DETERMINING THE DECEPTION OF SEXUAL ORIENTATION CHANGE EFFORTS

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INTRODUCTION

In a 1962 speech addressing the protection of consumer interests, President John F. Kennedy stated, "All of us are consumers. All of us deserve the right to be protected against fraudulent or misleading advertisements and labels."[1] With his administration's consumer rights legislation promoting fair packaging and labeling, changes to testing for prescription drugs, regulations for new food additives and food supplements, and required performance testing of household appliances, President Kennedy has been credited with being on the forefront of consumer advocacy in the 1960s.[2] However, since the 1960s, consumer advocacy has drastically changed. Nowadays, even the Kennedy Administration would likely be surprised at the ability of modern consumer protection laws to target a new industry altogether: therapies that claim to be able to alter a person's sexual orientation.

While such therapies were evidently not a cornerstone of early consumer law legislation, plaintiffs have recently begun exploring the ability to challenge groups that provide sexual orientation change efforts (SOCE) through consumer protection laws.[3] Under consumer protection laws, plaintiffs may generally allege that advertisements and promises of a change in sexual orientation from SOCE practitioners constitute deceptive business transactions or trade practices.[4] In fact, plaintiffs have had success with this line of legal action. In New Jersey, a jury found for the plaintiffs in *Ferguson v. JONAH* and determined that, under state consumer protection law, SOCE practitioners were liable for damages incurred

1. President John F. Kennedy, Special Message to Congress on Protecting the Consumer Interest 1 (Mar. 15, 1962), https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-037-028 [https://perma.cc/NR87-M84F].

2. *See* Robert J. Lampman & Robin A. Douthitt, *The Consumer Bill of Rights: Thirty-Five Years Later*, ADVANCING CONSUMER INT., Fall 1997, at 4, 5.

3. *See* Olga Khazan, *Can Sexuality Be Changed?*, ATLANTIC (June 3, 2015), http://www.theatlantic.com/health/archive/2015/06/can-sexuality-be-changed/394490/ [https://perma.cc/A2PV-LBWL]; Charles Pulliam-Moore, *These LGBT Groups Are Trying to Shut Down this Virginia Gay Conversion Camp*, FUSION (Feb. 25, 2016, 12:32 PM), http://fusion.net/story/273250/virginia-gay-conversion-therapy-ftc/ [https://perma.cc/59CE-2752].

4. *Consumer Protection*, 27 BUS. TORTS REP. 133, 133-34 (2015).

by patients that underwent the practitioner-provided SOCE.[5] The defendant, Jews Offering New Alternatives for Healing (JONAH), was a conversion therapy group, and the plaintiffs were former JONAH clients who asserted that JONAH failed to fulfill its promises to change their sexual orientations.[6]

At the heart of *Ferguson v. JONAH* was a consumer-business transaction. JONAH offered conversion therapy sessions and counseling services with the claim that participation in such activities would alter participants' sexual orientations and rid them of same-sex attraction.[7] The cost of JONAH's services varied, with group sessions costing $60 and individual sessions costing $100.[8] The paid-for therapy and counseling sessions consisted of a variety of different SOCE.[9] Group sessions were often elaborate activities with aspects that involved the plaintiffs standing naked in a circle with other young men, reenacting scenes of past sexual abuse, and being taunted with homophobic slurs.[10] Individual sessions were counseling-based and involved counselors advising the plaintiffs to complete a variety of activities to combat same-sex attraction.[11] The suggested activities included spending more time at the gym, visiting bathhouses with their fathers, and wearing a rubber band on the wrist and snapping it when feeling attracted to another man.[12] One individual session involved a therapist instructing one of the plaintiffs to beat an effigy that represented his mother while screaming, as if killing her.[13]

The jury in *Ferguson v. JONAH* determined that the consumer-business transactions involving the aforementioned SOCE violated New Jersey consumer protection law.[14] The case was the first of its

5. *See* Olga Khazan, *The End of Gay Conversion Therapy*, ATLANTIC (June 26, 2015), http://www.theatlantic.com/health/archive/2015/06/the-end-of-gay-conversion-therapy/396953/ [https://perma.cc/DRA2-5R8A].

6. *Id.*

7. Ferguson v. JONAH, No. HUD-L-5473-12, 2015 WL 609436, at *1 (N.J. Super. Ct. Law Div. Feb. 5, 2015).

8. *See id.* at *2.

9. *See id.* at *1-2.

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.* at *2.

14. *See* Khazan, *supra* note 5.

kind in the United States,[15] and the aftermath of the case resulted in JONAH ceasing SOCE services for good.[16] Although anti-SOCE activists seemed invigorated by the decision,[17] the success of the plaintiffs in *Ferguson v. JONAH* raises further questions, with perhaps the most succinct question being: Is *Ferguson v. JONAH* a one-time case or a sign of things to come?

Some academic legal literature has discussed the intersection of consumer protection law and SOCE. While *Ferguson v. JONAH* was developing, one legal scholar advocated for plaintiffs to target SOCE through antideception statutes, including consumer protection laws.[18] In the wake of the *Ferguson v. JONAH* jury verdict, another legal scholar has argued that the case represents the beginning of the end for SOCE practitioners.[19] Yet another has argued that consumer protection litigation against SOCE may improve the quality and acceptability of care for lesbian, gay, and bisexual health rights.[20] However, this Note is distinguishable from other work on the intersection of consumer protection and SOCE because it accounts for the high likelihood of SOCE practitioners adapting the representation of their practices to limit liability under consumer protection laws.[21] While this Note argues that consumer protection laws are generally capable of holding practitioners liable for the harm caused by their SOCE practices,[22] major weaknesses exist within state consumer protection laws that frustrate the ability to

15. *See Consumer Protection*, *supra* note 4, at 133.

16. *Judge Orders New Jersey "Gay Conversion" Nonprofit to Close*, CBS NEWS (Dec. 18, 2015, 7:19 PM), http://www.cbsnews.com/news/judge-orders-new-jersey-gay-conversion-therapy-nonprofit-to-close/ [https://perma.cc/V5EE-CBFX].

17. *See* Stephen Peters, *Huge Legal Victory: New Jersey Jury Finds That Anti-LGBT Conversion Therapy Is Fraud*, HUM. RTS. CAMPAIGN (June 25, 2015), https://www.hrc.org/blog/huge-legal-victory-jury-finds-that-anti-lgbt-conversion-therapy-is-fraud [https://perma.cc/TZ8T-ANF8].

18. *See* Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532, 1564 (2014).

19. *See* Peter R. Dubrowski, *The* Ferguson v. JONAH *Verdict and a Path Towards National Cessation of Gay-to-Straight "Conversion Therapy*,*"* 110 NW. U. L. REV. ONLINE 77, 79 (2015).

20. Melissa Ballengee Alexander, *Victim to Victor: A Right to Health Perspective on* Ferguson v. JONAH, LESBIAN GAY BISEXUAL & TRANSGENDER ISSUES PHILOSOPHY (Am. Philosophical Ass'n, Newark, Del.), Spring 2016, at 1, 4.

21. *See infra* Part II.

22. *See infra* Part I.C.

ensure that SOCE practitioners are liable for deceptive trade practices.[23] Therefore, this Note focuses on the concept of deceptiveness, and predicts that SOCE practitioners will learn from *Ferguson v. JONAH* and attempt to avoid their services being labeled as "deceptive" under state consumer protection laws.[24]

This Note proceeds in four parts. Part I provides background on consumer protection law, details a brief history of SOCE, and explains why consumer protection laws provide an attractive opportunity to discredit SOCE. Part II explains the two core representations determined to be deceptive and in violation of consumer protection law in *Ferguson v. JONAH*. Part II then explains how SOCE practitioners will likely adapt the representation of their services to prevent them from being labeled as deceptive trade practices. Part III accounts for varying state consumer protection claim elements, and details how certain jurisdictions have requirements that would complicate SOCE claims. Part IV considers what defenses are likely to be raised by defendants, particularly involving First Amendment protections. This Note concludes by arguing that while *Ferguson v. JONAH* may be replicated nationwide, consumer protection laws will not be able to completely eradicate SOCE because SOCE practitioners still have viable ways to continue providing SOCE.

I. THE NEXUS OF CONSUMER PROTECTION AND SOCE

Before delving into the particularized legal aspects of consumer protection claims against SOCE, it is important to understand the basics of consumer protection law, the history of SOCE, and the motivations for eradicating SOCE practices. In this Part, Section A lays out the basic history and purpose of consumer protection law. Section B describes SOCE, including information about the practice's harmful impacts as well as details regarding the recent legislative movement to eliminate SOCE. Importantly, Section C explains why taking action through consumer protection laws serves as an attractive alternative to other efforts against SOCE.

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23. *See infra* Part III.D.

24. For information on consumer protection laws' focus on deceptiveness, see *infra* text accompanying notes 37, 105-07.

A. The Basics of Consumer Protection Laws

As the name suggests, consumer protection laws serve to protect consumers from harmful business practices they may encounter when engaging in the open market.[25] A typical consumer protection law may prohibit businesses from partaking in unfair or unconscionable practices, but all consumer protection laws prohibit "deceptive" practices.[26] Consumer protection laws have been described as "a complex combination of state and federal statutes, [with] private and public enforcement,"[27] and the antideception aspects of consumer protection law certainly match such a description.[28]

1. Common Law Origins

Predating consumer protection laws, the common law action for fraud or misrepresentation embodies the early legal framework prohibiting deception. Common law fraud or misrepresentation can be summarized as having five distinct elements.[29] A plaintiff in a common law fraud or misrepresentation case must prove that the defendant: "(1) made a false representation of a material fact; (2) knew or believed that the representation was false, or had an insufficient basis of information for making the representation (scienter); and (3) intended to induce the plaintiff to act in reliance on the representation."[30] Additionally, the plaintiff must prove that he or she: (4) "actually relied on the representation in a manner justifiable under the circumstances" and (5) "suffered damage as a result of such reliance."[31]

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25. *See* CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 5-6 (2009).

26. *Id.* at 5.

27. DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 1:1, Westlaw (database updated Nov. 2015).

28. For a recently updated compilation of the various aspects of state consumer protection laws, see Dubrowski, *supra* note 19, app. at 100-17.

29. PRIDGEN & ALDERMAN, *supra* note 27, § 2:2.

30. *Id.*

31. *Id.*

Originally, U.S. law was not amenable to accusations of fraud or misrepresentation in the business sphere.[32] Early law maintained implicit distinctions between ethics in business and ethics in other spheres of life, allowing greater leeway for businessmen to make commercial misrepresentations without suffering significant legal consequences.[33] As business transactions and tort law became more complex, early twentieth-century judges expanded the broadened theories of negligence into business transactions through the doctrine of misrepresentation.[34]

While common law fraud still remains an option for consumer-plaintiffs, the common law requirements—specifically those of intent and scienter—have been particularly difficult for consumers to prove.[35] Coupled with the general tort rule that attorneys' fees are generally not recoverable for plaintiffs, common law actions of fraud and misrepresentation left consumers "with little in the way of effective relief."[36] However, consumer law eventually grew in two different areas outside of common law to make fraud suits more favorable for the consumer: within the regulations of the Federal Trade Commission (FTC) and within state consumer protection laws.

2. Federal Consumer Protection Law and Subsequent State Adoption

The FTC was the first federal agency to lead the charge against deceptive business practices, defining a deceptive act as one that is "misleading in a material respect."[37] Established in 1914 to combat

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32. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 130-31 (1980).

33. *See id.* at 131.

34. *Id.*

35. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 2:9. In fact, at least one state court has held that proving a prima facie common law fraud claim also establishes a valid case under consumer protection law. *See* Buechin v. Ogden Chrysler-Plymouth, Inc., 511 N.E.2d 1330, 1337-38 (Ill. App. Ct. 1987).

36. PRIDGEN & ALDERMAN, *supra* note 27, § 2:9.

37. *See* FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/37SM-WTB5].

unfair methods of competition,[38] the FTC has served as a model for all state consumer protection efforts.[39] In the wake of the 1960s consumer movement, the FTC encouraged states to become active participants in consumer protection and adopt their own statutes against unfair and deceptive business practices.[40] When states adopted their own consumer protection laws, they either based their laws on FTC law or on model uniform legislation.[41] The FTC encouragement for state-level laws was important because deceptive consumer practices of small, locally owned companies would be overlooked if all enforcement actions could only be taken up through the federal agency.[42] The federal government did not expect to be able to enforce the "myriad" of deceptive practices by smaller companies, and the FTC instead focused on more wide-spread deceptive practices.[43]

The crucial difference between federal and state consumer protection law is that almost all states allow consumers to bring private actions against deceptive business acts, whereas the FTC does not allow private actions.[44] Thus, a consumer-plaintiff need not rely on government approval of their case to file a claim.[45] While the FTC is theoretically able to initiate action against SOCE practitioners for deceptive practices,[46] the FTC has not become significantly involved in the regulation of local activities.[47] Prominent consumer law scholars Dee Pridgen and Richard M. Alderman theorize two

38. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 KAN. L. REV. 1, 7 (2005).

39. LEE E. NORRGARD & JULIA M. NORRGARD, CONSUMER FRAUD: A REFERENCE HANDBOOK 9 (1998).

40. *See* J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 357 (1992). State consumer protection laws are often referred to as Uniform and Deceptive Acts and Practices (UDAP) laws. *See* CARTER, *supra* note 25, at 5.

41. *See* Schwartz & Silverman, *supra* note 38, at 15.

42. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 2:9.

43. *See id.*

44. *See* Schwartz & Silverman, *supra* note 38, at 3, 15-16.

45. Such advantages, however, do not exist in every state. *See infra* Part III.D.

46. *See* Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. § 45 (2012)) (broadening the FTC's authority by striking out "in commerce" and amending to "in or affecting commerce").

47. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 8:6.

reasons for the FTC's lack of presence in the local marketplace.[48] First, the strength of state consumer protection agencies make federal intervention unnecessary.[49] Second, the FTC is hesitant to extend its jurisdictional reach to the local level because it is still required to justify its jurisdiction under the statutory definition of "commerce."[50] While the FTC's authority over individual defendants largely depends on the scope of the particular practitioner's advertising and practices, state consumer laws apply against any trade or commerce offered within a state's borders.[51]

Despite consumer protection law existing in some form throughout the entirety of the twentieth century, consumer-plaintiffs did not first utilize consumer protection claims against SOCE until *Ferguson v. JONAH* was filed in 2012.[52] It is necessary to consider the history of SOCE in order to understand how SOCE practices went from being generally supported to being generally disregarded.

B. Understanding the History of SOCE

Existing for well over a century,[53] SOCE practices have been offered as reparative measures for individuals who identify as lesbian, gay, or bisexual, or are looking to rid themselves of feelings of same-sex attraction.[54] Historically, SOCE services have ranged from

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48. *See id.*

49. *See id.*

50. *See id.*; *see also* 15 U.S.C. § 44 (2012) ("'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.").

51. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 4:1.

52. *See* Ferguson v. JONAH, No. HUD-L-5473-12, 2015 WL 609436, at *1 (N.J. Super. Ct. Law Div. Feb. 5, 2015).

53. *See* Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 221, 221 (1994). For an in-depth history that separates SOCE into three distinct eras, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 789-803 (2002).

54. *See* David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1300 (1999). For an understanding of the difficulty behind defining sexual orientation, see Ritch C. Savin-Williams, *How Many Gays Are There? It Depends*, *in* CONTEMPORARY PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL IDENTITIES 5, 6-7 (Debra A. Hope ed., 2009). This Note limits its scope to change efforts for gay, lesbian, and bisexual persons that focus on sexual orientation. This Note does not explore the

medical (drug treatment, hormones, and surgery) to psychotherapeutic (electric shock and psychoanalytic therapy) to behavioral (rest, masturbatory reconditioning, visits to prostitutes, and excessive bicycle riding) to religious (prayer and spiritual intervention).[55] Even when the American Psychological Association (APA) decided to remove homosexuality from its list of diagnosable mental disorders in the 1970s,[56] SOCE practitioners promising a cure for same-sex attractions continued to offer their services, with SOCE being advertised as supportive and helpful to those wanting to eliminate same-sex attractions.[57] Despite the continued availability of practitioner-provided SOCE, individuals began to study and critique SOCE—first with early challenges to SOCE effectiveness,[58] and second with movements to explicitly ban SOCE altogether.[59]

1. Some Early Challenges to SOCE

After a period of acceptance, SOCE began to face accusations for being ineffective in changing sexual orientation, or at the very least, being unable to produce results that proved a true change. Throughout the 1960s, 1970s, and 1980s, SOCE practitioners were able to point to detailed scientific studies that claimed that altering patients' sexual orientation was possible.[60] However, by the 1990s, psychologists began to doubt previous sexual orientation conversion studies. Psychologist Douglas C. Haldeman claimed that definitions of sexuality "based solely on behavior" led to "deficient and misleading" results when studying sexual orientation.[61] Haldeman further critiqued psychological and religious-based conversion programs for reporting their results on a behavioral definition of sexual orientation and for not truly being able to prove their patients emerged

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therapies that are unique to transgender issues, such as sex reassignment therapy. For background information on therapies focusing on gender identity, see NICHOLAS M. TEICH, TRANSGENDER 101: A SIMPLE GUIDE TO A COMPLEX ISSUE 45-61 (2012).

55. *See* Haldeman, *supra* note 53, at 221. SOCE from *Ferguson v. JONAH* focused mainly on behavioral and spiritual means. *See supra* text accompanying notes 9-13.

56. *See* Cruz, *supra* note 54, at 1300.

57. *See* Yoshino, *supra* note 53, at 799.

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

59. *See infra* Part I.B.2.

60. *See* Haldeman, *supra* note 53, at 222-23.

61. *Id.* at 221.

from treatment completely rid of all feelings of same-sex attraction.[62]

Along with doubts regarding the effectiveness of SOCE, viable evidence that such therapies were truly harmful to patients began to emerge. Haldeman's 1992 article acknowledged that former SOCE patients later "become shamed, conflicted, and fearful about their homoerotic feelings" and "report increased guilt, anxiety, and low self-esteem."[63] Although the lack of data forced Haldeman to stop short of explicitly describing SOCE as harmful,[64] the APA issued a statement in 1998 opposing any psychiatric treatment that assumed homosexuality was a mental disorder—including reparative or conversion therapy—because such treatment risked depression, anxiety, and self-destructive behavior.[65] The APA statement also validated Haldeman's critique against the effectiveness of SOCE, as the statement acknowledged that no scientifically sound evidence existed that sexual orientation can be changed.[66]

Despite statements from major professional organizations, like the APA, declaring that SOCE practices were harmful and ineffective, not all mental health care professionals agreed with the APA's determinations. Psychiatric studies of SOCE that occurred after the APA's statements garnered results that rebutted presumptions of ineffectiveness and harmfulness.[67] One notable study by Robert L. Spitzer, a psychiatrist who led the effort to declassify homosexuality as a disorder in the 1970s, found that highly motivated SOCE patients were able to achieve "heterosexual functioning," or at least significantly decrease their levels of same-sex attraction.[68] Spitzer's study further found that SOCE helped patients overcome feelings of depression by the end of their treatments, contrary to the idea

62. *See id.* at 224-25.

63. *Id.* at 225.

64. *See id.* ("'What harm has been done in the name of sexual reorientation?' At present, no data are extant.").

65. Nancy A. Del Pizzo, *If It Ain't Broke, Don't Fix It: Condemning Promises to 'Straighten' Homosexuals for a Fee*, N.J. LAW., June 2013, at 6, 6.

66. *See id.*

67. *See* A. Dean Byrd, *Homosexuality: Innate and Immutable? What Science Can and Cannot Say*, 4 LIBERTY U. L. REV. 479, 498 (2010).

68. *See id.*; Gabriel Arana, *My So-Called Ex-Gay Life*, AM. PROSPECT (Apr. 11, 2012), http://prospect.org/article/my-so-called-ex-gay-life [https://perma.cc/2FKQ-WJYR].

that SOCE were harmful.[69] Studies such as Spitzer's were controversial for cutting against the APA's determinations on sexual orientation conversion,[70] but such controversy illustrated the staying power of ideas that sexual orientation could be treated and changed despite the opposing determinations by leading professional groups like the APA.[71]

2. The Tide Turns Against SOCE

With competing studies regarding the true impact of SOCE, and the APA's determinations alone not being enough to eliminate SOCE, a clear desire emerged among gay, lesbian, and bisexual activists and supporters to eliminate—or at the very least reduce—SOCE practices across the nation.[72] Legislative efforts against SOCE on both the state and federal levels met varying degrees of success.[73] The major success has come in the form of laws that ban SOCE for minors.[74] California, Illinois, New Jersey, Oregon, and the District of Columbia have each passed laws that ban minors from undergoing SOCE.[75] These legislative successes largely derive from the states justifying their decisions in the name of protecting

69. *See* Byrd, *supra* note 67, at 498.

70. *See id.* Notably, Spitzer has attempted to retract his study that claimed that highly motivated individuals could achieve a change in sexual orientation. *See* Arana, *supra* note 68; *see also* Benedict Carey, *Psychiatry Giant Sorry for Backing Gay 'Cure*,*'* N.Y. TIMES (May 18, 2012), http://www.nytimes.com/2012/05/19/health/dr-robert-l-spitzer-noted-psychiatrist-apologizes-for-study-on-gay-cure.html [https://perma.cc/5Z53-K79N].

71. While perhaps the most prominent, Spitzer's study has not been the only scientific study to suggest the ability of a person to alter his or her sexual orientation. *See, e.g.*, A. Dean Byrd et al., *Clients' Perceptions of How Reorientation Therapy and Self-Help Can Promote Changes in Sexual Orientation*, 102 PSYCHOL. REP. 3, 4 (2008).

72. *See* Khazan, *supra* note 5 (quoting the plaintiffs' attorney in *Ferguson v. JONAH* as saying that "[c]onversion therapy and homophobia are based on the same central lie—that gay people are broken and need to be fixed").

73. Tiffany Lo, *Innate, Not Immoral*, BERKELEY POL. REV. (May 10, 2016), https://bpr.berkeley.edu/2016/05/10/innate-not-immoral/ [https://perma.cc/DG8Y-U8BL].

74. *See id.*

75. *See* Peters, *supra* note 17. For an example of a statute banning SOCE for minors, see CAL. BUS. & PROF. CODE §§ 865-865.2 (West 2016). While a law has not been passed through the legislature, New York's governor implemented state regulations that severely limit the availability of SOCE to minors. *See* Jennifer Peltz, *N.Y. Governor: It's Time to Ban Conversion Therapy*, USA TODAY (Feb. 7, 2016, 2:03 AM), http://www.usatoday.com/story/news/nation/2016/02/07/ny-governor-s-time-ban-conversion-therapy/79962790/ [https://perma.cc/WK8J-3S4U].

minors.[76] For instance, as the first state to ban SOCE for minors, California's legislature claimed the law was justified by the state's compelling interest to protect the physical and psychological well-being of minors by limiting exposure to the harms of SOCE.[77] Two federal circuit courts have upheld these SOCE bans for minors despite accusations that the laws unconstitutionally hinder the First Amendment rights of SOCE practitioners, potential SOCE patients, and the potential patients' parents.[78] Thus, for the time being, the laws banning SOCE for minors seem to be here to stay.

The concern for the well-being of minors, however, has not been enough to result in a successful limitation of SOCE practices. In fact, while four states and the District of Columbia have enacted SOCE bans for minors, seventeen other states have seen similar proposals stall during the legislative process or fail outright.[79] The bills have failed for different reasons. In Colorado and Hawaii, bills banning SOCE for minors died in committee due to lack of support.[80] In Maryland, the sponsoring state legislator withdrew the bill, citing anti-SOCE advocates' desires to pursue regulatory changes within state health boards and forgo legislative action.[81] Even where the bills are still traversing the state legislatures, there is not necessarily reason for optimism among anti-SOCE advocates. For example, despite the Texas legislature considering a bill banning conversion therapy for minors, the Texas Republican Party endorsed

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76. *See, e.g.*, 405 ILL. COMP. STAT. 48/5(13) (2016); Alison S. Bohm et al., *Challenges Facing LGBT Youth*, 17 GEO. J. GENDER & LAW 125, 157-58 (2016).

77. *See* Victor, *supra* note 18, at 1535.

78. *See* Doe *ex rel.* Doe v. Governor of N.J., 783 F.3d 150, 151 (3d Cir. 2015); King v. Governor of N.J., 767 F.3d 216, 220 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208, 1221-22 (9th Cir. 2013).

79. *See* Margaret Hartmann, *Where the States Stand in the Fight to Ban Gay Conversion Therapy*, N.Y. MAG.: DAILY INTELLIGENCER (Apr. 9, 2015, 5:05 AM), http://nymag.com/daily/intelligencer/2015/04/where-the-states-stand-on-gay-conversion-therapy.html [https://perma.cc/KZK9-R8ZA] (reporting that legislation banning SOCE for minors has been introduced in Arizona, Connecticut, Florida, Iowa, Massachusetts, Minnesota, Nevada, New York, Ohio, Pennsylvania, Rhode Island, Texas, and Vermont, while similar legislation has failed in Colorado, Hawaii, Maryland, and Virginia).

80. *See id.*

81. *See* Kevin Rector, *Gay 'Conversion Therapy' Bill Withdrawn as Advocates Pursue Regulatory Oversight*, BALT. SUN (Mar. 14, 2014, 6:54 PM), http://www.baltimoresun.com/features/gay-in-maryland/gay-matters/bs-gm-gay-conversion-therapy-bill-withdrawn-20140314-story.html [https://perma.cc/EMQ7-3CNS].

"reparative therapy" in 2014.[82] The state party's official position will likely serve as a major hurdle in getting the bill passed.

Further, no state has come close to installing a complete, explicit, and outright ban on SOCE for all potential patients.[83] There have been multiple attempts on the federal level to make SOCE practices unlawful nationwide, and actions have ranged from proposed federal laws banning SOCE to calls for administrative investigations into SOCE practices.[84] Most recently, Representative Ted Lieu introduced the Therapeutic Fraud Prevention Act in the 114th Congress.[85] This Act would amend the practices of the FTC and formally recognize conversion therapy as an illegal, deceptive practice.[86] However, the Therapeutic Fraud Prevention Act has stalled in the House of Representatives and has not been signed into law.[87] Although the attempts nationwide have focused on more than just banning SOCE therapies for minors, the federal efforts have not seen any successes or concrete policies created. As a result, a variety of organizations offering or promoting SOCE still exist today.[88]

To summarize this brief history of SOCE, two points are most important. First, SOCE practices have been doubted and challenged as both ineffective and harmful to SOCE patients, despite SOCE practitioners advertising their services otherwise. Second, both state and federal actors have taken steps to limit the pervasiveness of SOCE in order to protect their citizens, yet they have been unable

82. *See* Hartmann, *supra* note 79.

83. *See id.*

84. *See* Press Release, Representative Ted Lieu, Congressman Lieu Announces Therapeutic Fraud Prevention Act (May 19, 2015) [hereinafter Lieu Press Release], https://lieu.house.gov/media-center/press-releases/congressman-lieu-announces-therapeutic-fraud-prevention-act [https://perma.cc/C5HL-87AZ]; Press Release, Representative Jackie Speier, Congresswoman Speier Demands FTC Investigation of "Gay Conversion Therapy" Practices (May 13, 2015), https://speier.house.gov/media-center/press-releases/congresswoman-speier-demands-ftc-investigation-gay-conversion-therapy [https://perma.cc/C4BN-FRPC].

85. *See* Lieu Press Release, *supra* note 84.

86. *See id.* For information on the FTC's role in antideception consumer protection, see *supra* text accompanying notes 37-43, 46-51.

87. *See Therapeutic Fraud Prevention Act*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/therapeutic-fraud-prevention-act [https://perma.cc/JZ5C-J8GW] (last updated Mar. 11, 2016).

88. *See, e.g.*, *Ministry in Action*, ONE BY ONE, http://www.oneby1.org/ [https://perma.cc/8PR3-DWQQ]; PATH: POSITIVE APPROACHES TO HEALTHY SEXUALITY, http://www.pathinfo.org/ [https://perma.cc/QX8G-7PS7]; PEOPLE CAN CHANGE, http://www.peoplecanchange.com/ [https://perma.cc/5DTX-AEQB].

to enact new, far-reaching legislation to explicitly ban SOCE. With these two points in mind, this Note turns to explaining why state consumer protection law functions as an attractive means for plaintiffs to challenge SOCE.

C. Reasons to Combat SOCE with State Consumer Protection Law

While various other legal claims potentially exist that allow former SOCE patients to bring suit against SOCE practitioners,[89] consumer protection actions represent a unique opportunity for a plaintiff wishing to make a statement against SOCE practices. Consumer protection actions are a desirable pathway for former SOCE patients for a variety of reasons. First, the necessary laws to bring suit against SOCE practitioners already exist as state consumer protection laws and require no new approval by legislators.[90] Second, state consumer protection actions are available to any consumer-plaintiff in almost every state, whereas current anti-SOCE laws only aim to protect minors.[91] Third, a slew of consumer protection cases accusing SOCE practitioners of deceptive business practices will generate a negative image of the industry and help to delegitimize it.[92]

First, despite the challenges in passing explicit SOCE bans that protect individuals from being harmed by SOCE in the first place,[93] all fifty states may already have a viable course for individuals that have already suffered harm by SOCE. After all, all fifty states and the District of Columbia have some type of consumer protection laws that both the state attorney general and private lawsuits have

89. *See* Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219, 232-49 (1999) (exploring various tort claims against SOCE practitioners); Arcangelo S. Cella, Note and Comment, *A Voice in the Room: The Function of State Legislative Bans on Sexual Orientation Change Efforts for Minors*, 40 AM. J.L. & MED. 113, 131-36 (2014) (exploring professional negligence against SOCE practitioners); Karolyn Ann Hicks, Comment, *"Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse*, 49 AM. U. L. REV. 505, 510 (1999) (recommending that SOCE be interpreted as child abuse); Victor, *supra* note 18, at 1563 n.134 (suggesting that sexual harassment law could provide relief for former SOCE patients).

90. *See supra* text accompanying notes 40-43.

91. *See supra* text accompanying notes 74-78.

92. *See infra* text accompanying notes 99-102.

93. *See supra* Part I.B.

enforced.[94] As stated above, due to the ability for private plaintiffs to bring consumer protection actions,[95] state laws are more amenable to consumers than federal law.[96] The intricacies of these laws are explained and discussed later in this Note,[97] but merely knowing consumer protection laws are available in every state is an important factor in establishing the viability of consumer protection claims against SOCE. Additionally, with *Ferguson v. JONAH* successfully utilizing New Jersey consumer protection law, state law clearly has both the capability and momentum to be a successful basis for consumer protection claims against SOCE.

Second, because successful legislation against SOCE has been limited to banning the services for minors, challenging SOCE with consumer protection laws would fill in the gaps because any plaintiff, regardless of age, would be able to bring a suit against a SOCE practitioner.[98] Therefore, whether legislative action against SOCE succeeds in states is largely unimportant because plaintiffs can take advantage of existing consumer protection laws to receive damages for being subject to SOCE practitioners' deceptive business practices.

Third, gay, lesbian, and bisexual activists have consistently used courts to shift public opinion in their favor.[99] Courts finding SOCE practitioners liable for violating consumer protection laws would assist in delegitimizing their SOCE practices to the public because a reputation for fraud and deception in any industry would be harmful in continuing business operations.[100] Such negative publicity would assist SOCE's opponents' goals in two ways. First, the threat

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94. *See, e.g.*, D.C. CODE §§ 28-3901 to -3913 (2016); VA. CODE ANN. §§ 59.1-201, 59.1-204 (2016).

95. For difficulties in states that do not allow private consumer actions against deceptive business actions, see *infra* Part III.D.

96. However, plaintiffs are beginning to test the strength of FTC claims against SOCE. *See* Pulliam-Moore, *supra* note 3.

97. *See infra* Parts II-III.

98. *See* Alexander, *supra* note 20, at 3, 5 n.23.

99. *See* Michael E. Waterstone, *The Costs of Easy Victory*, 57 WM. & MARY L. REV. 587, 600-01 (2015).

100. *See, e.g.*, Ackerman v. Nw. Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999) ("[P]ublic charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual)."); *see also* Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281, 291-93 (2004) (describing how heightened pleading requirements for fraud are designed to protect defendants' reputations).

of reputation-damaging litigation would dissuade practitioners from involving themselves in SOCE in the first place. This phenomenon would, in effect, create some pre-action protection for potential SOCE patients. Second, public opinion shifting farther against SOCE may impact the application of other laws. For instance, many state laws prohibit mental health professionals from making deceptive claims.[101] Favorable court determinations showing that providing SOCE is a deceptive practice under consumer protection laws would also likely allow SOCE practitioners to be held liable under laws that regulate licensed professionals.[102] Thus, the success of consumer protection actions against SOCE practitioners can pave the way for other antideception laws to be utilized to limit the practice of SOCE.

One disadvantage to state consumer protection laws that may limit the ability of consumer-plaintiffs to bring suits is the handling of attorneys' fees. Arizona, Delaware, Mississippi, South Dakota, and Wyoming do not allow plaintiffs to collect attorneys' fees when bringing consumer protection claims, while North Dakota and Ohio only allow plaintiffs to collect attorneys' fees if the defendants are proven to knowingly violate the consumer protection law.[103] The inability to ensure that attorneys' fees will be paid certainly weakens the likelihood that attorneys will take up lengthy and difficult consumer protection cases in the first place. In such cases, plaintiffs may need to rely on pro bono attorneys or nonprofit legal organizations.[104]

II. CLASSIFYING SOCE REPRESENTATIONS AS DECEPTIVE TRADE PRACTICES

As described in Part I, many benefits exist in bringing a consumer protection claim against a SOCE practitioner. However, in order to bring the claim, the consumer-plaintiff must be able to prove that the SOCE representations involved were deceptive trade practices.

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101. *See, e.g.*, CAL. BUS. & PROF. CODE § 651 (West 2016); N.J. STAT. ANN. § 45:1-21 (West 2016); *see also* Victor, *supra* note 18, at 1568-69 (describing California's prohibition of deceptive acts by licensed therapists).

102. *See* Victor, *supra* note 18, at 1537.

103. *See* Dubrowski, *supra* note 19, at 96.

104. *See id.* at 96 n.96.

Generally, an affirmative misrepresentation of fact will classify a trade practice as deceptive, so long as that misrepresentation is false or misleading.[105] While some states prohibit only a closed list of specific deceptive acts in their statutes,[106] state courts have acknowledged that consumer protection laws should be interpreted in light of their broad legislative purpose to provide relief from deceptive trade practices, allowing even numerated lists to be considered broadly.[107]

Importantly, though, SOCE can exist in a wide variety of ways, and *Ferguson v. JONAH*'s theory of deception was successful under a particular set of facts. In light of *Ferguson v. JONAH*, SOCE practitioners will likely adapt their advertising and services in order to continue to offer SOCE. To be sure, SOCE practitioners have already displayed a willingness to change the way they represent SOCE, as JONAH changed the meaning behind its titular acronym from "Jews Offering New Alternatives for Homosexuality" to "Jews Offering New Alternatives for Healing" once legal action against the group began.[108] While speculative, this Part addresses the two core representations the New Jersey Superior Court found to be deceptive in *Ferguson v. JONAH* and explains how SOCE practitioners will likely alter their practices to avoid liability under consumer protection law. As seen in *Ferguson v. JONAH*, two common accusations of misrepresentation will likely involve a practitioner's assertion that homosexuality is a disorder or that sexual orientation is alterable.[109]

105. *See, e.g.*, Tietsworth v. Harley-Davidson, Inc., 677 N.W.2d 233, 245 (Wis. 2004). Some states allow an omission of material facts to qualify as a deceptive trade practice. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 3:7.

106. *See, e.g.*, COLO. REV. STAT. § 6-1-105 (2016); IND. CODE § 24-5-0.5-3 (2016); OR. REV. STAT. § 646.608 (2016); CARTER, *supra* note 25, at 11.

107. *See* Denson v. Ron Tonkin Gran Turismo, Inc., 566 P.2d 1177, 1179 n.4 (Or. 1977); Nienke v. Naiman Grp., Ltd., 857 P.2d 446, 450 (Colo. App. 1992).

108. *See* Victor, *supra* note 18, at 1534 n.7.

109. *See* Ferguson v. JONAH, No. HUD-L-5473-12, 2015 WL 609436, at *10 (N.J. Super. Ct. Law Div. Feb. 5, 2015); Dubrowski, *supra* note 19, at 81-83. For a brief discussion on how informed consent may absolve SOCE practitioners of being accused of misrepresentation at all, see Alexander, *supra* note 20, at 4.

A. Homosexuality as a Disorder

Despite the APA determining otherwise, some have still maintained that a nonheterosexual sexual orientation is a disorder requiring a cure.[110] *Ferguson v. JONAH* serves as a useful example of how SOCE services can qualify as deceptive trade practices when practitioner-defendants misrepresent homosexuality as a disorder or illness. The examination of expert qualifications in preparation for the *Ferguson v. JONAH* trial illustrates how courts may no longer be able to admit evidence that homosexuality is a disorder. In *Ferguson v. JONAH*, the consumer-plaintiffs moved to bar the testimony of six defense experts, asserting there was no reliable foundation for the experts' testimony that homosexuality is a disorder.[111] In response, the practitioner-defendants argued that their experts' opinions classifying homosexuality as a disorder were legitimate and scientifically based.[112]

The New Jersey Superior Court found that "the generally accepted scientific theory is that homosexuality is not a mental disorder and not abnormal."[113] In its decision evaluating the eligibility of JONAH's experts for testimony, the Superior Court weighed arguments by both the consumer-plaintiffs and practitioner-defendants and the importance of the APA removing homosexuality from its list of mental disorders, officially titled the Diagnostic and Statistical Manual of Mental Disorders (DSM).[114] The Superior Court acknowledged that the APA's DSM was "unquestionably authoritative in the mental health field" and that New Jersey courts have repeatedly found general acceptance of the DSM as beyond dispute.[115] Further, the APA's determination had been embraced by other health organizations.[116] Acknowledging that general acceptance is not dispositive, the court noted that general acceptance constitutes a strong and perhaps conclusive indication

110. *See* Byrd, *supra* note 67, at 480.
111. *See Ferguson*, 2015 WL 609436, at *1, *13-14.
112. *See id.* at *5.
113. *Id.* at *9.
114. *See id.* at *4, *6-10.
115. *See id.* at *7.
116. *See id.* at *8.

of the reliability of the results.[117] Evidence of a minority view did not deter the court from finding general acceptance in the scientific community that aligned with the APA's DSM; the court held that JONAH's experts' testimony was inadmissible.[118] The court clearly stated that JONAH's "experts base their conclusion on the initial false premise that homosexuality is either abnormal or a mental disorder."[119] Some commentators have interpreted the holding to mean that the court determined homosexuality is not a disorder as a matter of law.[120]

Although the decision itself was limited to expert qualifications in one state, the New Jersey Superior Court's line of reasoning could similarly be applied in consumer protection cases across the nation. Both *Frye* and *Daubert* evidentiary jurisdictions are likely to follow the *Ferguson v. JONAH* model,[121] and if state courts have a history of holding APA determinations in high regard when making legal determinations, then the courts would likely have little choice but to also find that homosexuality is not a disorder as a matter of law.[122] With so much evidence cutting against homosexuality being a disorder, SOCE practitioners characterizing homosexuality otherwise will likely be considered as providing deceptive representations. In that sense, SOCE practitioners are likely to stop defining homosexuality as a disorder in order to avoid being labeled as deceptive.

B. Ability to Alter Sexual Orientation

Although the assertion that homosexuality is a disorder would rely on the same general facts in each case, each consumer protection case would be unique depending on the business practices of the

117. *See id.*

118. *See id.* at *9.

119. *Id.* at *10.

120. *See, e.g.*, *Consumer Protection*, *supra* note 4, at 133.

121. *See* Dubrowski, *supra* note 19, at 84 n.30. For a description of the importance of both the *Frye* and *Daubert* evidentiary regimes, see Edward K. Cheng & Albert H. Yoon, *Does* Frye *or* Daubert *Matter? A Study of Scientific Admissibility Standards*, 91 VA. L. REV. 471, 476-77 (2005).

122. *But see Ex parte* H.H., 830 So. 2d 21, 35-36 (Ala. 2002) (Moore, C.J., specially concurring) (stating that judges should not rely on the latest psychological studies, as such studies are subject to bias and philosophical leanings).

defendant accused of misrepresenting their ability to alter sexual orientation. While SOCE practitioners advertise and offer similar services, they are far from a unified industry.[123] Even the consumer-plaintiffs in *Ferguson v. JONAH* acknowledged that they did not intend to prove that all SOCE were ineffective.[124] Instead, the plaintiffs simply aimed to prove that the defendant's programs specifically were unable to alter sexual orientation, at least in accordance with the statistics that the defendants provided.[125] After all, to have a successful claim, plaintiffs only need to prove the specific SOCE advertised and offered by the practitioner-defendants were unable to alter sexual orientation.

In *Ferguson v. JONAH*, the New Jersey Superior Court disqualified experts from testifying on the effectiveness of SOCE due to the expert's initial false belief that "homosexuality is abnormal or a disorder that can be resolved through counseling."[126] The effectiveness of sexual orientation alteration in *Ferguson v. JONAH* was based on the idea that homosexuality was a disorder, and subsequent evidence on altered sexual orientation was therefore based on an unreliable premise.[127] However, other views of sexual orientation exist that do not rely on homosexuality being a disorder, and subscribing to such a theory while engaging in the business of SOCE may offer different and more successful defenses for practitioner-defendants to defend their services.

Practitioner-defendants will likely argue that even a minor change in a patient's sexual practices satisfies its representation that SOCE effectively alters sexual orientation. Studies on sexuality claim that sexual orientation can be determined in a variety of ways, including sexual attraction, romantic attraction, sexual behavior, and sexual identity.[128] Given that sexual behavior is one aspect of sexual orientation, practitioner-defendants may attempt to claim that even small changes in sexual behavior validate the

123. *See* Haldeman, *supra* note 53, at 221.

124. *See Ferguson*, 2015 WL 609436, at *2.

125. *See id.*

126. *Id.* at *10-11.

127. *Id.* at *10 ("One is inexorably tied to the other: [the experts] cannot explain their clinical experience to the jury without also presenting their scientifically discredited belief that homosexuality is abnormal or a mental disorder.").

128. *See* Savin-Williams, *supra* note 54, at 7-9.

advertisements and promises of a change in sexual orientation. For example, in *Ferguson v. JONAH*, the defendants unsuccessfully argued that former clients choosing not to act on homosexual desires represented a change in sexual orientation.[129] Such invocations are likely to remain ineffective.[130] Courts have generally held that consumer protection laws are intended to truly protect consumers, and representations that are "literally true does not mean they cannot be misleading to the average consumer."[131] Consumer protection laws aim to protect against misleading business practices, and so practitioner-defendants will likely not be able to argue that a minor literal truth justifies their business representations as legitimate.

In another strategy to prove that sexual orientation is alterable, practitioner-defendants may try to argue that sexual orientation itself is inherently fluid and can change over time. The extent to which factors that make up sexual orientation are stable over time is essentially unknown, especially regarding the biological basis behind sexual orientation.[132] Scientific studies show that the factors used to determine sexual orientation have been noted to change throughout an individual's lifetime.[133] If practitioner-defendants have represented sexual orientation as described above, they may have a better opportunity to prove that their methods can assist clients in managing the potential fluidity of sexual orientation. Such a representation would be different from the representations made by the defendant-practitioner in *Ferguson v. JONAH*, as it would focus more on management and less on a cure.[134] While such a characterization of sexuality would not be as hard of a stance against homosexuality as previous incarnations of SOCE, such a stance may

129. *See Consumer Protection*, *supra* note 4, at 134.

130. *See id.*

131. Smajlaj v. Campbell Soup Co., 782 F. Supp. 2d 84, 98 (D.N.J. 2011).

132. *See, e.g.*, Mark Joseph Stern, *Born This Way?*, SLATE (June 28, 2013, 5:45 AM), http://www.slate.com/articles/health_and_science/science/2013/06/biological_basis_for_homosexuality_the_fraternal_birth_order_explanation.html [https://perma.cc/ZZR5-D4NJ] (acknowledging some biology behind sexual orientation, but noting that scientific research is unlikely to "uncover a single biological basis for homosexuality"); Ed Yong, *No, Scientists Have Not Found the 'Gay Gene*,*'* ATLANTIC (Oct. 10, 2015), http://www.theatlantic.com/science/archive/2015/10/no-scientists-have-not-found-the-gay-gene/410059/ [https://perma.cc/W7MD-7D4B] (acknowledging the difficulty in pinpointing a genome that causes homosexuality).

133. *See* Savin-Williams, *supra* note 54, at 11-12.

134. *See* Dubrowski, *supra* note 19, at 90 (noting that *Ferguson v. JONAH* focused on curing homosexuality).

allow SOCE to exist at some level so long as practitioners carefully characterize their services to focus on the possible fluidity of sexual orientation.

The Supreme Court may have dealt a blow to the argument that sexual orientation is alterable at all in its *Obergefell v. Hodges* decision, which legalized same-sex marriage.[135] Writing for the majority, Justice Kennedy referred to the petitioners, a same-sex couple seeking to marry in Ohio, as having an "immutable nature" that made same-sex marriage their only path to marriage.[136] With the Supreme Court seemingly acknowledging the immutability of sexual orientation, arguments that sexual orientation is unalterable may strengthen consumer-plaintiffs' arguments when challenging SOCE in consumer protection claims. However, the impact of *Obergefell*'s reference to the immutability of sexual orientation outside the realm of constitutional analysis remains to be seen.

III. ACCOUNTING FOR DIFFERENCES IN STATE CONSUMER PROTECTION LAWS

While a practitioner's representations serve as the cornerstone for a consumer protection claim against SOCE, consumer protection laws have a variety of other requirements that consumer-plaintiffs must also meet. This Part focuses on three major requirements: Section A explains how the SOCE in question must fall within the scope of states' consumer protection law, Section B describes different states' intent requirements, and Section C describes different states' reliance requirements. Section D explains the challenges of state consumer protection laws that require the state government to initiate lawsuits against deceptive trade practices.

135. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

136. *Id.* at 2594; *see also* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 23-27 (2015) (explaining how immutability has been applied in the constitutional context). Before the *Obergefell* decision, circuit courts had also acknowledged that sexual orientation was likely immutable. *See, e.g.*, Baskin v. Bogan, 766 F.3d 648, 657 (7th Cir. 2014).

A. Differing Scopes of State Consumer Protection Laws

Before delving into different types of state consumer protection laws, a plaintiff's claim must first fall within the scope of the applicable state consumer protection law. Consumer protection statutes are considered to be neutral and generally applicable, allowing many consumer-business transactions to fall within their scope.[137] However, different state laws have their limits on what activities they can regulate, and the same is true for SOCE: not all types of SOCE may be reached by consumer protection laws.

First, the SOCE transaction in question must be defined as a consumer-business transaction in order to be covered by consumer protection laws. In interpreting which types of transactions are subject to consumer protection, courts have looked to the general purpose of the laws, which intended for consumer protection to apply when the transaction at question is for business and not gratuity.[138] Straightforwardly put, a relationship must exist between the plaintiff as a consumer and the defendant as a products dealer or services provider. Generally applied, charitable transactions and transactions between relatives or friends likely would not be subject to consumer protection laws. Therefore, any type of SOCE that is provided without any payment is unlikely to fall within the scope of consumer protection laws, leaving the subject of the SOCE with no action under the title of consumer protection.[139]

Second, some states have carved out certain exempt professions in their consumer protection laws, thus making certain professionals nearly untouchable in this area of litigation.[140] Twenty-two states have exempted at least one type of profession from its consumer protection laws.[141] However, not all of the exempt professions could feasibly include SOCE practitioners. Exempt group member-

137. *See* Am. Target Advert., Inc. v. Giani, 199 F.3d 1241, 1247 (10th Cir. 2000); Kate Maternowski, Note, *The Commercial Speech Doctrine Barely Survives* Sorrell, 38 J.C. & U.L. 629, 650 (2012).

138. *See, e.g.*, Word of Faith World Outreach Ctr. Church, Inc. v. Morales, 787 F. Supp. 689, 696-97 (W.D. Tex. 1992), *rev'd on other grounds*, 986 F.2d 962 (5th Cir. 1993).

139. For a discussion of the lack of liability for religious institutions under consumer protection law, see *infra* Part IV.B.2.

140. *See* Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 154 (2006).

141. *Id.* at 155-63.

ships that SOCE practitioners may be able to claim include doctors,[142] medical practitioners or health care providers,[143] learned professionals,[144] professional service providers,[145] and professionals whose practices are regulated under state law.[146] While the aforementioned titles may be legal terms of art, state licensure boards determine which exemptions apply to certain types of practitioners.[147] Additionally, by focusing on the advertising of SOCE instead of the actual services, plaintiffs still may be able to bring claims against the SOCE practitioners, as certain professionals are only exempt if the act in question falls within the scope of their professional, licensed capacity.[148] For example, New Jersey has a learned professional exemption,[149] but the plaintiffs in *Ferguson v. JONAH* focused on advertising in their claim,[150] which falls outside the potential scope of actions covered by the "learned professional" exemption.[151] Therefore, even if practitioner-defendants attempt to gain an exemption from consumer protection laws, consumer-plaintiffs can avoid this exception by focusing on advertising to ensure SOCE claims fall within the scope of their state's consumer protection laws.

B. The Element of Intent and Genuine Belief

Intent requirements vary greatly across different states' consumer protection laws. Generally, and contrary to common law fraud or misrepresentation, many states do not require a plaintiff to prove

142. *See, e.g.*, Quimby v. Fine, 724 P.2d 403, 406 (Wash. Ct. App. 1986).

143. *See, e.g.*, MD. CODE ANN. COM. LAW § 13-104 (West 2016); Ott v. Baker, 53 Va. Cir. 113, 115 (2000).

144. *See, e.g.*, N.C. GEN. STAT. § 75-1.1 (2016); Macedo v. Dello Russo, 840 A.2d 238, 242 (N.J. 2004).

145. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.49(c) (West 2016).

146. *See, e.g.*, OKLA. STAT. tit. 15, § 754(2) (2016).

147. *See, e.g.*, Nadia N. Sawicki, *Character, Competence, and the Principles of Medical Discipline*, 13 J. HEALTH CARE L. & POL'Y 285, 286 (2010).

148. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.49(c); *Macedo*, 840 A.2d at 242 (allowing exemptions for professionals "so long as they are operating in their professional capacities").

149. *Macedo*, 840 A.2d at 242.

150. *See* Ferguson v. JONAH, No. HUD-L-5473-12, 2015 WL 609436, at *2 (N.J. Super. Ct. Law Div. Feb. 5, 2015).

151. *See Macedo*, 840 A.2d at 242.

the defendant's intent to deceive in a consumer protection claim.[152] While the lack of an intent requirement may result in defendants being held liable for even innocent misrepresentations, the general purpose of consumer protection laws is to protect the public and not necessarily to punish the wrongdoer.[153] The lack of an intent element reflects such a purpose. As an Ohio appeals court succinctly stated, "'the very reason for the enactment of the [Ohio law] was to give the consumer protection from a supplier's deceptions which he lacked under the common law' [and] to require proof of intent to deceive would 'effectively emasculate the act and contradict its fundamental purpose.'"[154]

When some type of intent is required for a practitioner-defendant to be liable, a consumer protection claim against SOCE becomes more difficult. Two major types of intent may be required in different consumer protection laws: either an intent to deceive or an intent that the consumer rely on the deceptive act.[155] For an intent to deceive, some states explicitly require by statute that defendants act willfully, knowingly, or intentionally in practicing deceptive acts in order to be liable under consumer protection laws.[156] Other states have read intent into their consumer protection laws, with state courts interpreting consumer law to mean that defendants must have acted with an intent to deceive consumers.[157] Similarly, some other states require defendants to intend for consumers to rely on their actions, not be deceived by their actions.[158]

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152. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 3.2; Schwartz & Silverman, *supra* note 38, at 20.

153. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 3.2.

154. *Id.* (quoting Thomas v. Sun Furniture & Appliance Co., 399 N.E.2d 567, 570 (Ohio Ct. App. 1978)).

155. *See* Schwartz & Silverman, *supra* note 38, at 20. Some states require a degree of intent only when the defendant is alleged to have omitted or concealed material facts. *See, e.g.*, ALASKA STAT. § 45.50.471(12) (2016) (requiring a knowing intent for omissions); ARIZ. REV. STAT. ANN. § 44-1522(A) (2016) (requiring an intent that consumers rely on an omission). However, as this Note explores affirmative misrepresentations of SOCE practitioners, these intent requirements will not be analyzed.

156. *See, e.g.*, OR. REV. STAT. § 646.605(10) (2016) (willfully); S.D. CODIFIED LAWS § 37-24-6(1) (2016) (knowingly); UTAH CODE ANN. § 13-11-4(2) (West 2016) (knowingly or intentionally).

157. *See, e.g.*, Dix v. Am. Bankers Life Assurance Co., 415 N.W.2d 206, 209 (Mich. 1987) (requiring an "intent to deceive").

158. *See, e.g.*, N.D. CENT. CODE § 51-15-02 (2016) (statutorily requiring an intent for consumers to rely on action); Nilsson v. NBD Bank of Ill., 731 N.E.2d 774, 784 (Ill. App. Ct.

With practitioner-defendants being required to have an intent to deceive consumers in some states, consumer-plaintiffs have a higher bar in structuring consumer protection claims compared to states that do not require intent at all. After all, SOCE practitioners that genuinely advertise and offer services in the belief that their brand of SOCE alters sexual orientation would seemingly be free of liability under those consumer protection laws.[159] Such concerns are well warranted; others have also acknowledged the difficulty of intent requirements in structuring a consumer protection claim.[160] New Jersey's consumer protection law did not contain an intent requirement, and so a genuine belief problem was not put to the test in *Ferguson v. JONAH*.[161] Moving beyond *Ferguson v. JONAH*, SOCE practitioners are sure to rely on a state's intent requirement if available.

However, the difficulties posed by the intent requirements are not insurmountable, especially if SOCE practitioners offer services under a state professional license. As professionals dealing with counseling and similar services, SOCE practitioners may be required to know and act within what a reasonable similar practitioner would do in similar circumstances.[162] Therefore, SOCE practitioners are expected to have the knowledge that SOCE have generally been proven ineffective, or at least should be knowledgeable of such information. Representing such services without regard to the reputation of ineffectiveness may result in SOCE practitioners' actions satisfying the intent requirement of consumer protection laws.

Further, despite the intent requirements, state courts have still seemed willing to interpret the consumer protection laws favorably for consumer-plaintiffs. For example, New Mexico's consumer protection law requires a defendant to act knowingly in order for an action to be defined as deceptive.[163] However, New Mexico state courts still allow consumer protection claims to proceed even without an

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1999) (reading an intent for consumers to rely on action into state consumer protection law).

159. For a discussion of SOCE practitioners that offer services on the basis of their religious beliefs, see *infra* Part IV.B.1.

160. *See* Dubrowski, *supra* note 19, at 94-95.

161. *See id.* at 90.

162. *See* Thomas L. Hafemeister et al., *Parity at a Price: The Emerging Professional Liability of Mental Health Providers*, 50 SAN DIEGO L. REV. 29, 52 (2013).

163. *See* N.M. STAT. ANN. § 57-12-2(D) (West 2016).

intent to deceive, stating that if a pure intent completely protected plaintiffs, then the consumer protection act would become "toothless."[164] The willingness of some courts to view laws in light of their consumer-friendly purpose gives consumer-plaintiffs a reason for optimism, even if a state maintains an intent requirement in its antideception aspect of consumer protection law.

C. The Element of Reliance

While proving actual reliance was a staple of common law fraud, state consumer protection laws fall in one of two camps: they either maintain the common law requirement of actual reliance or have eliminated the need for a consumer-plaintiff to show actual reliance. A small minority of states, made up of Indiana, Texas, and Wyoming, have explicitly maintained actual reliance as a requirement in the language of their consumer protection acts.[165] While not explicitly utilizing the term "reliance," Kansas courts have read the requirement of actual reliance into the term "aggrieved" in its consumer protection law.[166] Other states' courts read the common law definition of reliance into their consumer protection laws, therefore also requiring some type of actual reliance for a successful consumer protection claim, whether reasonable reliance or not.[167] To meet the actual reliance requirement, consumer-plaintiffs must be able to show that their reliance on SOCE practitioners' deceptive representations resulted in their damages.[168]

Consumer-plaintiffs can straightforwardly argue that their damages at question are the cost of the treatments and that the promise to rid the consumer-plaintiffs of same-sex attraction caused them to pay the money in the first place. For example, the plaintiffs in *Ferguson v. JONAH* sought the restitution of money paid to JONAH

164. *See* Ashlock v. Sunwest Bank of Roswell, N.A., 753 P.2d 346, 348 (N.M. 1988), *overruled on other grounds by* Gonzales v. Surgidev Corp., 899 P.2d 576 (N.M. 1995).

165. *See* IND. CODE § 24-5-0.5-4(a) (2016); TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(B) (West 2016); WYO. STAT. ANN. § 40-12-108(a) (2016).

166. *See* Finstad v. Washburn Univ. of Topeka, 845 P.2d 685, 691-92 (Kan. 1993).

167. *See, e.g.*, Parks v. Macro-Dynamics, Inc., 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979); Lynas v. Williams, 454 S.E.2d 570, 574 (Ga. Ct. App. 1995).

168. *See, e.g.*, *Parks*, 591 P.2d at 1008.

for its services.[169] The plaintiffs paid JONAH in reliance on JONAH's promise to alter their sexual orientation, and so JONAH's misrepresentations resulted in the damages.[170] Similar transactions would likely be replicated in other cases of paid-for SOCE services.

Instead of requiring a consumer-plaintiff to show actual reliance, most other states merely require a showing that the act has a tendency or a capacity to mislead consumers.[171] Notably, courts in states that do not require actual reliance typically consider all levels of consumers, including the unsophisticated and the reasonable, when making a determination on the tendency or capacity of a business practice to mislead.[172] Some states' courts have developed such a formulation by relying on federal cases evaluating FTC practices, finding the same motivation behind state consumer acts as the federal regulations.[173] Such reliance is easy to meet, as consumers generally are considered to rely on all statements of commercial dealers.[174]

D. A Note on State-Brought Consumer Protection Claims

While the ability of a private plaintiff to bring suit against a business serves as a key advantage for plaintiffs in state consumer protection laws, states are able to bring actions against deceptive businesses as well. However, a state-brought consumer protection claim may bring its own set of complications, especially if the state-brought claim is against a SOCE practitioner.

First, not all states allow a private plaintiff to bring antideception consumer protection claims. Iowa, Mississippi, and Texas do not allow consumers to bring actions against deceptive acts, even

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169. *See* Ferguson v. JONAH, No. HUD-L-5473-12, 2015 WL 609436, at *3 (N.J. Super. Ct. Law Div. Feb. 5, 2015).

170. *See id.*

171. *See* Schwartz & Silverman, *supra* note 38, at 19. At least three states have not clearly established whether reliance is a requirement for private consumer protection actions at all. *Id.*

172. *See, e.g.*, Guggenheimer v. Ginzburg, 372 N.E.2d 17, 19 (N.Y. 1977) ("We do not look to the average customer but to ... the ignorant, the unthinking and the credulous.").

173. *See, e.g.*, Kugler v. Koscot Interplanetary, Inc., 293 A.2d 682 (N.J. Super. Ct. Ch. Div. 1972) ("Laws are made to protect the trusting as well as the suspicious." (quoting Goodman v. FTC, 244 F.2d 584, 603 (9th Cir. 1957))).

174. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 3:4.

though Mississippi and Texas allow consumers to bring claims under other aspects of their consumer protection laws.[175] This limitation significantly harms the enforcement of the antideception aspect of consumer protection laws, as consumers must gather some level of state approval of their complaint before taking legal action. In the controversial field of SOCE, consumer-plaintiffs may have difficulty convincing state offices to approve of their lawsuit claims, let alone pursue them. States that do not allow consumers to initiate antideception suits do grant them the opportunity to file formal consumer complaints, although such filings seem to be the limit for consumer action without state action.[176]

When a state enforcement agency brings a consumer protection claim, the agency generally must additionally demonstrate that the suit will serve the public interest.[177] The basis for a public interest requirement comes from a theory of incentivizing a state agency to make wise use of its resources to ensure that its consumer protection claims truly help consumers.[178] However, six states have extended the public interest requirement to private consumers as well.[179]

What exactly satisfies the public interest requirement varies from state to state.[180] States typically require some type of factored test to prove public interest, whether implied by statute or created completely by the state judiciary.[181] As seen by comparing both Colorado's consumer protection law as interpreted by state courts with

175. *See* IOWA CODE § 714.16(7) (2016); MISS. CODE. ANN. § 75-24-21 (2016); TEX. BUS. & COM. CODE ANN. § 17.48 (West 2016).

176. *See Consumer Protection Complaint Form*, OFF. ATT'Y GEN.: ST. MISS., http://www.ago.state.ms.us/forms/consumer-protection-complaint-form/ [https://perma.cc/PR6H-VNBT]; *File a Consumer Complaint*, ATT'Y GEN. TEX., https://www.texasattorneygeneral.gov/cpd/file-a-consumer-complaint [https://perma.cc/BUK9-RA9F]; *File a Consumer Complaint*, IOWA DEP'T JUST.: OFF. ATT'Y GEN., https://www.iowaattorneygeneral.gov/for-consumers/file-a-consumer-complaint/ [https://perma.cc/9UH2-6NQ5].

177. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 5.5. Some have referred to this as a "public impact" requirement. *See, e.g.*, Dubrowski, *supra* note 19, at 95.

178. *See* PRIDGEN & ALDERMAN, *supra* note 27, § 5.5.

179. *Id.* (listing Colorado, Connecticut, Georgia, Nebraska, Washington, and South Carolina as requiring private plaintiffs to show that their suit will serve the public interest).

180. *See* Dubrowski, *supra* note 19, at 95.

181. *See* Martinez v. Lewis, 969 P.2d 213, 222 (Colo. 1998) (en banc) (explaining Colorado's statutory public interest requirement); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 719 P.2d 531, 537 (Wash. 1986) (en banc) (explaining Washington's judge-made public interest requirement).

Washington's court-created public interest requirement, a public interest can generally be proven when deceptive business practices affect multiple consumers, occur multiples times, and could continue into the future.[182] When applying this general formulation of the public interest requirement to claims against SOCE practitioners, the public interest requirement seems most likely to be satisfied when a practitioner is actively advertising SOCE within a community or online and offering SOCE to multiple clients. If taking advantage of public interest requirements, SOCE practitioners may attempt to move to a more direct, one-on-one solicitation of SOCE clients. This would, of course, limit the pervasiveness and publicity of SOCE, but would more than likely be for naught, as such targeted business transactions would still be actionable by private plaintiffs in the vast majority of states.

IV. RESPONDING TO POTENTIAL FIRST AMENDMENT DEFENSES

The aforementioned requirements of a consumer protection claim are merely part of any lawsuit against SOCE practitioners. While some legal arguments exist that may be supportive of practitioner-defendants in consumer protection claims, SOCE practitioners have also demonstrated a willingness to challenge the constitutionality of laws that hinder their SOCE practices.[183] This Part describes the First Amendment defenses that SOCE practitioners will likely assert in an attempt to gain constitutional protection for SOCE practices, with Section A first describing freedom of speech, and Section B then describing freedom of religion.

A. The Likely Inapplicability of Freedom of Speech Defenses

SOCE practitioners have furthered freedom of speech arguments against laws that limit SOCE by focusing mainly on talk therapy, a type of SOCE administered completely through verbal commun-

182. *Compare* COLO. REV. STAT. § 6-1-1102 (2016), *and Martinez*, 969 P.2d at 222, *with Hangman Ridge Training Stables, Inc.*, 719 P.2d at 537.

183. *See* King v. Governor of N.J., 767 F.3d 216, 220 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208, 1221 (9th Cir. 2013).

ication.[184] SOCE practitioners have argued that laws hindering their ability to communicate freely and openly with clients via "talk therapy" unconstitutionally limit their freedom of speech as professionals.[185] Practitioners have been met with conflicting responses to their freedom of speech claims, but all decisions have resulted in the same denial of First Amendment infringement. In *Pickup v. Brown*, for example, the Ninth Circuit disagreed with practitioners and held that a SOCE ban for minors limited conduct, not speech, therefore not infringing on the First Amendment speech rights of SOCE practitioners.[186] The *Pickup* ruling was the first one to involve a court labeling the activities that take place during SOCE, an important determination for a First Amendment ruling.[187] In *King v. Governor of New Jersey*, a case involving a SOCE ban for minors similar to *Pickup*, the Third Circuit disagreed with the Ninth Circuit and determined the law regulated professional speech, not conduct, and was subject to some degree of First Amendment protection.[188] However, the Third Circuit acknowledged that professional speech had a diminished level of First Amendment protection, and because the SOCE ban for minors advanced a substantial state interest, the law was held constitutional.[189]

The First Amendment speech status of SOCE practices like talk therapy has been hotly debated outside of the courtroom. Some agree that healthcare treatments such as SOCE represent conduct, not speech, and deserve no First Amendment protection.[190] Others predict that anti-SOCE laws do implicate the First Amendment and will be unable to pass heightened levels of constitutional scrutiny.[191] Some are more generally concerned as to the categorization of

184. *See King*, 767 F.3d at 224.

185. *See id.*

186. *See Pickup*, 740 F.3d at 1222.

187. *See* William Travis, Case Note, *Bad Medicine: The Ninth Circuit Reviews Issues of Free Speech, Professional Regulations, and California's Ban on Sexual Orientation Change Efforts in* Pickup v. Brown, 23 TUL. J.L. & SEXUALITY 191, 191-92 (2014).

188. *See King*, 767 F.3d at 224.

189. *See id.*

190. *See, e.g.*, Nick Clair, *Chapter 835: "Gay Conversion Therapy" Ban: Protecting Children or Infringing Rights?*, 44 MCGEORGE L. REV. 550, 557 (2013).

191. *See, e.g.*, Megan E. McCormick, Note, *The Freedom to Be "Converted"?: An Analysis of the First Amendment Implications of Laws Banning Sexual Orientation Change Efforts*, 48 SUFFOLK U. L. REV. 171, 202 (2015).

speech for therapeutic professionals.[192] Yet, at least one assertion is clearly true: the First Amendment questions surrounding therapist-patient communications are unsettled.[193] Thankfully, the speech in question in a consumer protection action is not as muddled as the speech in question from a law that directly bans SOCE practices. In fact, the uncertainty of the First Amendment on laws banning SOCE outright has led to the suggestion to SOCE opponents that they focus on "anti-deception statutes of general applicability" instead of outright bans.[194] Antideception consumer protection laws fit this proposal.[195]

Consumer protection laws have already proved their constitutional muster under challenges to commercial speech.[196] With consumer protection claims against SOCE practitioners focusing on the deceptive nature of SOCE advertising and not the actual speech between therapists and patients, the consumer protection laws likely avoid the still-unclear area of talk therapy First Amendment jurisprudence altogether.

B. Freedom of Religion: A Consumer-Plaintiff's Greatest Challenge

When utilizing religious freedom defenses, practitioner-defendants have two pathways to validate their SOCE practices. First,

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192. *See, e.g.*, Warren Geoffrey Tucker, Note, *It's Not Called Conduct Therapy; Talk Therapy as a Protected Form of Speech Under the First Amendment*, 23 WM. & MARY BILL RTS. J. 885, 886 (2015).

193. *See* Clay Calvert et al., *Conversion Therapy and Free Speech: A Doctrinal and Theoretical First Amendment Analysis*, 20 WM. & MARY J. WOMEN & LAW 525, 571 (2014) (noting that conversion therapy and free speech is "an issue that easily could, given its controversial nature, work its way up to the nation's high court"). *But see* Christian S. Cyphers, *Banning Sexual Orientation Therapy: Constitutionally Supported and Socially Necessary*, 35 J. LEGAL MED. 539, 540 (2014) (arguing that SOCE bans are clearly constitutional).

194. *See* Victor, *supra* note 18, at 1537, 1562-64.

195. *See id.* at 1563-64 (focusing primarily on professional codes of conduct, but acknowledging consumer protection laws as "wide-ranging anti-deception regulation").

196. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("The government may ban forms of communication more likely to deceive the public than to inform it."); *see also* Shawn L. Fultz, Comment, *If It Quacks Like a Duck: Reviewing Health Care Providers' Speech Restrictions Under the First Prong of* Central Hudson, 63 AM. U. L. REV. 567, 587 (2013) (stating that commercial speech limitations on deceptive or misleading speech for professionals must satisfy rational basis review).

this Section discusses how SOCE practitioners may be able to rely on their religious beliefs to avoid liability under consumer protection laws, and then this Section explains how practitioners can use the protection awarded to religious institutions to provide SOCE.

1. Religious Beliefs of SOCE Practitioners

The practitioner-defendants in *Ferguson v. JONAH* believed that homosexuality was a learned behavior and that homosexuality could be reduced or eliminated through psychological and spiritual help.[197] Such a belief may be scientifically untrue, as sexual orientation may be a completely immutable characteristic.[198] But what if SOCE practitioners truly believe that certain SOCE, particularly spiritual therapy, can alter sexual orientation? Some argue that in order to be liable for fraud, one must know that the services he or she provides do not result in the promised results.[199] This definition is frustrated in the world of spiritual services, in which practitioners sincerely believe in the ability of the services they offer.[200] Analogized to SOCE, a practitioner's sincere beliefs may not be half-baked assertions to avoid liability in a consumer protection claim, but instead deeply held convictions that become a vital part of the consumer transaction.

With the passage of the federal Religious Freedom Restoration Act (RFRA), a new body of law developed in the United States surrounding the ability of private citizens to invoke freedom of religion defenses when noncompliant with the law.[201] The existence of such law provides the possibility that SOCE practitioners could defend themselves against consumer protection claims by arguing that consumer protection laws substantially burden their free exercise of religion, with the exercise in question being the ability

197. *See* Ferguson v. JONAH, No. HUD-L-5473-12, 2015 WL 609436, at *3 (N.J. Super. Ct. Law Div. Feb. 5, 2015).

198. *See supra* Part II.B.

199. *See* Jonathan Bolton, *Between the Quack and the Fanatic: Movements in Our Self-Belief*, 14 MED. HEALTH CARE & PHIL. 281, 282 (2011).

200. *See* Amanda van Eck Duymaer van Twist, *Introduction* to MINORITY RELIGIONS AND FRAUD: IN GOOD FAITH (Amanda van Eck Duymaer van Twist ed., 2014) (ebook); Bolton, *supra* note 199, at 282-83.

201. *See* City of Boerne v. Flores, 521 U.S. 507, 512-16 (1997).

and right to alter sexual orientation through spiritual means. With its broad application, RFRA's protections apply not only to persons, but also corporations, companies, associations, societies, and similar entities.[202] However, the federal RFRA is limited because it does not apply to state and local governments.[203]

The applicability of RFRA laws, however, does not stop at the federal level. As of February 2016, nineteen states had adopted laws based on the federal RFRA, creating state RFRAs.[204] The purpose of many state RFRAs has been to apply a stronger version of the federal RFRA to citizens of those states, so that state governments may substantially burden a right to free exercise of religion only if the regulation furthers a compelling state interest and utilizes the least restrictive means available.[205] Despite the potential applicability of state RFRAs to consumer protection claims against SOCE, state RFRA cases have been small in number, and the true impact of such laws is largely left to be seen.[206] With state RFRAs getting a lot of media attention on issues affecting gay, lesbian, and bisexual individuals,[207] SOCE practitioners are likely to attempt to use the defenses when available.

In states without RFRA laws, though, commercial and professional groups that subscribe to views against homosexuality and provide SOCE seem to have little First Amendment protection from consumer protection laws. Courts have found that laws directly banning SOCE for minors were constitutional for being neutral, generally applicable, and rationally related to a legitimate government

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202. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014).

203. *See* Mary L. Topliff, Annotation, *Validity, Construction, and Application of Religious Freedom Restoration Act (42 U.S.C.A. §§ 2000bb et seq.)*, 135 A.L.R. Fed. 121 § 3 (2015).

204. *See* Jordan Mathews, Comment, *State RFRAs: Trust Judges to Strike the Proper Balance Between Religious Freedom and Anti-Discrimination Law*, 85 MISS. L.J. SUPRA (forthcoming 2016) (manuscript at 14), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2558835 [https://perma.cc/JVX5-9EMU].

205. *See* Brian L. Porto, Annotation, *Validity, Construction, and Operation of State Religious Freedom Restoration Acts*, 116 A.L.R. 5th 233 § 2 (2004).

206. An in-depth analysis of state RFRA applicability is outside the scope of this Note. For a general discussion of state RFRA applicability, see Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 479-82 (2010).

207. *See, e.g.*, Tom Davies, *Indiana Officials Look to Stem Religious Objections Fallout*, ASSOCIATED PRESS (Mar. 28, 2015, 3:36 AM), http://bigstory.ap.org/article/5c0770a9256e4dca98c4c569f62f44db/indiana-officials-look-stem-religious-objections-fallout [https://perma.cc/6YL4-BSC4].

objective.[208] If a law specifically targeting SOCE practices can survive constitutional scrutiny, then neutral consumer protection laws likely will as well.

2. The Immunity of Religious Institutions

In the United States, religious institutions have long opposed homosexual behavior as morally wrong.[209] With the ability to point to religious texts that decry homosexuality,[210] religious groups have influenced the continuation of SOCE and still have great interest in continuing to ensure the availability of SOCE practices.[211] In the wake of *Ferguson v. JONAH*, opponents of SOCE have acknowledged that applying consumer protection laws to religious institutions will be a challenge, and they expect SOCE practitioners to "be forced to operate through churches and other religious institutions" and to rely on religious freedom legal defenses.[212]

While commercial SOCE practitioners who hold certain religious beliefs may be found liable for deceptive trade practices under consumer protection laws, religious groups offering SOCE are likely to be completely protected from any claim under consumer protection laws. To demonstrate this point, one must look to case law in which religious institutions have been challenged under any type of fraud law. Most notably, the Fifth Circuit's *Word of Faith World Outreach Center Church, Inc. v. Morales* decision involved a Texas church being publicly accused in a media exposé of falsely representing its charitable endeavors, despite its supporters and members having sent it $65 million in one year.[213] The accusation resulted in the Texas Office of the Attorney General demanding documents from the church pursuant to Texas's consumer protection law.[214] The

208. *See* King v. Governor of N.J., 767 F.3d 216, 241-43 (3d Cir. 2014).

209. Jonathan Sacks, New Development, *"Pray Away the Gay?" An Analysis of the Legality of Conversion Therapy by Homophobic Religious Organizations*, 13 RUTGERS J.L. & RELIGION 67, 71 (2011).

210. *See, e.g.*, *Leviticus* 18:22 ("You shall not lie with a male as one lies with a female; it is an abomination.").

211. *See* Sacks, *supra* note 209, at 72.

212. Khazan, *supra* note 5.

213. 986 F.2d 962, 963-64 (5th Cir. 1993).

214. *Id.* at 964. Despite the *Word of Faith* case not being brought by a private consumer-plaintiff, it still serves as a strong illustration of the problems in bringing consumer protection

church refused to provide the documents, and the Attorney General then filed a petition to compel the church to provide the requested documents.[215] In response, the church filed its own federal lawsuit, aiming to assert its own rights and privileges as a church against the state's legal action.[216]

The district court issued two holdings that ruled in favor of the church and halted the Texas consumer protection law from applying to religious institutions. First, the court held that religious institutions did not fall within the scope of the Texas consumer protection law.[217] Second, the court stated that even if the church was subject to the Texas consumer protection law, the law could not constitutionally be applied to the church.[218] While an appeals court on review stated that the district court's rulings were unnecessary and reversed and remanded the case for other reasons,[219] the district court's reasoning for its rulings is important to understanding the applicability of consumer protection laws to religious institutions.

First, the *Word of Faith* decision illustrates that consumer protection laws are limited to business transactions,[220] and courts have been reluctant to define church relationships with parishioners as business transactions. With the Word of Faith Church operating as a nonprofit institution providing religious services and its donors offering gratuitous donations, the church could not be subject to the consumer protection law.[221] Despite its reversal, the appeals court agreed with the district court that "it is highly likely" that Texas's consumer protection statute does not apply to the church, but urged that the application of Texas's consumer protection law was to be determined by the Texas courts.[222]

While the first *Word of Faith* decision did not even result in binding case law in the Fifth Circuit due to the reversal, its first holding spells trouble for the ability to bring a consumer protection claim

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claims against religious institutions.

215. *Id.*

216. Word of Faith World Outreach Ctr. Church, Inc. v. Morales, 787 F. Supp. 689, 692 (W.D. Tex. 1992), *rev'd*, 986 F.2d 962 (5th Cir. 1993).

217. *Id.* at 696.

218. *Id.* at 698.

219. *Word of Faith*, 986 F.2d at 968-70.

220. *See supra* text accompanying notes 138-39.

221. *See Word of Faith*, 787 F. Supp. at 697.

222. *See Word of Faith*, 986 F.2d at 968.

against a church for the services it provides, such as church-provided SOCE. Imagine a church and its religious officers provide SOCE as a religious service to its parishioners at no cost. Under the reasoning in *Word of Faith*, as long as a church's SOCE does not resemble a business transaction and is offered gratuitously, a consumer protection claim against the church would not succeed, even if the church-provided SOCE meets the deceptive and harmful elements of a consumer protection claim.

The *Word of Faith* district court's religious freedom holding further illustrates problems for consumer protection actions against religious institutions. The district court held that the Texas consumer protection proceedings against the church fostered "an excessive government entanglement with religion."[223] The district court looked not at the initial legal action brought under the Texas consumer protection law itself, but at its potential "end result": an injunction against the church providing the deceptive practice and the continual oversight of church activities.[224] Because the "end result" of actions under the Texas consumer protection law would result in oversight and excessive government entanglement, the church could not constitutionally be held liable under the Texas consumer protection law.[225]

Although the appeals court did not state an official opinion on the district court's findings on First Amendment protections of the church,[226] the district court was not the first court to find consumer laws inapplicable to religious institutions due to excessive government entanglement.[227] Even though the *Word of Faith* case was brought by the state attorney general's office, thirty-three states allow private consumer-plaintiffs to bring actions similar to those of the state attorneys general, meaning that injunctive relief is

223. *See Word of Faith*, 787 F. Supp. at 701 (quoting Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

224. *See id.* at 701-02.

225. *See id.* at 702.

226. *Word of Faith*, 986 F.2d at 968 ("We venture no opinion as to the correctness of the district court's decision on the constitutional merits.").

227. *See* Surinach v. Pesquera de Busquets, 604 F.2d 73, 78-79 (1st Cir. 1979) (finding Puerto Rico's Department of Consumer Affairs' investigations into Catholic schools to represent excessive government entanglement); s*ee also* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 674-75 (1970) (describing excessive government entanglement in relation to determining the tax-exempt status of churches).

available should the plaintiffs succeed.[228] In light of court decisions such as *Word of Faith*, consumer protection laws are generally considered to infringe unconstitutionally on religious freedom. Therefore, even if church-provided SOCE is part of a consumer-business transaction, practitioner-defendants likely remain untouchable due to churches' religious freedom rights.[229]

CONCLUSION

A viable path exists for individuals harmed by SOCE to bring consumer protection claims against the practitioners who have provided damaging SOCE services. After all, the result of the *Ferguson v. JONAH* case speaks for itself. However, the path is not so straightforward. Moving forward from *Ferguson v. JONAH*, SOCE practitioners are likely to adapt their practices in three major ways. First, SOCE practitioners may begin to advertise and represent their services in different ways, taking advantage of the unclear status of sexual orientation and avoiding the "deceptive trade practice" label. Second, SOCE practitioners can generate legal arguments that apply to other aspects of state consumer protection laws that were not applicable in New Jersey, particularly intent and reliance. Third, SOCE practitioners can create the greatest obstacle of all if they are able to avail themselves to religious protections. State RFRA protections may help individual practitioners, and the First Amendment insulates religious institutions from any liability.

Ultimately, the challenges are not insurmountable, and *Ferguson v. JONAH* may certainly be replicated to some extent nationwide. With consumer protection laws offering a viable path forward for former SOCE patients to bring claims against practitioners, the

228. *See, e.g*, HAW. REV. STAT. § 480-13(b)(2) (2016); PRIDGEN & ALDERMAN, *supra* note 27, § 6.9.

229. In a unique case from Florida, a state appeals court allowed an antideception consumer protection claim to proceed against a defendant invoking a religious freedom defense. *See* State v. Jackson, 576 So. 2d 864, 864-65 (Fla. Dist. Ct. App. 1991). *Jackson*, however, does not necessarily impact consumer protection laws as applied to established religious institutions, as the defendant was a self-proclaimed reverend who mailed solicitations promising to provide winning lottery numbers "revealed to him by God" to those who sent him money. *See id.* The court's reasoning seemed to be underlined by the court's concern with the overtly fraudulent nature of the solicitations and the court's minimal belief in the sincerity of the defendant's asserted religious beliefs. *See id.* at 868 (Gersten, J., specially concurring).

practice of SOCE may be reduced in the coming years. But the availability of consumer protection actions are far from a guarantee to eradicate SOCE altogether. After all, SOCE practitioners may not be able to alter sexual orientation, but they are certainly able to alter the way they represent SOCE.

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* J.D. Candidate 2017, William & Mary Law School; B.A. 2014, Pennsylvania State University. I would like to thank my family for its continuous support of all my academic endeavors. Your encouragement inspires and motivates me to always do my best. Of course, I would be remiss to not also thank the staff members of the *William & Mary Law Review* for their work editing this Note and Professor Christopher L. Griffin, Jr., for his helpful comments and suggestions.