed and unlicensed professionals overlooks the pervasive ability for parents to simply circumvent one jurisdiction's regulation and still force their children into conversion therapy elsewhere. This is especially true in the United States, where the smattering of states that prohibit the practice are far outnumbered by the states that offer—if not openly support, as seen in Florida with the *Otto* ruling—conversion therapy. That seventy-four percent of juveniles globally are coerced or forced into conversion therapy reflects the role of parents in either supporting or counteracting the practice.¹⁹³ The German ban, which articulates clearly that violence against juveniles is not a protected form of parental behavior, mirrors the framework of Fourteenth Amendment parental rights doctrine.

Finally, and most innovatively, the ban replaces conversion therapy with actual mental health outlets for individuals seeking more information about their sexual orientation or gender identity. Whereas other models condemn and prohibit the practice, then simply expect that violence against LGBTQ+ individuals via conversion therapy will cease, the German ban acknowledges that banning the practice is only the first step in addressing the numerous underlying systems of violence that affect the LGBTQ+ community. By providing survivors with mental health outlets to counteract the misinformation provided via conversion therapy, the violence perpetuated by conversion therapy may not only be stopped, but underlying ideologies may also be eradicated. Moreover, government-sponsored therapy programs dedicated to counteracting the damage done by conversion therapy practitioners reflect an intentional public policy decision by the German government to reorient the ideologies of its citizenry.¹⁹⁴ Proper understanding of gender identity and sexuality carries extremely meaningful and positive ramifications for societal development,

¹⁹³ Bishop, *supra* note 8.

¹⁹⁴ See generally Press Release, *supra* note 74.

particularly as individuals are encouraged to flourish rather than change.¹⁹⁵

For these reasons, coupled with the fact that the German ban would likely be deemed constitutional in the United States, Congress should seriously consider the many positive aspects of the German ban that could help improve the Therapeutic Fraud Prevention Act.

IV

THE FUTURE OF CONVERSION THERAPY BANS AS MORE NATIONS SEEK PROHIBITION

Domestic and international research conducted on conversion therapy reveals that juveniles are disproportionately subjected to the practice; their interaction with conversion therapy is predominantly involuntary or a result of coercion or threats, often from their own parental guardians.¹⁹⁶ However, of the five nations that have passed conversion therapy bans, only two—Malta and Germany—provide the protection of juveniles as a major motivation for the prohibition. As more nations attempt to ban conversion therapy, governments must focus explicitly upon the effect that the practice has upon juveniles. Simply passing a conversion therapy ban does not acknowledge the detrimental effects that the practice has upon younger populations. Concomitantly, governments must draft their conversion therapy bans carefully, for overregulation could lead to censorship and autonomy infringement issues for adults.¹⁹⁷ “Ultimately, the most effective and rights-respecting approach is to bring about a world where efforts to change sexual orientation and gender identity are widely recognized and rejected as a harmful fraud.”¹⁹⁸ For conversion therapy to be effectively eradicated, the illogical and unscientific foundations on which it is premised must themselves be delegitimized.

It should be noted that other academic and legal analyses have expressed concern that the passing of conversion therapy bans will have an adverse effect on the professional capabilities of medical

¹⁹⁵ See generally *Sexuality and Social Justice: A Toolkit*, SEXUALITY, POVERTY & L. PROGRAMME, <http://spl.ids.ac.uk/sexuality-and-social-justice-toolkit/1-issues-and-debates/why-sexuality-development-issue> [https://perma.cc/N3VH-9PX9].

¹⁹⁶ Bishop, *supra* note 8.

¹⁹⁷ Ryan Thoreson, *Why Banning Anti-LGBT ‘Conversion Therapy’ Isn’t Enough*, HUM. RTS. WATCH (May 15, 2020, 11:09 AM), <https://www.hrw.org/news/2020/05/15/why-banning-anti-lgbt-conversion-therapy-isnt-enough> [https://perma.cc/6BJ8-NX9A].

¹⁹⁸ *Id.*

professionals.¹⁹⁹ Both the *Pickup* and *Otto* courts addressed this concern, albeit briefly. This Comment shows, however, that conversion therapy represents a uniquely dangerous form of pseudo-psychology; proponents perpetuate the practice based on personal opinion and purported religious belief rather than scientific evidence. In fact, conversion therapy practitioners actively counteract evidence from decades of research on gender and sexuality. Arguing that the prohibition of conversion therapy could lead to a censoring of other legitimate forms of therapy is absurd. Conversion therapy is not therapy; it is violence. Regulation of such violence has no impact upon the actions of legitimate medical professionals seeking to help others understand the complexities of gender identity and sexual orientation.

In the United States, conversion therapy remains widely practiced. Recent rulings like *Otto* signal that perception of the practice remains ideologically intertwined with free speech and religious expression. Absent federal action, conversion therapy will persist, placing millions of Americans at risk of violence. Fortunately, institutional efforts to prohibit conversion therapy are growing throughout the nation.²⁰⁰ Moreover, an increasing number of state and municipal governments have prohibited the practice.²⁰¹ This Comment adds to that momentum and encourages an innovative approach to banning conversion therapy for juveniles in the United States by offering the German ban as a viable blueprint for federal prohibition.

¹⁹⁹ See, e.g., Tucker, *supra* note 110.

²⁰⁰ See, e.g., Oscar Lopez, *American Medical Association Announces Support for U.S. Ban on Conversion Therapy*, REUTERS (Nov. 19, 2019, 1:10 PM), <https://www.reuters.com/article/us-usa-lgbt-therapy-trfn/american-medical-association-announces-support-for-u-s-ban-on-conversion-therapy-idUSKBN1XT2PJ> [<https://perma.cc/RB2H-D4XB>].

²⁰¹ Amanda Robert, *ABA Conversion Therapy Legislative Guide*, AM. BAR ASS'N (July 29, 2019), https://www.americanbar.org/groups/diversity/sexual_orientation/publications/equalizer/2019-july/aba-conversion-therapy-legislative-guide/ [<https://perma.cc/KE9S-XFBS>].

