

“PRAY AWAY THE GAY?” AN ANALYSIS OF THE
LEGALITY OF CONVERSION THERAPY BY
HOMOPHOBIC RELIGIOUS ORGANIZATIONS

*Jonathan Sacks*¹

I. INTRODUCTION

“You can’t pray away the gay...baby I was born this way!”² rallied a gay rights activist group³ who infiltrated Bachmann & Associates, Inc. (“the Bachmann Clinic”),⁴ a Minnesota faith based counseling clinic, owned by former GOP presidential hopeful Michele Bachmann and her husband, Marcus.⁵ The protest came amidst the media firestorm that ensued after Andrew Ramirez, a former patient, gave an exclusive interview with ABC News where he stated that counselors at the Bachmann Clinic conducted controversial conversion therapy on him,⁶ in which he was told that

1. New Developments Associate Editor, Rutgers Journal of Law & Religion; J.D. Candidate May 2013, Rutgers School of Law-Camden.

2. See Posting of Dan Savage to The Stranger, <http://slog.thestranger.com/slog/archives/2011/07/21/gay-barbarians-invade-bachmanns-pray-away-the-gay-clinic-demanding-to-be-disciplined>. (July 21, 2011, 12:57 PM).

3. This gay rights group dressed in barbarian costumes during their protest in reaction to alleged statements by Marcus Bachmann that gays are “barbarians who need to be disciplined.” Jim Newell, *Horde of Gay Barbarians Glitterbomb Marcus Bachmann’s Clinic*, THE GAWKER, July 21, 2011, 2:29 PM, <http://gawker.com/5823490/horde-of-gay-barbarians-glitterbomb-marcus-bachmanns-clinic>. The audio clip of this statement was heard over a year ago on an obscure Christian Radio show and has blossomed into a nationally known sound-bite. Mike Mullen, *Ken Avidor: I didn’t doctor Marcus Bachmann’s ‘gay barbarians’ quote*, CITY PAGES, July 15, 2011, http://blogs.citypages.com/blotter/2011/07/marcus_bachmann_barbarians_quote.php.

4. See Jim Acosta and Erika Dimmler, *What’s going on at the Bachmann clinic?*, CNN, July 12, 2011, <http://politicalticker.blogs.cnn.com/2011/07/12/whats-going-on-at-the-bachmann-clinic/> (stating that Bachman & Associates is a Christian counseling service that was started by Michele and Marcus).

5. Marcus serves as the lead counselor at the clinic. *Id.* Michele Bachman dropped out of the GOP race on Wednesday, January 4, 2012 after finishing sixth in the Iowa caucuses with 5% of the votes. Brian Montopoli, *Michele Bachmann Drops Out of GOP Race*, CBS NEWS, Jan. 4, 2012, http://www.cbsnews.com/8301-503544_162-57352112-503544/michele-bachmann-drops-out-of-gop-race/.

6. Brian Ross, *Michele Bachmann Clinic: Where You Can Pray Away the Gay?* ABC NEWS, July 11, 2011, <http://abcnews.go.com/Blotter/michele-bachmann-exclusive-pray-gay-candidates-clinic/story?id=14048691>. Conversion therapy is

prayer could rid him of his homosexual urges and that he could eventually be “re-oriented.”⁷ This report helped confirm the rumors, which the Bachmanns had continuously denied, that the Bachmann Clinic was offering conversion therapy to help “convert” homosexuals into heterosexuals.⁸

The controversy was exacerbated when it was revealed that the Bachmann Clinic had received over one hundred thousand dollars in state and federal funding.⁹ Considering the current economic

also known as reparative therapy and reorientation therapy. *Reparative & other therapy to alter sexual orientation, Introduction, Part 1: Quotations, Overview, & Terminology*, http://www.religioustolerance.org/hom_exod.htm (last visited Dec 31, 2011).

7. Ross, *supra* note 6. Ramirez was 17 at the time he sought help from the clinic. *Id.* He told ABC news that “[o]ne counselor’s path for my therapy would be to read the Bible, pray to God that I would no longer be gay... And God would forgive me if I were straight.” *Id.*

8. Grace Wyler, *ABC News Confirms Bachmann Clinic Used ‘Pray Away The Gay’ Therapy*, BUSINESS INSIDER, July 11, 2011, <http://www.businessinsider.com/abc-news-confirms-bachmann-clinic-used-pray-away-the-gay-therapy-2011-7>. Even more evidence of the clinic’s practices were exposed when the gay activist group, “The Truth Wins Out,” sent staffer John Becker to pose as a patient at the Bachmann clinic. Michelle Goldberg, *Marcus Bachmann’s Gay ‘Cure,’* THE DAILY BEAST, July 10, 2011, <http://www.thedailybeast.com/articles/2011/07/10/marcus-bachmann-s-controversial-gay-therapy-and-how-it-affects-michele-s-campaign.html>. Becker attended and secretly videotaped five sessions with therapist Timothy Wiertzma, who “assured him that it’s possible to rid himself of same-sex attractions.” *Id.* In the transcript of a session, Wiertzma stated that, “I think it’s possible to be totally free of [same-sex urges]...it’s happened to a number of people. I don’t know how many, but...that’s for sure.” *Id.* The transcript further revealed that Wiertzma told Becker that, “we’re all heterosexuals, but we have different challenges.” *Id.* Wiertzma instructed Becker to attend an “ex-gay Outpost Ministry, to ‘further develop your own sense of masculinity,’ and to cultivate an attraction to females by paying attention to beautiful women and acknowledging ‘the fact, like okay, God made her this way, you know, that’s awesome.’” *Id.*

9. See Joan Walsh, *Bachmann clinic got \$137,000 in Medicaid funds*, SALON, June 29, 2011, http://www.salon.com/news/opinion/joan_walsh/politics/2011/06/28/bachmann_gets_medicaid_subsidies. NBC News revealed that the Bachmann clinic received \$137,000 in Medicaid funds over the last five years, along with \$24,000 in federal funds to train clinic employees. *Id.* The funds to Bachmann & Associates are for “the treatment of low-income mentally ill patients and are based on a ‘fee for service’ basis, meaning the clinic was reimbursed by Medicaid for the services it provided.” Bossip Staff, *Bolitics: Michele Bachmann’s Clinic Receives \$137K In Medicaid Funds*, BOSSIP, June 29, 2011, <http://bossip.com/407762/boliticsmichele92380/>. Additionally, the clinic has taken in approximately \$30,000 in state funds since 2007. Andy Birkey, *Bachmann’s Christian counseling clinic receives state funds*, THE MINNESOTA INDEPENDENT,

difficulties facing the nation, it is disconcerting to learn that federal funds have been going to an organization practicing a form of therapy that has been discredited by the psychological community.¹⁰ Furthermore, conversion therapy is viewed by the homosexual community as the overt perpetuation of homophobia.¹¹ Religious organizations have been receiving considerable federal funding since former President George W. Bush issued an executive order on January 29, 2001, which established the White House Office of Faith-Based and Community Initiatives.¹² The President's goal was to provide faith-based entities with an equal opportunity to compete with secular service organizations for federal funds.¹³ While there have been challenges to the federal funding of religious social service providers, the constitutionality of religious organizations receiving federal money has not yet been addressed.¹⁴

Without guidance on the constitutionality of this funding, it appears that the most effective way to frustrate the practice of conversion therapy appears to be a direct legal attack on the practitioners themselves or on the parents who subject their children to this therapy. First, this article will outline the history and subsequent discrediting of conversion therapy by the psychological community. Next, this article will provide an overview of past government support for religiously driven homophobia. Finally, this article will suggest that while it is unlikely that federal fund-

June 4, 2010, <http://minnesotaindependent.com/59781/bachmanns-christian-counseling-clinic-receives-state-funds>.

10. See Douglas C. Halderman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 221, 221 (1994) (finding that the literature in psychotherapeutic and religious conversion therapies shows "no evidence" indicating that such treatments are effective in their intended purpose).

11. See Douglas C. Halderman, *The Pseudo-science of Sexual Orientation Conversion Therapy*, 4 ANGLES: THE POL'Y J. OF THE INSTITUTE FOR GAY AND LESBIAN STRATEGIC STUDIES 1, 1 (1999) (stating that "the promotion of reparative or conversion therapy goes beyond its obvious market of disaffected lesbian, gay and bisexual people" and that the promotion of conversion therapy attempts to "influence public opinion and justify anti-gay discrimination by inaccurately portraying homosexuality as a mental disorder and a social evil").

12. Exec. Order No. 13,199, 66 Fed. Reg. 8, 499 (Jan. 29, 2001).

13. Anthony M. Lise, *Bringing Down the Establishment: Faith-Based and Community Initiative Funding, Christianity, and Same-Sex Equality*, 12 N.Y. CITY L. REV. 129, 148 (2008).

14. See *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 593 (2007).

ing for religiously based homophobic organizations would be found unconstitutional under the Fourteenth and Fifth Amendments,¹⁵ legal attacks on the practice of conversion therapy, itself, could dissuade the continuation of this discredited and dangerous therapy.

II. CONVERSION THERAPY

Practitioners of conversion therapy have utilized a variety of treatments ranging from the novel and humorous to the appalling and dangerous.¹⁶ These treatments include: psychoanalytic therapy, prayer and spiritual interventions, electric shock, nausea-inducing drugs, hormone therapy, surgery, and behavioral treatments, including masturbatory reconditioning, rest, visits to prostitutes, and excessive bicycle riding.¹⁷ For example, a student revealed to the Kansas State Collegian that as a teenager he was subjected to a method of conversion therapy that utilized a combination of mental and physical torture.¹⁸ His treatment first consisted of two months of complete emotional and mental breakdown in which the therapist told him he was an “abomination,” that he, like *all* gay men, had AIDS,¹⁹ and that “there were no other gay people in the world, [because] the government found gay children and killed them.”²⁰ For the next stage of his therapy, the student

15. See *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (articulating the theory of reverse incorporation in which the equal protection guarantee of the Fourteenth Amendment is incorporated into the Fifth Amendment’s Due Process Clause, allowing equal protection to apply to the federal government; therefore, an individual is protected against a denial of equal rights by the national government). The Fifth and Fourteenth Amendments have also served as the primary source of fundamental rights under a substantive due process theory of constitutional interpretation. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (determining that the Fifth and Fourteenth Amendments’ Due Process Clause protected the fundamental right to engage in private sexual conduct between consenting adults).

16. Halderman, *supra* note 10, at 221.

17. *Id.*

18. Jason Miller, *Student Recounts Painful Conversion Therapy, Abuse*, KANSAS STATE COLLEGIAN, Dec. 7, 2009, <http://www.kstatecollegian.com/news/student-recounts-painful-conversion-therapy-abuse-1.2114740?pagereq=1>. The student, utilizing an anonymous name, shared his story, with the paper as part of a series addressing the gay community and its relationship to organized religion. *Id.*

19. The therapist lied to the student, telling him that he was going to die of AIDS and that he needed to change before he died. *Id.*

20. *Id.*

was strapped to a chair where he had either blocks of ice or chemical heat pads pressed to his palms as he was shown images of same sex intimacy.²¹ The final stage of his “treatment” consisted of being electrocuted while being shown homosexual pornographic images.²² While this individual’s case appears extreme, the idea of changing an individual’s sexual orientation has existed as long as homosexuality has been discussed in psychological and medical literature.²³

Organized religion is the most potent source of opposition to homosexuality as most religious groups in the United States have long believed that homosexual behavior is morally wrong.²⁴ In the United States, the vanguard in opposing homosexuality and promoting conversion therapy are Evangelical Protestants, who are “especially prone to stigmatize homosexuality.”²⁵ This disposition arises because Evangelical theology stresses individual morality and assigns to “social institutions, including the government, responsibility for fostering individual moral behavior.”²⁶ Evangelicals have been joined by other theologically conservative churches to form what is known as the “Christian Right,”²⁷ a social movement concentrated among “religious traditionalists.”²⁸ However, Evangelicals are diverse in religious terms and not all are strictly antigay.²⁹

21. *Id.*

22. Miller, *supra* note 18 (he had “[v]ery very thin needles...inserted into [his] fingers” and was electrocuted as “all types of adult images were portrayed on the screen”).

23. Halderman, *supra* note 10, at 221.

24. John C. Green, *Antigay: Varieties of Opposition to Gay Rights*, in *THE POLITICS OF GAY RIGHTS* 121, 122 (Craig Rimmerman, Kenneth Wald & Clyde Wilcox eds., 2000), available at <https://www9.georgetown.edu/faculty/wilcox/green.PDF>.

25. *Id.* at 123.

26. *Id.*

27. The Christian Right is a social movement concentrated among Evangelical Protestants and dedicated to restoring “traditional values” in public policy. *Id.* at 125. One of their chief goals is to respond to the “moral decay” of American society, mainly the “decaying traditions” of the patriarchal family, defined as “two, legally married heterosexual adults and their children.” *Id.* at 125-26.

28. *Id.* at 123.

29. *Id.* Many other religious traditions are divided on this issue. *Id.* For example, “mainline and black Protestants, Roman Catholics and Jews all contain elements that are critical of homosexuality...[b]ut within these groups...are also elements tolerant of gay rights, and still others that are strong proponents.” *Id.*

These antigay views are “frequently rooted in sacred texts and codes of sexual conduct derived from those texts.”³⁰ Specifically, opponents of homosexuals point to “The Sin of Sodom-Genesis 19,” which they interpret as God punishing the people of Sodom, because the men of the City surrounded Lot’s house and ordered him to bring out the men so that they “may know them.”³¹ The statement “we may know them” has been interpreted to mean that the men of the city wanted to have sexual relations with the visitors.³² Furthermore, these opponents support this interpretation with a commentary on Genesis 19, found in Jude 7, which “states that the sin of Sodom involved gross immorality and going after strange flesh.”³³ Other verses that have been used to denounce homosexual behavior are: Lev. 18:22,³⁴ Lev. 20:13,³⁵ 1 Cor. 6:9-10,³⁶ and Rom. 1:26-28.³⁷

For over a century, partly in response to religious influences, many medical, psychological, and religious practitioners have tried to reverse homosexual behavior.³⁸ The rationale behind conversion therapy has “deep roots” in the history of psychology.³⁹ For a long time, homosexuality was considered a disease, and this belief per-

30. *Id.* at 122.

31. See Kerby Anderson, *Homosexual Theology*, BIBLE.ORG 1997, <http://bible.org/article/homosexual-theology>.

32. *Id.*

33. *Id.*

34. “You shall not lie with a male as one lies with a female; it is an abomination.” *Lev* 18:22 (NASB Bible).

35. “If there is a man who lies with a male as those who lie with a woman, both of them have committed a detestable act; they shall surely be put to death. Their bloodguiltiness is upon them.” *Lev* 20:13 (NASB Bible).

36. “Or do you not know that the unrighteous shall not inherit the kingdom of God? Do not be deceived; neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor homosexuals, nor thieves, nor the covetous, nor drunkards, nor revilers, nor swindlers, shall inherit the kingdom of God.” *1 Cor* 6:9-10 (NASB Bible).

37. “For this reason God gave them over to degrading passions; for their women exchanged the natural function for that which is unnatural, and in the same way also the men abandoned the natural function of the woman and burned in their desire toward one another, men with men committing indecent acts and receiving in their own persons the due penalty of their error. And just as they did not see fit to acknowledge God any longer, God gave them over to a depraved mind, to do those things which are not proper.” *Rom* 1:26-28 (NASB Bible).

38. Halderman, *supra* note 10, at 221.

39. Over the past four decades, several psychologists and psychiatrists have contributed to the notion that homosexuality is caused by childhood circumstances and can be unlearned. Reparative Therapy: Idealized Heterosexuality, <http://www.publiceye.org/equality/x-gay/X-Gay-04.html> (last visited Jan. 5, 2012).

sisted until the American Psychiatric Association (“APA”) decided to remove homosexuality from its Diagnostic and Statistical Manual of Mental Disorders in 1973.⁴⁰ Although homosexuality is no longer defined as a mental disorder, efforts to reorient homosexuals have persisted.⁴¹ The APA followed the decision to remove this classification with a resolution affirming the anti-illness homosexual perspective, stating that “the APA urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations.”⁴² The APA stressed that conversion therapies diverge from their policies and have been questioned as a matter of professional ethics.⁴³ More specifically, conversion therapy is in conflict with the psychological ethics mandate that all mental health professionals subscribe to methods that “support human dignity and are effective in their stated purpose.”⁴⁴ In fact, the APA’s practice guidelines for lesbian, gay, and bisexual clients states that “same-sex attractions, feelings, and behaviors are normal variants of human sexuality and that efforts to change sexual orientation have not been shown to be effective or safe.”⁴⁵

Bryant Welch, the APA’s executive director for professional practice, has stated that the “research [on conversion therapy] findings suggest that efforts to ‘repair’ homosexuals are nothing more than social prejudice garbed in psychological accoutrements.”⁴⁶ In addition to the antiquated, unscientific hypotheses on which conversion therapy has been based, the modern view of sexuality has rendered “traditional reorientation therapy anachronistic.”⁴⁷ The primary proponents of conversion therapy have

40. Douglas C. Halderman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 149, 149 (J. Gonsiorek & J. Weinrich eds., 1991), available at <http://drdoughaldeman.com/doc/ScientificExamination.pdf>.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 159. The APA’s “Fact Sheet on Reparative Therapy” opens with: “No scientific evidence exists to support the effectiveness of any of the conversion therapies that try to change sexual orientation.” *Id.*

45. *Practice Guidelines for LGB Clients: Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients*, <http://www.apa.org/pi/lgbt/resources/guidelines.aspx?item=3> (last visited Dec. 31, 2011).

46. Halderman, *supra* note 40, at 150.

47. Halderman, *supra* note 10, at 226.

been pastors and religiously-oriented lay persons.⁴⁸ Mental health professionals have also served as referral sources to fundamentalist Christian groups who provide conversion therapy.⁴⁹ These practitioners promote methods of sexual reorientation based primarily on dismissed notions of the pathology of homosexuality and certain biblical interpretations.⁵⁰ Advocates of secular reparative therapy for homosexuals “play an important role within the ex-gay movement and the homophobic agenda of the Christian Right, blurring the lines between clinical and political issues.”⁵¹ Furthermore, many secular practitioners of conversion therapy support anti-gay legislation, and “reparative therapists have moved from the traditional psychoanalytic center and have been embraced by conservative religious and political forces opposed to homosexuality.”⁵²

Conversion therapy has been largely discredited because of its proven ineffectiveness and its potentially dangerous effects on patients. Specifically, empirical studies have failed to show any evidence that conversion therapy can achieve its stated goal of changing sexual orientation.⁵³ In fact, “no consistency emerges” from studies that claim sexual orientation is “amendable to redirection or significant influence from psychological intervention.”⁵⁴

Not only is conversion therapy ineffective, but it also has potentially deleterious effects. For example, this therapy poses a significant risk to patients as it has been shown that those homosexuals most likely to be inclined toward “doctrinaire religious

48. Halderman, *supra* note 40, at 156. Although, individuals like Marcus Bachmann, religiously-orientated mental health professionals, have attempted to combine Christianity with clinical psychology in order to provide clientele with faith based counseling. See Bachman & Associates, Inc., <http://www.bachmanncounseling.com/> (last visited Dec. 31, 2011).

49. Halderman, *supra* note 40, at 156.

50. *Id.* at 160.

51. Reparative Therapy: Idealized Heterosexuality, <http://www.publiceye.org/equality/x-gay/X-Gay-04.html> (last visited Dec. 31, 2011). The lead organization advocating secular reparative therapy is the National Association for the Research and Therapy of Homosexuality (NARTH), which was founded in 1992 by Charles Socarides, Benjamin Kaufman, and Joseph Nicolosi in preparation for the 20th anniversary of the 1973 decision by the American Psychological Association to remove homosexuality from its Diagnostic Manual. *Id.* NARTH's statement of policy idealizes heterosexuality as the norm and the organization clearly values social conformity above the needs of the individual. *Id.*

52. *Id.*

53. Halderman, *supra* note 40, at 149.

54. Halderman, *supra* note 10, at 224.

practice” are also likely to have low self-esteem, to view their homosexuality as sinful, and to suffer from depression.⁵⁵ These individuals are vulnerable targets for providers of conversion therapy.⁵⁶ Furthermore, these forms of treatment have resulted in patients suffering nervous breakdowns, experiencing feelings of guilt, committing suicide, self-mutilating their genitalia, exhibiting symptoms of post-traumatic stress disorder, and experiencing other psychological traumas.⁵⁷ Many individuals that have undergone religious prayer-based therapy, or other types of counseling-based conversion therapies, have experienced depression over their homosexuality, compounded with a sense of shame over having “failed” at their therapy.⁵⁸ Such patients may have a “psychologically debilitating sense” of having lost those important life elements such as family, religious affiliation, and social support for which there was still some hope as long as the individual was trying to change.⁵⁹ Some former conversion therapy clients also report extraordinary difficulties with interpersonal interactions, and particularly sexual intimacy, with same-sex partners.⁶⁰ Overall, there is a consensus in the psychological professional community that conversion therapy simply does not work and is not founded in legitimate science or psychology.

III. GOVERNMENT SUPPORT FOR RELIGIOUSLY DRIVEN HOMOPHOBIA

While the government has not directly provided federal money to organizations that conduct conversion therapy, indirect federal and state support of religiously driven homophobic initiatives is not a new phenomenon. The government has consistently supported efforts against same-sex marriage and has provided funding for religious organizations that discriminate against homosexuals in hiring practices.⁶¹ Such organizations do not have open mission statements to discriminate against homosexuals, but may

55. Halderman, *supra* note 40, at 156.

56. *Id.*

57. Karolyn Ann Hicks, *Reparative” Therapy: Whether Parental Attempts to Change A Child’s Sexual Orientation Can Legally Constitute Child Abuse*, 49 AM. U. L. REV. 505, 515, n. 42 (1999).

58. Halderman, *supra* note 11, at 3.

59. *Id.*

60. *Id.*

61. See Lise, *supra* note 13, at 149, 168-70.

employ a portion of their resources to engage in anti-gay initiatives.⁶²

For example, the Associated Press recently reported that federal grant money has been awarded to the anti-gay group, “The Family Leader,”⁶³ to provide marriage counseling.⁶⁴ Unfortunately, a portion of the grant money was utilized to pay for the group’s operational expenses while it was leading an anti-gay-marriage campaign.⁶⁵ Similarly, the \$2.2 million given to the Iowa Family Policy Center between 2006 and 2010 helped provide education and counseling but also “paid for part of the salaries of five employees, rent, telephone, internet and other expenses while it was fighting legalized gay marriage in Iowa.”⁶⁶ Additionally, the group declined to serve same-sex couples with the grant money.⁶⁷ Moreover, it has been reported that “Project SOS” (“SOS”), a Jacksonville organization that teaches abstinence-only programming in public schools, received \$454,000 in federal funds in 2010.⁶⁸ SOS’s curriculum promotes arguably homophobic messages, primarily by relaying misinformation about HIV and AIDS.⁶⁹

Anti-gay rights legislation has also been supported by the executive branch of the federal government. For example, President Bill Clinton signed the Defense of Marriage Act (“DOMA”) in 1996.⁷⁰ DOMA authorizes states to ignore the Full Faith and Credit Clause of the Constitution of the United States when deal-

62. See, e.g., Chris Johnson, *Federal Funds Used to Support Anti-Gay Efforts in Iowa*, WASHINGTON BLADE, Aug. 29, 2011, <http://www.washingtonblade.com/2011/08/29/federal-funds-used-to-support-anti-gay-efforts-in-iowa/> (describing how the Iowa group, The Family Leader, received federal funding to further its mission statement to provide marriage counseling and education for state residents, but also used the money for anti-gay initiatives).

63. The Family Leader is a Christian Organization that openly fights same-sex marriage in Iowa. See THE FAMILY LEADER, <http://www.ifpaction.org/>.

64. *Federal Money Funds Anti-Gay Effort*, WISCONSIN GAZETTE.COM, Sept. 10, 2011, <http://www.wisconsin-gazette.com/midwest-gaze/federal-money-funds-anti-gay-effort.html>.

65. *Id.*

66. *Id.*

67. *Id.*

68. Posting of Kerry Eleveld to Equality Matters, <http://equalitymatters.org/blog/201104060011> (April 6, 2011, 2:14 PM).

69. *Id.*

70. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

ing with the issue of same-sex marriage.⁷¹ This act essentially serves as federal disapproval of same-sex marriage. Its legislative history reflects “congressional concern” about the effect that legalizing same-sex marriage in one state would have on “other states, federal laws, the institution of marriage, traditional notions of morality, and state sovereignty.”⁷²

Furthermore, President G. W. Bush’s 2001 faith-based initiative opened the door for religious organizations to more easily receive federal funding.⁷³ Religious institutions, unlike their secular counterparts, do not have to abide by Title VII, which requires the unbiased hiring of qualified employees despite age, race, gender, or sexual orientation, and which allows for discrimination against homosexuals at the discretion of the organizations.⁷⁴ While these organizations cannot deny someone services because of his religious affiliation, they may deny services because of “beliefs he may hold or practices in which he may engage that do not comport with the tenets of the organization’s religion.”⁷⁵

71. James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christian Christianity*, 4 MICH. J. GENDER & L. 335, 337 (1997). Section 2 states that:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship. *Id.* (citing Defense of Marriage Act § 2(a), 28 U.S.C.A. § 1738C (West Supp. 1997)).

Section 3 of the act is less abstract and more controversial than section 2, it states that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife. *Id.* (citing Defense of Marriage Act § 3(a), 1 U.S.C.A. § 7 (West 1997)).

72. Federal Defense of Marriage Act (DOMA), <http://www.domawatch.org/about/federaldoma.html> (last visited Dec. 31, 2011).

73. Federal Funding of Religious Institutions and ‘Faith-Based Initiative’ Program, http://www.secular.org/issues/faith_based (last visited Oct. 4, 2011).

74. *Id.*

75. Lise, *supra* note 13, at 163. For example, “if an organization were to deny services to drug users, or homosexuals, or women who have had abortions,

IV. WHAT CAN BE DONE TO LIMIT THE PRACTICE OF CONVERSION THERAPY?

Constitutional challenges to conversion therapy will not likely affect the operation of practicing clinics because these clinics are administered by private actors without any government oversight. However, by utilizing theories of child abuse, intentional or negligent infliction of emotional distress, negligent malpractice, and informed consent, individual victims of conversion therapy may be able to successfully challenge the legality of this practice and obtain individual relief.

A. *Constitutionality*

Unfortunately, a constitutional challenge to the practice of religiously driven conversion therapy would likely fail, because the therapy is administered privately, without any governmental oversight. While the thought of the Bachmann Clinic receiving taxpayer dollars to reimburse it for providing conversion therapy to low income individuals is repugnant, individual taxpayers have no standing to challenge this practice under the Constitution. The simplest reason for this inability is that there is no “bad” state actor.⁷⁶ A constitutional challenge that is predicated on some sort of state-sponsored initiative, such as a statute or piece of legislation that promotes the perpetuation of homophobia, would be much easier to strike down.⁷⁷ In this situation there is no conscious ac-

or any other person who had engaged in activity with which the organization did not agree, it would be permissible.” *Id.*

76. A “bad” state actor is a phrase used to explain that only the action of the state government or an agent of the state can be challenged under the Constitution. *See, e.g.*, 15 AM. JUR. 2D *Civil Rights* § 73 (2011) (maintaining that in the context of a 42 U.S.C.A. § 1983 civil suit against a government, for deprivation of a federally secured right, a plaintiff must generally show that the alleged deprivation was committed by a person acting under color of state law; conversely, purely private conduct is not within the reach of the statute). More specifically, the Supreme Court has established that “the protections offered by the Fourteenth and Fifteenth Amendments to the U.S. Constitution apply only to actions authorized or sanctioned by state law.” State Action, <http://legal-dictionary.thefreedictionary.com/State+Action> (last visited Jan. 9, 2012). The “state-action” requirement means “private acts of discrimination cannot be addressed under these amendments or the federal civil rights laws authorized by the amendments.” *Id.*

77. Such a piece of legislation would clearly be unconstitutional under the framework of *Romer v. Evans*, which determined that an amendment to the Colo-

tion on the part of the government to support conversion therapy. The lack of government action could be analogized to a situation where a non-profit organization receives federal aid and then engages in employment discrimination; the individual organization can be held liable, but there is no constitutional violation on the part of the federal government.

B. Child Abuse

Despite the failure of constitutional claims, one theory that may permit recovery for individuals would be to pursue child abuse charges against parents that subject their minor children to conversion therapy.⁷⁸ While it appears that the physically invasive methods of conversion therapy (i.e. electro shock therapy, drug treatments, and surgery) would constitute abuse, it is less clear if the purely psychological methods would. However, almost all states include emotional maltreatment as part of their definition of child abuse or neglect.⁷⁹ Additionally, while the definition of “child abuse” differs from state to state, the federal Child Abuse Prevention and Treatment Act defines child abuse as “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.”⁸⁰

Based on this standard, it is possible to argue that subjecting a child to conversion therapy is child abuse because doing so could lead to serious emotional harm. More specifically, the potential for this therapy to emotionally harm individuals has been demonstrated on numerous occasions.⁸¹ Two psychology researchers

rado state constitution that prohibited all legislative action at any level of state or local government that was designed to protect homosexuals was unconstitutional under rational basis review. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996). Alternatively, legislation that discriminates against homosexuals on its face would be found unconstitutional under *Lawrence v. Texas*. 539 U.S. 558, 585 (2000).

78. See Hicks, *supra* note 57, at 505.

79. Sean Young, *Does “Reparative” Therapy Really Constitute Child Abuse?: A Closer Look*, 6 YALE J. HEALTH POL’Y, L. & E. 163, 173 (2006). According to the National Clearinghouse on Child Abuse and Neglect Information, emotional abuse is now widely considered to be a form of child abuse. *Id.*

80. See *id.* (citing 42 U.S.C.A. § 5106g(2) (West 2003)).

81. See *Practice Guidelines for LGB Clients*, *supra* note 45 (citing A. Shidlo & M. Schroeder, *Changing Sexual Orientation: A Consumers’ Report*, 33 PROF. PSYCHOL.: RES. AND PRAC. 249 (2002)).

found that “a majority of subjects reported that they were misled by their therapists about the nature of sexual orientation as well as the normative life experiences of lesbian, gay, and bisexual individuals.”⁸² Additionally, there exists a spectrum of negative client outcomes from failed attempts at conversion therapy.⁸³ These include intimacy avoidance, sexual dysfunction, depression, and suicide.⁸⁴

Parents who subject their children to conversion therapy could be criminally prosecuted under individual state child abuse laws, because the psychological community has established the dangerous emotional effects of this therapy. Alternatively, prosecutors could attempt to hold the individual therapists liable as they could be considered caretakers under the federal child abuse act. The potential criminal charges against parents could help dissuade them from using clinics that practice conversion therapy. Reduction of clientele could help weaken the ability of clinics, like the Bachmann Clinic, to operate.

C. Intentional or Negligent Infliction of Emotional Distress

Individual therapists could also be held civilly liable on a theory of intentional infliction of emotional distress.⁸⁵ This tort consists of the following elements: (1) the defendant must have acted intentionally or with reckless disregard of the consequences; (2) the defendant’s conduct must have been extreme or outrageous; (3) the plaintiff must have suffered severe emotional distress; and (4) the defendant’s conduct must have been the cause of such emotional distress.⁸⁶

First, the conversion therapist could be shown to have acted intentionally or recklessly. To satisfy this element, the plaintiff must demonstrate that the therapist knew that there was a “high degree of probability that the mental distress [would] follow” from

82. *Id.*

83. *Id.*

84. *Id.*

85. The Restatement (Second) of Torts states that “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” RESTATEMENT (SECOND) OF TORTS § 46 (1965).

86. 43 AM. JUR. 2D *Proof of Facts* §2 (1985).

his or her actions but proceeded to act nevertheless.⁸⁷ Even if the therapist believes that he is actually helping the patient, he could still act with a reckless disregard for the potential harm the therapy will cause to the patient.⁸⁸ Specifically, the Ninth Circuit held, in the context of an asylum case, that the conversion therapy treatments to which the asylum seeker had been subjected constituted mental and physical torture.⁸⁹ Additionally, the court rejected the argument that the treatments to which the plaintiff had been subjected did not constitute persecution because they had been intended to help her, not harm her.⁹⁰ Overall, proceeding with conversion therapy is reckless because there is no evidence that it could be successful, the APA denounces its use in its guidelines of practice, and studies demonstrate the therapy's harmful effects.⁹¹

Moreover, the plaintiff must prove that the therapist engaged in extreme and outrageous conduct that goes "beyond all possible bounds of decency," is both "atrocious" and "utterly intolerable in a civilized community," and an average member of the community would be outraged upon hearing the facts.⁹² Courts have assessed whether a defendant's conduct has been "extreme and outrageous" by considering whether he or she knew that "the plaintiff was especially sensitive, susceptible and vulnerable to injury through mental distress at the particular conduct."⁹³ Here, homosexuals who are not comfortable with their sexuality are more prone to depression, and conversion therapy could exacerbate their feelings of depression, guilt, and shame.⁹⁴ Therefore, subjecting them to

87. Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219, 246 (1999).

88. See *Pitcherskaia v. Immigration and Naturalization Service*, 118 F.3d 641, 647-48 (9th Cir. 1997).

89. *Id.*

90. *Id.*

91. The APA stresses that conversion therapy often has "deleterious effects." Damon Suden, *The Dangers of Conversion Therapy*, THE TECH, Mar. 9, 1999, <http://tech.mit.edu/V119/N11/col2.11c.html>. The APA maintains that potential risks of conversion therapy include "depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient." *Id.*

92. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d, (1965).

93. Gans, *supra* note 87, at 246.

94. See *Homosexuality and Mental Illness*, 56 ARCH GEN PSYCHIATRY 883, 883 (1999), available at <http://archpsyc.ama-assn.org/cgi/content/full/56/10/883> (stating that homosexuals are at a substantially higher risk for some forms of

this therapy and making them further question their sexuality would constitute extreme and outrageous conduct. By viewing the practice of conversion therapy from a reasonable person standard, it appears plausible that the therapy could fall under the rubric of extreme and outrageous conduct. Attempting to “cure” an individual from a “mental disorder” which has been deemed by the professional community to be normal and healthy seems to go beyond all bounds of decency.

Lastly, the plaintiff could satisfy the remaining two elements by demonstrating that the therapy caused severe emotional distress. Courts have found that severe emotional harm exists even where no physical signs of harm exist.⁹⁵ In addition to requiring that the emotional harm was severe, courts require that a “reasonable person of ordinary sensibilities” would have suffered the same type of mental distress as the plaintiff.⁹⁶ This standard does not apply in cases where the defendant possesses special knowledge of the plaintiff’s susceptibility to injury.⁹⁷ Correspondingly, since a conversion therapist knows the patient’s homosexual orientation, he has a special knowledge that the patient is susceptible to harmful emotional consequences, such as depression and internalized feelings of guilt and shame, as a result of the therapy. If the plaintiff exhibits any of the negative aftereffects of conversion therapy, such as depression or suicidal tendencies, he or she should be able to prove that the therapy caused the emotional distress.⁹⁸

Correspondingly, if the plaintiff could not establish a claim for intentional infliction of emotional distress, he could attempt to

emotional problems including “suicidality, major depression, and anxiety disorder”).

95. Gans, *supra* note 87, at 247. See, e.g., *Muffley v. Gem County*, 2008 WL 110970, at *2 (D. Idaho Jan. 8, 2008) (holding that a claim for intentional infliction of emotional distress “requires no physical injury”); *Franklin Collection Serv., Inc. v. Kyle*, 955 So. 2d 284, 290 (Miss. 2007) (finding that a party who suffers no physical injury may recover for intentional infliction of emotional distress “where there is something about the defendant’s conduct which evokes outrage or revulsion”); *Apostle v. Booth Newspapers, Inc.*, 572 F. Supp. 897, 901 (W.D. Mich. 1983) (maintaining that “when the infliction of emotional distress is *intentional*, no physical injury is required”).

96. Gans, *supra* note 87, at 247.

97. *Id.*

98. In her article, “Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability,” Laura A. Gans presents a hypothetical where a lesbian sues her former therapist for intentional infliction of emotional distress after developing depression after undergoing conversion therapy. *Id.* at 240-50.

bring a negligent infliction of emotional distress claim. A claim of negligent infliction of emotional distress requires the following elements: (1) the defendant's conduct in the underlying incident fell below the applicable standard of care; (2) the plaintiff suffered severe emotional distress, and; (3) the defendant's conduct was a cause-in-fact of the plaintiff's injury.⁹⁹ Additionally, unlike a claim for intentional infliction of emotional distress, a claim for negligent infliction of emotional distress does not require proof of outrageous conduct.¹⁰⁰ Under this theory, the therapist may be held liable for practicing conversion therapy even if the conduct itself is not considered outrageous under the objective standard.

E. Negligent Malpractice

Furthermore, a plaintiff who is unable to establish an intentional or negligent infliction of emotional distress claim could attempt to recover under a theory of negligent malpractice. The elements of ordinary negligence are essentially the same as the elements of professional misconduct, except for the standard of care owed to the other person.¹⁰¹ Specifically, once the therapist forms a relationship with the patient, the therapist owes a duty to exercise the degree of skill and learning ordinarily possessed and exercised by members of his "profession in good standing," and to use ordinary and reasonable care and diligence, and his best judgment, in the application of his skills to the individual case.¹⁰² Because the conversion therapist is practicing a type of therapy that is denounced by the psychological community, he appears to be deviating from the established standard of care. If the patient could establish causation and damages in the same fashion as in

99. 86 C.J.S. *Torts* § 84 (2011).

100. *Id.*

101. RESTATEMENT (SECOND) OF TORTS §285 (1977). The common law elements of negligence are: 1.) A duty or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks; 2.) A failure on the person's part to conform to the standard required: a breach of duty; 3.) A reasonably close causal relationship between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause," and which includes the notion of cause in fact; and 4.) Actual loss or damage resulting to the interests of another. Gans, *supra* note 87, at 232 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §30 (5th ed. 1984)). Additionally, courts hold professionals to a higher standard than they hold ordinary citizens, whom courts generally hold to the "reasonable man" standard. RESTATEMENT (SECOND) OF TORTS §285 (1977).

102. Gans, *supra* note 87, at 233.

an intentional or negligent infliction of emotional distress claim, he could prevail under a negligent malpractice theory.

F. Informed Consent

In attempting to succeed on any of these legal theories, an obstacle to a plaintiff's claim may be the defense's assertion of informed consent.¹⁰³ Alternatively, a plaintiff could use a therapist's faulty acquisition of informed consent offensively as the legal basis for another cause of action.¹⁰⁴ It has been suggested that a homosexual patient could not give consent to conversion therapy because "clinical experience suggests that any person who seeks conversion therapy may be doing so because of social bias that has resulted in internalized homophobia."¹⁰⁵ Moreover, evidence of the potential harms of reparative therapy would need to be provided to the patient to obtain informed consent.¹⁰⁶ Informed consent would also require disclosure that the psychological professional community denounces conversion therapy. Correspondingly, it is unlikely that a conversion therapist would reveal any of this information to the patient, which would subsequently limit the applicability of an informed consent defense.

Furthermore, additional conflict issues exist when parents attempt to subject their children to conversion therapy. Generally, until a person reaches the age of majority, "only a parent or legal guardian could give effective consent to medical [or psychological] treatment unless an emergency exists and the parent is unavailable."¹⁰⁷ However, under the *parens patriae* doctrine,¹⁰⁸ the state

103. Psychologists obtain appropriate informed consent to therapy or related procedures using language that is reasonably understandable to participants. The content of informed consent will vary depending on many circumstances; however, informed consent generally implies that the person (1) has the capacity to consent, (2) has been informed of significant information concerning the procedure, (3) has freely and without undue influence expressed consent, and (4) consent has been appropriately documented. CROSS EXAM. EXP. IN BEH. SCI. § 10:1 (2011).

104. 31 AM. JUR. *Proof of Facts* 2d § 487 (1982). Theories of liability for improper informed consent include: negligence, malpractice, deceit, breach of warranty, and civil assault and/or battery. *Id.*

105. Gans. *supra* note 87, at 244.

106. Young, *supra* note 79, at 215.

107. John Alan Cohan, *Parental Duties and the Right of Homosexual Minors to Refuse "Reparative" Therapy*, 11 BUFF. WOMEN'S L.J. 67, 81 (2003).

may override parental decisions concerning medical or psychological care when a child's welfare and best interest warrant it.¹⁰⁹ Additionally, the laws in many states support a minor's right to refuse extreme treatments such as "electroconvulsive therapy, psychosurgery, and behavior modification programs utilizing deprivation or aversive techniques."¹¹⁰ Therefore, a conversion therapist may not be able to obtain proper informed consent when a parent subjects their minor child to treatment.

V. CONCLUSION AND RECOMMENDATIONS

The practices taking place in the Bachmann Clinic should not be funded with government money. Unfortunately, opponents of conversion therapy are not able to challenge this funding on a constitutional basis. Despite the unavailability of a constitutional challenge, the Bachmann Clinic and other practitioners of conversion therapy could be susceptible to individual legal challenges. Litigation may be the only way to dissuade clinics from practicing conversion therapy. Such litigation may attempt to allege various forms of negligence, intentional infliction of emotional distress, and professional malpractice, and child abuse.

While it is difficult to predict the outcomes in potential suits, the overarching effects of initiating litigation could weaken the standing of the Bachmann Clinic and similar institutions conducting conversion therapy.¹¹¹ With Michele Bachmann's political career in the foreground, various civil suits against her husband and her clinic would produce a storm of negative publicity. Regardless of the outcome of potential litigation, the financial, political, and social pressure placed upon the Bachmanns could hurt the clinic. Additionally, this pressure could spur the development of legislation outlawing conversion therapy, although challenges to enacting such legislation are outside the scope of this article. Continued pressure could lead to a temporary or permanent closing of the

108. The doctrine that all orphans, dependent children, and incompetent persons are within the special protection, and under the control, of the state. *BALLENTINE'S LAW DICTIONARY* (3d ed. 2010).

109. Cohan, *supra* note 107, at 81.

110. *Id.*

111. Judging from the paucity of case law on the use of conversion therapy, it "may be difficult to test the hypothesis that courts may provide a forum in which to seek relief...Only a handful of cases exist in which the use of conversion therapy has figured even remotely." Gans, *supra* note 87, at 228.

facility, or it could lead to a public denunciation of the practice of conversion therapy. A public denunciation from prominent conservative figureheads could help reduce the stigma of homosexuality and encourage public support for and acceptance of homosexual individuals.