

WEDNESDAY

THURSDAY

FRIDAY

MONDAY

TODAY

Questions and Comments

TODAY'S COLUMNS

LIBRARY

NEWS

RULINGS

VERDICTS

Search >>

Bookmark Reprints

Previous

Next

Reparative therapy ban passes muster

Erwin Chemerinsky is dean and distinguished professor of law at the University of California, Irvine School of Law.



California's recently enacted law, Senate Bill 1172, which prohibits "therapy" aimed at changing a child's sexual orientation, is clearly constitutional. The government unquestionably has the power to prohibit therapies that are harmful or ineffective. The 9th U.S. Circuit Court of Appeals' preliminary injunction, issued

on Dec. 23, 2012, in *Pickup v. Brown*, keeping the law from going into effect pending appeal, was thus misguided.

SB 1172 prohibits a licensed mental health professional from engaging in "sexual orientation change efforts" with a patient under age 18. The bill quotes findings from groups such as the American Psychological Association that such therapy does not succeed in changing a person's sexual orientation and often causes great psychological harm.

Two lawsuits were filed in federal district court in Sacramento challenging the law and seeking preliminary injunctions. Judge William Shubb issued a preliminary injunction, while Judge Kimberly Mueller denied the request for one. The plaintiffs appealed Judge Mueller's ruling and the 9th Circuit panel reversed and issued a preliminary injunction. The court offered no explanation, simply stating, "Appellants' emergency motion for an injunction pending appeal is granted." The case has been set for expedited briefing and argument. On review, the 9th Circuit should uphold the law and it shouldn't be a close question.

Thousands, and perhaps tens of thousands, of children have been subjected to aggressive efforts by therapists to try and change their sexual orientation. Parents, learning their children are expressing attraction to the same sex, have put them in so-called "conversion" or "reparative" therapy - despite warnings by medical and mental health organizations that these practices have no scientific credibility and put youth at risk of serious harms.

The therapy is often lengthy, seeking to change behavior and also a child's gender identity, thoughts and feelings. At times, the therapy has included aversive treatments, such as the application of electric shock to the hands and genitals and nausea-inducing drugs administered simultaneously with the presentation of homoerotic stimuli.

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There is no evidence that such "conversion therapy" works and significant evidence

SPECIAL REPORT

Top Deals



Tuesday, January 15, 2013

Government

Bar leaders consider limited law licenses for nonlawyers

State Bar officials may explore allowing nonlawyers to engage in "limited" law practice. In a meeting on future regulatory efforts, bar trustees also proposed demanding more practice data from lawyers.

California Supreme Court

California Supreme Court expands fraud exception to parol evidence rule

The state Supreme Court broadened the scope of evidence admissible to prove a contract's validity, overturning a 1935 precedent forbidding application of the parol evidence rule's fraud exception to "promissory fraud"

Labor/Employment

Plaintiffs' attorneys to receive \$31 million in contingency employment lawsuit

Los Angeles County Superior Court Judge John Shepard Wiley Jr. tentatively awarded plaintiffs' lawyers about \$27 million in attorneys' fees Monday in a meal-and-rest case against Los Angeles-based ABM Security Services Inc.

Law Practice

Dorsey acquires Silicon Valley bankruptcy boutique

The 38-year run for Silicon Valley's Murray & Murray PC ended Monday after five lawyers from the bankruptcy boutique officially joined the Palo Alto office of Dorsey & Whitney LLP.

Litigation

San Bernardino County to challenge ruling in suit over controversial settlement

San Bernardino County officials say they plan to challenge a recent ruling pushing forward a case by taxpayer groups battling the county over its 2006 approval of an allegedly fraudulent \$102 million settlement with a developer.

Law Practice

One LLP adds entertainment lawyers in

that it doesn't and that it causes real harms, such as depression and even suicide. Besides, the assumption of the "treatment" is that being gay or lesbian is a disease to be cured and no reputable medical or psychological organization accepts that premise.

As a result, the nation's most respected and prestigious health care organizations have uniformly condemned efforts to change a young person's sexual orientation as ineffective and harmful, including the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the American Counseling Association, the American Association for Marriage and Family Therapy, the American Psychiatric Association, the American Psychoanalytic Association, the American School Counselor Association, the National Association of Social Workers, and others.

The lawsuits challenging SB 1172 argue that it violates the First Amendment, especially as a restriction on freedom of speech. The claim is that the law impermissibly restricts the speech rights of therapists who wish to engage in conversion therapy.

But the fact that this therapy is done primarily through words does not mean that it is protected speech under the First Amendment. Speech of professionals, such as doctors and lawyers, can be restricted and can be the basis of liability without raising any First Amendment concerns. A doctor surely could not avoid liability for giving incompetent medical advice by saying that it was speech and thus protected by the Constitution. Doctors, of course, may be sanctioned for their speech during treatment, such as for expressing an inaccurate or false medical opinion to a patient, or for failing to provide adequate instructions or to ask necessary questions or to warn of side effects.

With respect to therapists, state licensing boards and courts already enforce a plethora of speech-based restrictions and requirements, including barring false, deceptive, or harmful statements. A therapist who advised a patient to commit suicide or an anorexic to lose more weight undoubtedly could be held liable. There is no First Amendment barrier to such regulations and liability, and there is none to SB 1172.

More generally, courts including the U.S. Supreme Court, long have held that the government may ban treatments, whether for physical or mental conditions, that are ineffective or harmful. Courts have repeatedly rejected the claim that individuals have a constitutional right to use treatments that are banned as harmful or ineffective. Above all, the government always has the power to safeguard children from physical or mental abuse and that is what SB 1172 is about. Therapists in California have no constitutional right to subject minors to dangerous practices based on scientifically false and discredited views about sexual orientation.

Nor do other constitutional claims against the law have any merit. Parents have the constitutional right to control the upbringing of their children, but not when it involves subjecting the children to harmful and ineffective forms of treatment.

SB 1172 is the first law of this type in the country and this might have influenced the 9th Circuit panel to issue the preliminary injunction. But the law fits squarely within a state's well-established authority to prevent health care professionals, including therapists, from harming their patients. The free speech claim of the challengers, which likely was the basis for the preliminary injunction, is meritless. The 9th Circuit should uphold SB 1172 as consistent with a long and unbroken tradition of the government being able to protect people, and especially children, from ineffective and harmful treatments.

Erwin Chemerinsky is dean and distinguished professor of law at the University of California, Irvine School of Law.

[Previous](#) [Next](#)

Beverly Hills

Intellectual property and entertainment litigation boutique One LLP is expanding into the Hollywood deals space with the addition of four transactional lawyers in a Beverly Hills office set to open today .

Entertainment & Sports

Lawyer works on studio venture

Kevin Morris, longtime lawyer for the creators of "South Park," helped shepherd the pair's founding a film and TV production studio, Important Studios.

Attorneys in Grauman's theater renaming announced

Venable LLP attorneys Mitch Evall and Brett Garner negotiated the sale of naming rights for iconic Grauman's Chinese Theatre in Hollywood to Chinese TV maker TCL Corp, announced Friday.

Criminal

Hedge fund founder sentenced to 12 years in investor fraud case

A San Jose federal judge sentenced hedge fund founder Albert Ke-Jeng Hu to 12 years in prison Monday for defrauding investors out of millions of dollars.

Corporate

Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

Law Practice

Firm opens OC office to reach existing base

Financial services law firm Smith Dollar PC announced the expansion of its California footprint this week with the opening of an Orange County office.

U.S. Court of Appeals for the 9th Circuit

Reparative therapy ban passes muster

California's recently enacted law, Senate Bill 1172, which prohibits "therapy" aimed at changing a child's sexual orientation, is clearly constitutional. By **Erwin Chemerinsky**

Zoning, Planning and Use

2012 eminent domain year in review

Last year federal funds continued to make their way to local projects and shovels continued to break ground for infrastructure projects - which led to increased eminent domain litigation. By **Bradford B. Kuhn and Rick E. Rayl**

Labor/Employment

What to expect when your employees are expecting

Employers need to become knowledgeable about what the laws require, and much savvy in the