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CONVERSION THERAPY: A BRIEF REFLECTION ON THE HISTORY OF THE PRACTICE AND CONTEMPORARY REGULATORY EFFORTS

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I would like to open my remarks by thanking Dean Michael Kelly, Professor Kelly Dineen, and the *Creighton Law Review* for hosting this conversation about inequities in health care and, in particular, for their kind invitation allowing me to participate in this discussion.

Today I will be talking about conversion therapy, with a particular emphasis on the movement to ban – or at least minimize – the practice. I would like to begin with a simple definition. What *is* conversion therapy? Very simply, it is a series of practices meant to alter an individual’s sexual orientation, gender identity, or gender expression.¹ It is rooted in the belief that the lived expression of LGBTQ+ identity is normatively problematic and subject to correction.² Even though the discussion regarding conversion therapy can extend be-

† Associate Dean of Academic Affairs, the University of South Dakota School of Law. I would like to thank the members of the *Creighton Law Review* for giving me the opportunity to participate in this symposium, as well as Professors Kelly Dineen and Victoria Haneman for their support.

1. Christy Mallory et al., *Conversion Therapy and LGBT Youth*, The Williams Institute: UCLA School of Law (Jan. 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf>. Even though it is common among many advocates to use the term “conversion therapy” to encompass the counseling and therapeutic practices covering attempts to alter sexual orientation, gender identity, and gender expression, others limit their use of the term to cover only sexual orientation change efforts. *Id.* See, e.g., Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 Ala. L. Rev. 793, 800-01 (2017).

2. Focus on the Family’s Position: Counseling for Unwanted Homosexuality, Focus on the Family (2015), <https://www.focusonthefamily.com/socialissues/sexuality/freedom-from-homosexuality/focus-on-the-familys-position-counseling-for-unwanted-homosexuality>. Focus on the Family, the advocacy organization, explains its support for counseling efforts to rid lesbian, gay, and bisexual individuals of their same-sex sexual desires or to eliminate same-sex sexual behaviors:

Focus on the Family supports the right of those with unwanted homosexuality—feelings, attractions, thoughts, desires, actions or identity—to seek help from licensed mental health professionals. Both adults and minors (with parental consent) should have access to professionally based, ethically directed care that assesses, clarifies and aligns with their deeply-held values, faith and life goals. We uphold parents’ foundational right and calling to sensitively determine the best course of care for their children and seek developmentally appropriate professional aid that respects and regards their family’s needs and values.

Id.

yond sexual orientation and enter the world of gender identity, my remarks will focus on sexual orientation.

While there are licensed healthcare practitioners (counselors, therapists, etc.) who offer counseling that is designed to change an individual's sexual orientation, most of the people who are engaged in this work today are actually religious and spiritual leaders.³ The Williams Institute ("Williams"), which is the preeminent think tank in the country focusing on LGBTQ issues, has studied conversion therapy, and as of January 2018, it found some remarkable statistics about the individuals who are *receiving* it:

Almost 700,000 LGBTQ individuals in the United States between the ages of 18 and 59 had received conversion therapy (approximately 350,000 of whom received it as adolescents);

Nine states had banned licensed practitioners from providing conversion therapy for minors; Williams estimated that in those states, 6,000 youths between the ages of thirteen and seventeen would have received conversion therapy if their states had not banned it;

Williams estimated that 57,000 youths around the entire country would receive conversion therapy from a religious or spiritual advisor before the age of eighteen.⁴

How did we get here? What does it really mean to experience conversion therapy? Two very short videos help to illuminate this question. They cover one conversation which was broken into two halves. The speaker is a young man from Iowa named Samuel Brinton. During the videos, he discusses his family's reaction when he realized as a child that he was attracted to other boys.⁵ Specifically, he reveals the physical abuse he suffered after sharing this information with his father; his parents' decision to send him to conversion therapy; his therapist's use of both emotional manipulation and behavioral modification techniques which linked same-sex desire to excruciating pain; a suicide attempt; his decision to return to the closet in order to

3. Mallory et al., *supra* note 1, at 1. In January 2018, The Williams Institute estimated that, in the states which did not prohibit licensed mental health professionals from providing conversion therapy services, approximately 20,000 LGBT youth between the ages of 13 and 17 would receive such services prior to the age of 18. *Id.* Since then, six more states have passed statutes prohibiting licensed professionals from providing these services to minors; therefore, that estimate is likely lower at this time. This fact notwithstanding, the majority of individuals providing these services are unlicensed faith advisors. *See id.* (noting that approximately 57,000 youths between the ages of 13 and 17 would receive conversion therapy from such individuals as compared to the estimated 20,000 youths who would receive it from licensed professionals).

4. *Id.*

5. *See* I'm From Driftwood, *Sam Brinton (I'm From Perry, IA) Part 1 - True LGBT Stories*, YOUTUBE (Oct. 1, 2010), <https://www.youtube.com/watch?v=USGKHdC19Mo>; I'm From Driftwood, *Sam Brinton (I'm From Perry, IA) Part 2 - True LGBT Stories*, YOUTUBE (Oct. 5, 2010), <https://www.youtube.com/watch?v=15M-BIUUc5k>.

restore family relations; and a new experience of family rejection when he came out to them again in college.⁶ This conversation was filmed in 2010; the forms of therapy Brinton experienced, which he has described as torture,⁷ occurred in the early 2000s. Despite the recent nature of those events, they hearkened back to earlier points in history when members of the healthcare profession used multiple techniques to try to change their patients' sexual orientations.

Conversion therapy as we currently understand it can trace its origins to late nineteenth century Europe⁸ and later spread to the United States. Physicians in the United States initially viewed homosexuality as a medical problem, so they implemented medical solutions in order to try to "cure" individuals.⁹ These interventions included castration, testicle implants, bladder washing, and rectal massage.¹⁰ Doctors would "wash a bladder" by inserting a catheter and flushing the bladder with a silver or nitrate solution; rectal massage was exactly what it sounded like – a small device would go into the rectum, and it would be used to massage the prostate.¹¹ By 1913 though, doctors started to realize that these techniques did not work.¹²

As psychotherapy became more prominent, the mental health profession began to take the lead in administering conversion therapy.¹³ This fact notwithstanding, physical interventions did not end as the efforts to change sexual orientation became increasingly prominent during the mid-twentieth century.¹⁴ Psychiatrists and psychoanalysts recommended and implemented techniques like electroshock

6. *Id.*

7. Sam Brinton, Editorial, *I Was Tortured in Gay Conversion Therapy. And It's Still Legal in 41 States*, N.Y. TIMES (Jan. 24, 2018), <https://www.nytimes.com/2018/01/24/opinion/gay-conversion-therapy-torture.html>.

8. See TOMMY DICKINSON, *CURING QUEERS: MENTAL NURSES AND THEIR PATIENTS, 1935–74* 20 (2015) (discussing the use of hypnotherapy as a "cure" for homosexuality by a German psychotherapist in 1889).

9. See J. Seth Anderson, *Why We Still Haven't Banished Conversion Therapy in 2018*, WASH. POST (Aug. 5, 2018), https://www.washingtonpost.com/news/made-by-his-story/wp/2018/08/05/why-we-still-havent-banished-conversion-therapy-in-2018/?utm_term=.d0ce86aa4b8e (providing an overview of the history of conversion therapy in the United States).

10. *Id.*

11. *Id.* Anderson noted in the article that at least one doctor believed that rectal massage would be effective because it would "kill the homosexual cells" in the prostate so that "heterosexual cells" could take their place." *Id.*

12. *Id.*

13. *Id.*

14. *Id.*; see also Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 790 (2002) (describing the period from 1938-1969 as the era when conversion therapy became entrenched).

therapy and lobotomies, in addition to talk therapy.¹⁵ The techniques were not simply torturous; they did not work.

Physically invasive interventions did not cease despite their failure to alter the sexuality of the affected patients but behavioral therapy techniques became more prominent, especially in the 1960s.¹⁶ Behavioral therapy often focused on the application of aversive techniques like inducing nausea or paralysis in response to homoerotic imagery and instructing patients to snap their wrists with a rubber band any time they were aroused by homoerotic images.¹⁷ Therapists tried non-aversive techniques as well. They included attempts to improve patients' dating skills with members of the opposite sex; assertiveness training for men (the need for which was often rooted in a belief that weak fathers and dominant mothers produced gay sons); teaching stereotypically masculine and feminine behaviors; orgasmic reconditioning; and, among other techniques, using hypnosis in order to shift the direction of arousal and desire.¹⁸

As the "gilded age"¹⁹ of conversion therapy ended in the late 1960s, a profession-wide shift in the view of both the effectiveness and propriety of conversion therapy began to take shape among psychotherapists. In 1968, the American Psychiatric Association published the Diagnostic and Statistical Manual-II ("DSM-II"), substantially echoing its view from the DSM-I by classifying homosexuality as a form of sexual deviation.²⁰ This fact notwithstanding, research in the field was increasingly successful in challenging the notion of homosexuality as a mental disorder.²¹ In addition, early gay rights pioneers like Frank Kameny were modestly successful in persuading government and civic actors that gay men and lesbians should receive civil rights protection.²² As a result of these and other pressures, the American Psychiatric Association declassified homosexuality as a mental disorder in 1973 and consequently removed it as such from the

15. See, e.g., JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 170-73, 191-93 (1976) (excerpting medical treatment records discussing a gay cross-dresser who was subjected to serial electroshock treatments, as well as several psychiatric patients who received lobotomies as a way to control their behavior, including manifestations of same-sex desire).

16. AM. PSYCHOLOGICAL ASS'N, *REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION* 22 (2009), <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

17. *Id.*

18. *Id.*

19. See JACK DRESCHER ET AL., *SEXUAL CONVERSION THERAPY: ETHICAL, CLINICAL AND RESEARCH PERSPECTIVES* 11 (2001) (using the "gilded age" language to describe the period between the 1940s and 1960s as the height of conversion therapy practices).

20. See AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (2d ed. 1968).

21. See AM. PSYCHOLOGICAL ASS'N, *supra* note 16, at 22.

22. *Id.* at 22-23.

DSM-II.²³ Over the next few decades, the American Medical Association, The American Psychiatric Association, The American Psychological Association, and other associations of healthcare professionals begin issuing statements which rejected conversion therapy on the grounds that it harmed the patients and largely did not produce the desired results.²⁴ Today, there are no longer any major healthcare professional associations which support the practice of conversion therapy.²⁵

While the debate over conversion therapy was happening in the healthcare field, the broader movement for LGBTQ equality was taking place in legislatures and courts around the country. In particular, activists in the early part of the twenty-first century focused significant attention, of course, on relationship recognition and marriage equality. Conversion therapy, however, was increasingly a matter of concern that lawmakers wished to address, especially in California. Acting in response to multiple statements from healthcare associations outlining the risks inherent in conversion therapy – which were pronounced for minors – California became the first state in the nation to prohibit licensed mental health practitioners from offering conversion therapy services to minors.²⁶ Since 2012, seventeen additional states, the District of Columbia, and forty-one local and county governments have done the same.²⁷

23. *Id.* at 23.

24. *Id.*

25. See NAT'L CTR. FOR LESBIAN RIGHTS, BORN PERFECT: THE FACTS ABOUT CONVERSION THERAPY, <http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/> (last visited June 17, 2019) (stating “[a]ll of the nation’s leading professional medical and mental health associations have rejected conversion therapy as unnecessary, ineffective, and dangerous”).

26. S.B. 1172, 2011-12 S., Reg. Sess. (Cal. 2012) (codified at CAL. BUS. & PROF. CODE § 865-865.2 (West 2019)).

27. In addition to California’s, the statutes which have banned licensed and regulated healthcare workers from using conversion therapy techniques on minors include the following: COLO. REV. STAT. § 12-245-224(1)(V) (2019); CONN. GEN. STAT. § 19a-907-19a-907c (2017); S.B. 65, 149th Gen. Assemb., (Del. 2018); D.C. CODE §§ 7-1231.02(25A), 7-1231.14a (2014); HAW. REV. STAT. § 453J-1 (2018); 405 ILL. COMP. STAT. ANN. 48/20 (West 2016); MD. CODE ANN., HEALTH OCC. § 1-212.1 (West 2018); ME. REV. STAT. ANN. tit. 32, § 2112 (2019); MASS. GEN. LAWS ANN: ch. 112, § 275 (West 2019); NEV. REV. STAT. ANN. § 629.600 (West 2018); N.H. REV. STAT. ANN. §§ 332-L:1–332-L:3 (2019); N.J. STAT. ANN. §§ 45:1-54–45:1-55 (West 2013); N.M. STAT. ANN. § 61-1-3.3 (West 2017); N.Y. EDUC. LAW § 6509-e (McKinney 2019); OR. REV. STAT. ANN. § 675.850 (West 2015); 23 R.I. GEN. LAWS ANN. §§ 23-94-1–23-94-5 (West 2017); VT. STAT. ANN. tit. 18, § 8352 (West 2016); WASH. REV. CODE § 18.130.180 (West 2018); see also Family Equality Council, *Conversion Therapy Laws* (June 2018), <https://www.familyequality.org/resources/conversion-therapy-laws/> (providing a list of cities and counties around the country that have implemented prohibitions on conversion therapy). In Puerto Rico, Governor Ricardo A. Rossello signed an executive order requiring licensed medical institutions to certify that they will not engage in the practice of conversion therapy. Concepción de León, *Governor of Puerto Rico Signs Executive Order Banning ‘Conversion*

The California statute became the model that other states followed when passing their own conversion therapy statutes. As a general proposition, the laws prohibit licensed or otherwise regulated healthcare workers from administering conversion therapy to minors. In addition, they define conversion therapy as efforts to change not just sexual orientation but also gender identity or gender expression. The prohibitions do not extend to therapeutic efforts designed to assist a person who is undergoing gender transition; similarly, they do not cover therapy supporting people who are seeking greater understanding of their identity or who wish to develop coping mechanisms, as long as the intervention is neutral and does not attempt to alter the identity.²⁸

The statutes, however, are not identical; important differences exist among these laws. By way of example, Maryland and Rhode Island prohibit the use of state funds for the purpose of providing health care coverage for conversion therapy.²⁹ Since the prohibition extends only to minors, these provisions ensure that adults who seek conversion therapy will have to pay for it out of pocket. This structural barrier likely limits the ability of practitioners to offer the service, unless they are prepared to offer it for free to those who otherwise would not be able to afford it. In addition, Nevada, New Hampshire, and Washington have created explicit carve-outs for religious and spiritual advisors who provide conversion therapy services, stating that the regulations do not cover their activities.³⁰ Nevada takes the extra step of noting

Therapy' for Minors, N.Y. TIMES (Mar. 27, 2019), <https://www.nytimes.com/2019/03/27/us/puerto-rico-conversion-therapy.html>.

28. See generally CAL. BUS. & PROF. CODE § 865-865.2 (2012); CONN. GEN. STAT. § 19a-907-19a-907c (2017); DEL. CODE ANN. tit. 24, § 3510 (West 2018); D.C. CODE §§ 7-1231.02(25A), § 7-1231.14a (2014); HAW. REV. STAT. § 453J-1 (2018); 405 ILL. COMP. STAT. ANN. 48/20 (West 2016); MD. CODE ANN., HEALTH OCC. § 1-212.1 (West 2018); MASS. GEN. LAWS ANN. ch. 112, § 275 (West 2019); NEV. REV. STAT. ANN. § 629.600 (West 2018); N.H. REV. STAT. ANN. §§ 332-L:1–332-L:3 (2019); N.J. STAT. ANN. §§ 45:1-54–45:1-55 (West 2013); N.M. STAT. ANN. § 61-1-3.3 (West 2017); N.Y. EDUC. LAW § 6509-e (McKinney 2019); OR. REV. STAT. ANN. § 675.850 (West 2015); 23 R.I. GEN. LAWS ANN. §§ 23-94-1–23-94-5 (West 2017); VT. STAT. ANN. tit. 18, § 8352 (West 2016); WASH. REV. CODE § 18.130.180 (West 2018).

29. MD. CODE ANN., HEALTH OCC. § 1-212.1(d)(2) (West 2018); 23 R.I. GEN. LAWS ANN. § 23-94-4 (West 2017).

30. NEV. S.B. 201, 79th Sess. (Nev. 2017) (“[T]here is nothing in this bill that regulates or prohibits licensed health care professionals from engaging in expressive speech or religious counseling with such children if the licensed health care professionals: (1) are acting in their pastoral or religious capacity as members of the clergy or as religious counselors; and (2) do not hold themselves out as operating pursuant to their professional licenses when so acting in their pastoral or religious capacity.”); N.H. REV. STAT. ANN. § 332-L:3 (2019) (“Nothing in this chapter shall be construed to infringe on any constitutional right, including the free exercise of religion.”); WASH. REV. CODE § 18.130.180 (2018) (“This act may not be construed to apply to . . . [r]eligious practices or counseling under the auspices of a religious denomination, church, or organization

that licensed practitioners who would otherwise be covered may still provide conversion therapy services to minors if they are doing so in a religious counseling or pastoral capacity and make clear that they are not operating under their professional licenses.³¹ Delaware prohibits covered practitioners from referring minors to conversion therapy practitioners who are out of state.³² The distinctions among the states highlight the underlying dynamics at play, as well as the way in which those dynamics differ across the country. In some states, there is a clear desire to eliminate conversion therapy as far as reasonably possible, even for adults. In other states, legislators made the explicit decision to signal that regulation of conversion therapy operating within the context of religious advising was off limits. While the states all shared the overarching goal of protecting minors from the harms of conversion therapy, state legislators were also attuned to their unique concerns about potential evasion, effectuation of a more widespread rejection of the practice, and shielding themselves from the possibility of litigation through a First Amendment challenge.

The majority of the country is not covered by conversion therapy prohibitions, and this raises important questions that are worth consideration while activists try to persuade legislators to follow the path of the other states. By way of example, what ethical constraints should guide healthcare practitioners in the non-prohibition states, especially for those who *do* provide conversion therapy services to minors? Multiple scholars have referenced using fraud or consumer protection models to regulate bad actors; is there any value in exploring a malpractice angle as well? The latter question is especially important when considering adults who seek conversion therapy services in states where public funds, especially Medicaid, cannot be used to cover the costs of therapy. If there are religious adults who hope to change their orientation or gender identity – regardless of the likelihood of success – should the state impose wealth barriers effectively preventing them from seeking the assistance? The answer to the question may well be yes, but if the answer is no, does a malpractice framework offer protection for these individuals that consumer fraud statutes lack? These and other questions highlight the challenges that exist as more legislatures grapple with the desire to limit the impact of conversion therapy.

that do not constitute performing conversion therapy by licensed health care providers on patients under age eighteen . . .”).

31. Nev. S.B. 201.

32. DEL. CODE ANN. 24 § 3510(d).

