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**The queer, the cross and the closet:
a critique of rights discourse in
conflicts between religious belief and
sexual orientation**

STELLA MARIA COYLE

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ABSTRACT

The clash between religious belief and sexual orientation has become a key flashpoint in modern rights struggles. A decade after the first recognition of lesbians and gay men in UK equality law, the conflict continues to be played out in domestic courts and in the European Court of Human Rights. This conflict is a microcosm of the wider relationship between law, religion and homosexuality, and the discursive techniques deployed by legal and political actors – of which liberal rights discourse plays a key role. This thesis uses a Foucaultian-informed Queer lens to analyse the discourses and underpinning structures that limit the inclusion of non-heterosexuals in the public sphere.

Recent case law has highlighted a shift in religious conservative discourse, which now disavows homophobia while seeking reasonable accommodation of religious rights and conscientious objection to homosexual equality in employment and the provision of goods and services. This perpetuates the notion that religion deserves special treatment because of a necessary relationship between religious belief and disapproval of homosexuality. This binary approach not only negates the experience of Queer religious people; it also masks the state's constructive delegation of homophobia through religious exemptions to equality law. These effects represent harms to gay people, constituting degrading treatment contrary to Article 3 of the European Convention on Human Rights.

Liberalism's universal human subject of rights was constructed through the heteronormative and theonormative prism that still permeates equality law. Queer theory's problematisation of the liberal rights paradigm offers a useful challenge to established norms and to the supposed neutrality of the state when adjudicating between conflicting rights. This thesis represents my contribution to the conversation between liberalism and Queer theory.

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DEDICATION

This thesis is dedicated to my supervisors, colleagues and friends at Keele Law School for their help and support. It is also dedicated to the memory of all LGBT people who have suffered and died as a result of homophobia in all its forms; and to those who are still fighting for their lives around the world.

CHAPTER 1: INTRODUCTION

*For the master's tools will never dismantle the master's house. They may allow us to temporarily beat him at his own game, but they will never enable us to bring about genuine change.*¹

Equality in 2016: the queer, the cross and the closet

In 2016, it may appear that the struggle for same-sex equality has been won. The UK no longer criminalises² homosexuality or prevents discussion of it in state educational settings.³ Sexual orientation is recognised as a subject of hate speech⁴ and hate crime.⁵ The 2010 Equality Act, which consolidated and replaced previous equalities legislation⁶, lists a series of protected characteristics,⁷ of which sexual orientation is one, as is religion. Direct⁸ discrimination against people with protected characteristics is always illegal, as is indirect⁹ discrimination – a provision, criterion or practice that has the effect of disadvantaging a protected characteristic - where it cannot be justified. There is also a general duty on local

¹ Audre Lorde, *Sister Outsider: Essays and Speeches* (2nd ed, Crossing Press 1984), 110

² Partial decriminalisation was achieved by the Sexual Offences Act 1967 s 1; it was not until the Sexual Offences Act 2003 that full decriminalisation was achieved.

³ Section 28 of the Local Government Act stated that a local authority 'shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality' or 'promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'. It was repealed by virtue of the Local Government Act 2003 s 122, although a significant number of MPs – including the former Prime Minister, David Cameron – voted against the repeal. Concerns have been raised over the de facto return of Section 28; see for example Nigel Morris, 'The return of Section 28: Schools and academies practising homophobic policy that was outlawed under Tony Blair' *The Independent* (London, 19 August 2013)

⁴ The Criminal Justice and Immigration Act 2008 amended Part 3A of the Public Order Act 1986. The amended Part 3A introduces the offence of inciting hatred on the ground of sexual orientation.

⁵ Hate crime is defined as 'any criminal offence which is perceived, by the victim or any other person, to be motivated by a hostility or prejudice towards someone based on a personal characteristic.' See H Corcoran, D Lader and K Smith *Hate Crime, England and Wales, 2014/15 Statistical Bulletin* 05/15 13 October, 2. The Criminal Justice Act 2003 s 146 (as amended) provides for increased sentences for hate crime.

⁶ Equal Pay Act 1970; Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995; Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006; Equality Act 2006; and Equality Act (Sexual Orientation) Regulations 2007

⁷ Equality Act 2010 Section 4

⁸ Equality Act 2010 Section 13

⁹ Equality Act 2010 Section 14

authorities to promote equality.¹⁰ Since 2014, lesbians and gay men have been able to marry;¹¹ indeed, the former Prime Minister, David Cameron, cited the passage of marriage equality legislation as one of his ‘proudest achievements’.¹²

These victories are important and overdue. However, they have not been without legal and discursive costs to gay people, nor do they signify the eradication of homophobia from the legal system. Both the Equality Act 2010¹³ and the Marriage (Same-Sex Couples) Act 2013¹⁴ contain religious exemptions and concessions, legitimising the view that religious belief justifies special treatment, even when such treatment facilitates and endorses discrimination against lesbians and gay men. Since the extension of protection to sexual orientation in the fields of employment and the provision of goods and services, further religious challenges to same-sex equality continue to be played out in domestic courts¹⁵ and in the European Court of Human Rights,¹⁶ invoking the right to privacy (Article 8); to freedom of religion (Article 9); to freedom of expression (Article 10); and the requirement that Convention rights be enjoyed without discrimination (Article 14).

Religious antipathy to non-heterosexuals has been prevalent throughout history, largely through norms both established and justified through religious texts and religiously informed moral codes: ‘From Hammurabi’s ancient Babylonian code to the New Testament to the Quran, one sees a common disdain towards women, slaves and

¹⁰ Equality Act 2010 Section 149

¹¹ Marriage (Same Sex Couples) Act 2013

¹² Nick Duffy, ‘David Cameron: Same-sex marriage was one of my proudest achievements in 2014’ *Pink News* (London, 10 January 2015)

¹³ Special provisions apply to religious organisations vis-à-vis homosexuality in employment (Schedule 9) and in the provision of goods and services (Schedule 23).

¹⁴ The Act contains provisions that amount to a ‘quadruple lock’ designed to ‘promote’ religious freedom: religious organisations must ‘opt-in’ to solemnise same-sex marriage in places of worship (ss 4-6); no-one can be forced to opt-in (s 2 (1)); no anti-discrimination law will be contravened by not opting-in (s 2(6)); and the Churches of England and Wales are unable to opt-in at all.

¹⁵ See for example *Bull v Hall* [2013] UKSC 73; *Ladele v Islington LBC* [2010] 1 WLR 955; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880

¹⁶ See for example *Eweida and others v UK* [2013] ECHR 37

homosexuals’.¹⁷ Despite a recent survey indicating that the UK is the sixth most tolerant of forty nations towards homosexuality,¹⁸ exemptions from anti-discrimination law granted on the basis of religion¹⁹ retell an ancient story that something is wrong with same-sex desire. This suggests that Christian moral ideas pertaining to the body and desire have been encoded into legislation, and continue to permeate legal discourse.

However, there has been a shift in conservative religious discourse over time; there has been a move away from explicit disdain of homosexuality in favour of arguments based on rights instead. Conservative religious organisations and individuals are employing the language of rights more often than their traditional language of morality, perhaps recognising that ‘where the State accords particular rights to those who are religious it does so, not because of the fact of their religious identity, but because they are secular citizens’.²⁰ This discursive shift means that religious conservatism is able to disavow homophobia while seeking ‘reasonable accommodation’ of religious rights and ‘conscientious objection’ to homosexual equality in arenas such as marriage, adoption, employment and the provision of goods and services. Indeed, the clash between religious belief and same-sex desire has now become a key flashpoint in modern rights struggles. This flashpoint has inspired the main question posed by this thesis: how should law adjudicate conflicts between sexual orientation and the expression of religious belief?

The UK is a signatory to the European Convention on Human Rights (ECHR), and domestic legislation must be ‘read and given effect in a way which is compatible with the

¹⁷ Micheline R Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press 2004), 6

¹⁸ This is a survey of public opinion, not legal treatment of homosexuality: *Global views on Morality*, Pew Research Center <<http://www.pewglobal.org/2014/04/15/global-morality/table/homosexuality/>> accessed 20 April 2014

¹⁹ Equality Act 2010 Schedule 9 (employment) and Schedule 23 (provision of goods and services)

²⁰ Anthony Bradney, *Law and Faith in a sceptical age* (Routledge-Cavendish 2008), 53

Convention rights’²¹ wherever possible. Article 9(1) of the Convention provides for freedom of religion (including no religion), conscience and belief; Article 9(2) allows member states to place limits on religious expression as are necessary to protect, inter alia, the rights and freedoms of others. Thus ‘freedom of religion... is constituted through the distinction between belief and manifestation’.²² Religious conservatives have criticised this distinction, countering that their *own* rights are compromised by restrictions on the expression of faith in public life: in effect, their religiosity is being closeted by the law. Such a closeted state has historically been the burden of lesbians and gay men, but the public/private distinction accorded to religious expression has persuaded some that both religion and sexuality are equally capable of being ‘closeted’ by the law.²³ This attempt to draw a parallel between religious and sexual orientation rights is based on a false equivalence. Religious people are not closeted in terms of who they are; rather, they are limited in how they express their beliefs, if such expression limits the rights and freedoms of others.

The danger is that discriminatory attitudes towards lesbian and gay people may be (re)popularised under the guise of accommodating the expression of religious faith. As Stychin concedes, the ‘language of rights lends itself to anti-gay arguments which not only employ rights talk, but which can mirror the arguments advanced by progressive actors’.²⁴ Equality law has been criticised for creating a ‘hierarchy of rights’,²⁵ for secularising the law by restricting religious freedom,²⁶ and for failing to make reasonable accommodation

²¹ Human Rights Act 1998 s 3(1)

²² Carl Stychin, ‘Faith in the Future: Sexuality, Religion and the Public Sphere’ (2009) *Oxford Journal of Legal Studies*, 729, 730

²³ See for example Carl Stychin [n 22]

²⁴ Carl Stychin, ‘Faith in Rights: The Struggle Over Same-Sex Adoption in the UK’ (2008) *Constitutional Forum Constitutionnel* 17, 12

²⁵ *Clearing the Ground inquiry: Preliminary report into the freedom of Christians in the UK* (Christians in Parliament February 2012) www.eauk.org/clearingtheground (accessed 11 May 2016)

²⁶ Julian Rivers ‘The secularisation of the British constitution’ (2012) *Ecclesiastical Law Journal* 14(3) 371

for the expression of religious belief, or for claims of religious conscience.²⁷ The resulting restrictions on the liberty of people who attempt to live out their faith mean that, for religious conservatives, ‘the right for religious groups and individuals to discriminate on grounds of sexual orientation is narrow and increasingly reducing’.²⁸ There is also a related discourse that lesbian and gay people have achieved ‘enough’ equality;²⁹ that gay rights are now being applied too widely and are restricting the freedom of the religious to manifest their faith. Sexual orientation may now be a protected characteristic, but there remains a conservative Christian religious discourse that homosexuality may exist, as long as it is “not in my hotel³⁰, registry office³¹ or counselling room”.³²

Research framework

This thesis offers a critique of rights discourse in conflicts between religious belief and sexual orientation. The research analyses how legal and political actors have framed the conflict in the context of equality law in the United Kingdom, through Parliamentary debates on statute law, parties’ arguments and judges’ decisions in domestic and European case law, and academic discussion. The historical importance of rights-based arguments for advancing LGBT equality is recognised, but the limitations of such arguments are also highlighted. The religious conservative idea of a ‘hierarchy of rights’ represents a misappropriation of rights language; its proponents have cherry-picked from Western

²⁷ See for example *Lee v Ashers Bakery and others* [2015] NICty 2

²⁸ Russell Sandberg ‘The Right to Discriminate’ (2011) *Ecclesiastical Law Journal* 13(2) 157, 181

²⁹ Chris Brickell, ‘Whose “Special Treatment”? Heterosexism and the Problems with Liberalism’ (2001) *Sexualities* 4(2), 211

³⁰ *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83; *Bull and anor v Hall and anor* [2013] UKSC 73; *Black v Wilkinson* [2013] EWCA Civ 820

³¹ *Ladele v Islington LBC* [2010] 1 WLR 955; *Eweida & Others v UK* [2013] ECHR 37

³² *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; *Eweida & Others v UK* [2013] ECHR 37

liberal discourse in order to assert, in Hohfeldian terms,³³ a ‘privilege’ on the part of some religious groups and individuals to be exempt from anti-discrimination law.

The research will focus on the conflict between Christianity and homosexuality, as this is the arena in which the cases in question are being fought and appealed. Recent challenges to equality law from other religions have been more about achieving their own recognition as religious people than about conflict with lesbians and gay men.³⁴ It can be argued that non-Christian faiths are seeking to be recognised in a society where the dominant and normative faith is Christianity. The discussion will focus on those Christian organisations and individuals involved in the recent legal conflicts. The research also considers the resistances to hetero- and theo- normativities presented by those religious individuals and groups who are challenging the binary of religion versus homosexuality.

Research questions

The overarching question that this thesis aims to answer is *how should law adjudicate conflicts between sexual orientation and the expression of religious belief?* The thesis also aims to address three sub-questions as part of its answer to this overarching question. These sub-questions are:

1. How are heteronormativity and theonormativity expressed in UK equality law?
2. How central is the concept of harm to resolving the conflict between religion and sexual orientation?
3. How might UK law finally realise sexual citizenship for lesbians and gay men?

³³ Wesley N Hohfeld (1919) ‘Fundamental legal conceptions as applied in judicial reasoning : and other legal essays’ < http://archive.org/stream/fundamentallegal00hohfuoft/fundamentallegal00hohfuoft_djvu.txt > accessed 30 September 2013

³⁴ See for example *Begum v Denbigh High School* (2006) UKHL 15

This thesis asks, *how should law adjudicate conflicts between sexual orientation and the expression of religious belief?* It is a normative question, and as such is part of a much broader discussion as to what sort of society we want, and what role law should play in securing it. The inquiry is situated within modern Western liberal democracy and so the research necessarily engages with liberal legal philosophies. Although framing the research in terms of conflict locates the inquiry within the prevailing discourse in this debate, the aim of this thesis is to move beyond it. The discussion will be developed further to argue that the conflict represents something more than the notion of competing rights.

This conflict raises many of the central questions of legal liberalism: freedom, equal rights, and harm. However, the conflict also provides valuable insights into how legal norms are created and sustained, and how they change. This conflict is a microcosm of the wider relationship between law, religion and homosexuality, and the discursive techniques employed by legal actors – of which rights discourse plays a key role. The task of this thesis is to identify and critique the discourses and societal structures that compromise the belonging of non-heterosexuals.

This task will be achieved through consideration of the three sub-questions. First, *how are heteronormativity and theonormativity expressed in UK equality law?* This question is a critical step and a ground-clearing exercise for examining the constellation of liberal concerns in the context of power and subordination. As Mouffe explains in her discussion of liberalism and pluralism,

There cannot be a pluralism which accepts all differences. We must be able to determine which differences should exist within a liberal regime, because these differences are necessary for the realization of principles of liberty and equality...

But [some] should never be accepted because [they] would create relations of subordination which are not acceptable within a pluralist society.³⁵

A political and legal regime that professes to be concerned with equality should attend to those parts of the law that compromise equal citizenship, dignity and security by legitimising heterosexism and homophobia. This analysis paves the way for the second sub-question: *how central is the concept of harm to resolving the conflict between religion and sexual orientation?* The effects of heteronormativity and homophobia on gay people are first examined through an analysis of harm. The classic liberal position³⁶ is considered, along with Raz's 'perfectionist liberal' critique,³⁷ Feinberg's analysis of harm to others,³⁸ and Judith Jarvis Thomson's discussion on harm, distress and belief.³⁹ Thereafter, Kendall Thomas's concept of constructive delegation of power in US anti-sodomy legislation⁴⁰ is applied to UK equality law, concluding that religious exemptions constitute constructive delegation of homophobia. Conscientious objection, viewed in terms of power relations, is one example of the state's constructive delegation of homophobia to individual religious conservatives.

Finally, the thesis considers *how might UK law finally realise sexual citizenship for lesbians and gay men?* A Foucaultian-informed Queer lens will be used, through which to identify and critique the discourses and underpinning structures that limit the inclusion of non-heterosexuals in the public sphere, including the impact of socio-economic status on sexual citizenship. Queer theory's general reluctance – or even refusal – to tackle

³⁵ Chantal Mouffe, 'On the Itineraries of Democracy: An Interview with Chantal Mouffe' (1996) *Studies in Political Economy* 49, 131, 136

³⁶ See for example John Stuart Mill *On Liberty* (Penguin Classics, 1985 [1859])

³⁷ Joseph Raz, 'Autonomy, Toleration and the Harm Principle' in R Gavison (ed) *Issues in Contemporary Legal Philosophy* (Clarendon, 1987)

³⁸ Joel Feinberg, *The Moral Limits of the Criminal Law Vol. 1: Harm to Others* (Oxford University Press, 1984)

³⁹ Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1990)

⁴⁰ Kendall Thomas, 'Beyond the Privacy Principle' (1992) *Columbia Law Review* 92, 1431

normative jurisprudential questions has been criticised.⁴¹ Other commentators have argued that anti-normativity (resisting *any* prescription) need not follow from counter-normativity (challenging established norms); the value Queer places on autonomy and diversity means that normative commitments *do* animate its theory.⁴² Furthermore, the continued existence of lesbian and gay inequality suggests a need for both a ‘non-essentialist conceptualisation of rights’ – which is a central concern of Queer theory – and a ‘more interventionist state’, which has been of less interest.⁴³ Accordingly, ‘Queer and liberal theory need to converse with each other’,⁴⁴ particularly in the current debate where issues of rights, and the state’s role in determining these rights, are highlighted. This thesis is a contribution to the conversation by offering a ‘critical and strategic engagement’⁴⁵ with rights discourse.

Homophobia in 2016: terrorism, state sponsorship, and religious exemptions

In June 2016, a young man perpetrated a mass shooting in a gay nightclub in Orlando, USA, killing 49 people and injuring 53 more. It was subsequently revealed that he was a Muslim who had been radicalised, but who also appeared to be struggling with his own sexuality.⁴⁶ The Orlando massacre was both a terrorist attack *and* a homophobic attack.⁴⁷

Yet much of the media seized on the terrorism aspect, to the extent that the mass murder of gay people was redrawn as an attack ‘against human beings’ and ‘the freedom of all people

⁴¹ Nicholas Bamforth, *Sexuality, Morals and Justice* (Continuum, 1997), 229; Steven Seidman, *Difference Troubles: Queering Social Theory and Sexual Politics* (Cambridge University Press, 1997), 160

⁴² Aleardo Zanghellini, ‘Queer, anti-normativity, counter-normativity and abjection’ (2009) *Griffith Law Review* 18 (1), 1, 9

⁴³ Momin Rahman, ‘Sexuality and rights: problematising lesbian and gay politics’ in Terrell Carver and Véronique Mottier (eds) *Politics of Sexuality: Identity, Gender, Citizenship* (Routledge, 1998) 79, 87

⁴⁴ Zanghellini [n 42], 14

⁴⁵ Ben Golder, ‘Foucault’s Critical (Yet Ambivalent) Affirmation: Three Figures of Rights’ (2011) *Social and Legal Studies* 20(3), 283, 286

⁴⁶ Eric Heinze, ‘Internalised homophobia: the exception or the paradigm?’ (*Critical Legal Thinking*, 15 June 2016) <<http://criticallegalthinking.com/2016/06/15/internalised-homophobia-exception-paradigm/>> accessed 9 September 2016

⁴⁷ Terrorism is defined as ‘the use of violent acts to frighten the people in an area as a way of trying to achieve a political goal’; homophobia is defined as ‘irrational fear of, aversion to, or discrimination against homosexuality or homosexuals’. See <<http://www.merriam-webster.com/dictionary/terrorism>> and <<http://www.merriam-webster.com/dictionary/homophobia>> , both accessed 9 September 2016

to try and enjoy themselves'.⁴⁸ This disavowal of the homophobic nature of the attack enabled commentators to locate the event firmly within the narrative of Islamist-inspired threats to Western liberal freedoms. Further, by painting the killer as someone with mental health problems, whose religion prevented him from accepting his sexuality, the liberal West excused itself from having to examine its own attitude towards same-sex desire.

One month earlier, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) published a global report⁴⁹ on state-sponsored homophobia. The ILGA report found that, out of 193 UN member states, 73 states (and five non-UN entities) criminalise same-sex sexual relations, with the death penalty applied in 13 states (or parts thereof). At least 17 states have 'propaganda' laws outlawing the promotion of homosexuality; and seven states uphold 'morality' laws restricting the expression of lesbian, gay and bi sexualities. Criminalisation of homosexuality is concentrated in the Middle East and parts of the global south, again enabling the West to position itself as more enlightened than the rest of the world; a place where lesbians and gay men can be told 'aren't you lucky you're not in Uganda?'⁵⁰

The underlying message to a non-heterosexual is that 'unless I am being thrown in prison or herded onto a cattle train, then it is not homophobia'.⁵¹ Such messages have proved useful for conservatives, particularly religious conservatives, in their crusade against same-

⁴⁸ Owen Jones, 'On Sky News last night, I realised how far some will go to ignore homophobia' *The Guardian* (London, 13 June 2016)

⁴⁹ Angus Carroll, *State-sponsored Homophobia. A world survey of sexual orientation laws: criminalisation, protection and recognition* (11th ed, updated to June 2016, ilga.org) <http://ilga.org/downloads/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf> accessed 8 September 2016

⁵⁰ Panti Bliss, 'All the little things' TEDx Dublin <<https://www.youtube.com/watch?v=hIhsv18lrqY>> accessed 25 March 2015. See also the discussion on how 'homonationalism' has been used to describe how gay politics have been used to bolster Islamophobic discourses that present Muslim cultures as sexually backward and oppressive: JK Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007). For a critique of 'homonationalism' see Aleardo Zanghellini, 'Are Gay Rights Islamophobic? A Critique of Some Uses of the Concept of Homonationalism in Activism and Academia' (2012) *Social and Legal Studies* 21(3), 357.

⁵¹ Panti Bliss, 'Panti's Noble Call at the Abbey Theatre' <<https://www.youtube.com/watch?v=WXayhUzWnl0>> accessed 15 February 2014

sex equality. The disavowal of homophobia has been used by the religious right in the West as both a shield and a sword against equality campaigners. For example, in 2014 the Irish television station, RTÉ, staved off legal action by agreeing a financial settlement with some opponents of same-sex marriage, after a gay rights campaigner and drag queen had described them on television as homophobic, because they had actively campaigned for gay people to be treated less favourably.⁵² Her comment on this is worth reproducing at some length:

So now Irish gay people find ourselves in a ludicrous situation where not only are we not allowed to say publicly what we feel oppressed by, we are not even allowed to think it because our definition has been disallowed by our betters... I have been denounced from the floor of parliament to newspaper columns to the seething morass of internet commentary for “hate speech” because I dared to use the word “homophobia”. And a jumped-up queer like me should know that the word “homophobia” is no longer available to gay people. Which is a spectacular and neat Orwellian trick because now it turns out that gay people are not the victims of homophobia – homophobes are.⁵³

The disavowal of homophobia by religious conservatives has been partly facilitated by their success in reframing the conflict as a clash of rights. Rights claims on sexual orientation grounds have largely been either for equal benefits or access, or an end to discrimination. On the other hand, religion-based claims seek exceptions so that religious individuals or organisations do not have to abide by rules which apply to others. Thus the

⁵² Willie Kealy and Niamh Horan, ‘RTE paid out €85,000 in “homophobe” row’ *Irish Independent* (Dublin, 2 February 2014)

⁵³ Panti Bliss [n 51] A member of Northern Ireland’s Democratic Unionist Party is understood to have commenced legal action against the BBC in similar circumstances: see Nick Duffy, ‘Anti-gay DUP politician suing BBC over homophobe claims’ (*Pink News*, 29 July 2016) <http://www.pinknews.co.uk/2016/07/29/anti-gay-dup-politician-suing-bbc-over-homophobe-claims/> accessed 29 July 2016

discourse of rights has been increasingly used by religious conservatives, but in pursuit of an aim that is unlike other rights claims, namely ‘the right to deny equal, inclusive treatment for queer people... where services are being offered to, or even on behalf of, the public’.⁵⁴ The following section offers an analysis of the role of liberal rights discourse in the conflict between religion and sexual orientation.

An analysis of liberal rights discourse

Conceptualising the conflict in terms of rights has left many legal actors ‘staring blankly at conflicting claims’⁵⁵ and attempting to balance these rights. Several commentators insist that religion deserves special consideration. For example, it has been said that there is something distinctively burdensome about the denial of a religious exemption,⁵⁶ and that it is wrong to force religious individuals to participate in practices they regard as unconscionable.⁵⁷ Religion has been characterised as an object of ‘strong evaluation’ that should be accorded government protection.⁵⁸ Counter-arguments have criticised religion as a culpable form of unwarranted belief,⁵⁹ the consequences of which should be borne by the believers themselves.⁶⁰ It has been suggested that we might assess how far the person claiming the exemption is responsible for the beliefs that cause her to be burdened. The more an individual is responsible for putting herself in a situation where she comes into conflict with the law, the more her case for an exemption is weakened.⁶¹ However,

⁵⁴ Bruce MacDougall and Donn Short, ‘Religion-based Claims for Impinging on Queer Citizenship’ (2010) *Dalhousie Law Journal* 133, 134

⁵⁵ Jeffrey Weeks, *Against Nature: Essays on history, sexuality and identity* (Rivers Oram Press 1991), 193

⁵⁶ Andrew Shorten, ‘Cultural Exemptions, Equality and Basic Interests’ (2010) *ETHNICITIES*, 10 (1), 100

⁵⁷ Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford University Press 2003)

⁵⁸ Andrew Koppelman, ‘Is it fair to give religion special treatment?’ (2006) *University of Illinois Law Review* 571

⁵⁹ Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2013)

⁶⁰ Peter Jones, ‘Religion and Freedom of Expression’ (2011) *Res Publica* 17 (1), 1

⁶¹ Jonathan Seglow, ‘Theories of Religious Exemptions’ in G Calder and E Ceva (eds) *Diversity in Europe: Dilemmas of Differential Treatment in Theory and Practice* (Routledge, 2010)

religious belief can be the result of early indoctrination, so responsibility is a complex issue.⁶²

It becomes clear that framing the issue in terms of rights has led to a zero-sum game and has resulted in compromise becoming a figural term in the discourse. For example, Stychin has argued for a ‘fact-specific approach which is sensitive to the rights in a particular context, and which focuses upon the values of accommodation, tolerance and mutual respect’.⁶³ Eisgruber and Sager⁶⁴ argue that there should be no privilege accorded to religion, but that religion should be protected from discrimination due to the particular vulnerability of religious minorities. Malik concludes that, while there is no perfect resolution, it may be possible to develop ‘a set of principles that encourage a balance between the values of religious freedom, free speech and equality’.⁶⁵ The value of such exhortations, beyond rhetoric, is not clear. However, the difficulty experienced by legal liberalism is illustrated by how uneasily it wears its neutral face when a conflict of rights arises.

This difficulty can be attributed, at least in part, to the fault line that runs through Western liberal thought: the concept of universal rights, held by subjects who embody an ‘anthropological constant – an atemporal and universal human essence’⁶⁶ – that provides the basis for rights claims. Moreover, universal rights, as illustrated in the preceding discussion, are ‘sooner or later entangled in their own contextual particularism and are

⁶² See the general criticism of raising children within a religion put forward by Richard Dawkins, *The God Delusion* (Bantam Press, 2006), 382

⁶³ Carl Stychin, [n 22], 729

⁶⁴ Christopher Eisgruber and Lawrence Sager, *The Vulnerability of Conscience: Religious Freedom and the Constitution* (Harvard University Press, 2006)

⁶⁵ Maleiha Malik, ‘Religious freedom, free speech and equality: conflict or cohesion?’ (2011) *Res Publica* 17(1), 21

⁶⁶ Ben Golder [n 45], 284

incapable of fulfilling their universal function'.⁶⁷ This is because liberalism's focus on formal rights largely ignores how differences are socially constructed. Throughout history, societies have walked an uneasy line between ideas of a common humanity and norms justifying differential treatment for certain moral sub-categories in the taxonomy of the human species. Norms established through the prism of religiously-inspired disdain influenced the law and determined who was entitled to participate fully in civic society.

The liberal Enlightenment in the eighteenth century saw the ambition of a common humanity become more figural in Western legal and political discourse, and with this ambition came the idea of universal human subject of rights. However, the creation of any subject logically requires the corresponding creation of a non-subject or Other, against whom the subject can be favourably compared.⁶⁸ The universal legal subject – the beneficiary of human rights – was constructed as white, male, heterosexual, and indeed, Christian. This is why the Enlightenment's assumption of a universal human subject, and the subsequent human rights movement, came to be criticised by those who recognised that the liberal ambition of a universal rights-bearing human subject was far from all-embracing.

In the United Kingdom in the 21st century, the line between the subject of legal rights and the Other has moved, to the extent that lesbians and gay men, as we have seen, now have unprecedented civil rights. However, liberalism's universal subject was constructed through a heteronormative and theonormative prism that still permeates equality law. The reluctance to recognise homophobia, and the law's willingness to allow faith-based exclusion of gay people, is facilitated by the endurance of both hetero- and theonormativity in law.

⁶⁷ Ernesto Laclau, 'Subject of Politics, Politics of the Subject' (1995) *Differences: A Journal of Feminist Cultural Studies* 7.1, 156

⁶⁸ Judith Butler, *Bodies that Matter* (Taylor and Francis 2011), xiii

Heteronormativity

Legal discourse has the power to shape sexual subjectivities: ‘law constitutes and regulates, punishes and self-disciplines’.⁶⁹ This power is found in equality law; the very framework of anti-discrimination law requires an ‘other’ to use as a comparator with reference to an established norm. Under the Equality Act, discrimination on grounds of a protected characteristic is established with reference to a standard comparator. People of colour, women, people with disabilities, non-heterosexuals and those who do not conform to gender binaries are compared to the universal legal subject. Equality law thereby grants protection to those ‘others’ who have been able to show that they are sufficiently ‘like’ white, male heterosexuals in order for the comparator to be meaningfully deployed.⁷⁰

For example, in the ‘bed and breakfast’ cases,⁷¹ the focus was on the equivalence of marriage and civil partnership, and the comparator was a heterosexual married couple – the very paradigm of heteronormativity. With the exception of Lady Hale,⁷² the Supreme Court had very little to say about the implications of religious exemptions for sexual citizenship. There was no recognition of the heteronormativity implicit in the equivalence of heterosexual marriage and homosexual civil partnerships. In effect, homosexual relationships are considered suitable for legal protection if they mirror traditional heterosexual ones.

Heteronormativity (and the related term, heterosexism), then, assumes that ‘heterosexuality is *the* normative form of human sexuality... the measure by which all other sexual

⁶⁹ Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford University Press, 2007), 16

⁷⁰ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006), 109

⁷¹ *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83; *Bull v Hall* [2013] UKSC 73. See also *Black v Wilkinson* [2013] EWCA Civ 820

⁷² *Bull v Hall* [2013] UKSC 73 [53]

orientations are judged.’⁷³ In the current debate, the prevailing rights-based discourse largely neglects the construction of sexuality. Even liberal, democratic societies are based on a hierarchy of sexuality (as opposed to the ‘hierarchy of rights’ as claimed by religious conservatives), with non-heterosexual desires construed as deviations from the given norm. Maintaining a distinction between sexualities, without questioning the structures and discourses behind them, confirms heterosexuality’s normative status.⁷⁴ As a consequence, state accommodation of religious expression, which discriminates against lesbians and gay men in the public sphere, serves to maintain heteronormativity and homophobia.⁷⁵

Today, the Master of the Rolls – the head of the civil judiciary and the second most senior judge in England and Wales – is a gay man.⁷⁶ Yet the judiciary has a history of heteronormativity, and the perception of homophobia still lingers. For example, until 1991 unmarried men and women – including lesbians and gay men – were not permitted to become judges. More recently, research by the lesbian, gay, bisexual and transgender legal group Interlaw found that 70% of LGBT lawyers believe there is prejudice within the selection process for judicial office.⁷⁷

The concept of heteronormativity continues to be useful in questioning the prevailing heterosexual norm and challenging homophobia. However, the concept can also be something of a distraction from discussions of how the politics of sexuality include issues of race and class, which is why some argue that ‘queer critique needs to move beyond its focus on the heteronormative if it is to capture emerging modalities and ambivalence of

⁷³ Patricia B Jung and Ralph F Smith, *Heterosexism: An ethical challenge* (SUNY Press, 1993), 13-14

⁷⁴ Stevi Jackson, *Heterosexuality in Question* (Sage, 1999)

⁷⁵ B MacDougall and D Short, ‘Religion-based Claims for Impinging on Queer Citizenship (2010) Dalhousie Law Journal, 133

⁷⁶ Owen Bowcott, ‘Britain’s first openly gay judge becomes master of the rolls’ *The Guardian* (London, 26 May 2016)

⁷⁷ Leslie J Moran and Daniel K Winterfeldt (2011) ‘Barriers to application for judicial appointment research: lesbian, gay, bisexual and transgender experiences’ Interlaw Diversity Forum for LGBT Networks <<http://eprints.bbk.ac.uk/4396/1/4396.pdf>> accessed 3 August 2017

inclusion and exclusion’.⁷⁸ Part of the task of this thesis is to consider how sexual orientation equality is compromised through the privatization of citizenship, through the decimation of the post-war welfare state and the increasing role of the market. The thesis also considers how sexual orientation equality is threatened by religion’s role in this process with faith organisations increasingly plugging the gap in public service provision.

Theonormativity

In a similar vein, theonormativity exists ‘when theism is the default, the standard, and everything else is a deviation from this norm’.⁷⁹ The extent to which theism has been socially constructed as ‘real’ is under-appreciated. The noun ‘atheist’ itself is defined with reference to ‘theist’.⁸⁰ Even the atheist sentiment ‘I don’t believe in God’ carries with it an assumption of theonormativity. The word ‘god’ is invariably capitalised, in contrast to those subjects of worship from other cultures (both historical and present). We do not say ‘I don’t worship any gods’ or ‘I don’t believe in your god.’ So the idea of a god is pervasive, even in liberal discourse. This thesis argues that it is dangerous to allow this theonormative assumption to go unchallenged. It not only continues to permeate our lawmaking;⁸¹ it is also precisely what creates a space for ‘conscience’ talk to be used by religious conservatives.⁸²

⁷⁸ Cossman [n 69], 193

⁷⁹ <<http://harvardhumanist.org/2012/12/19/theonormativity/>> accessed 1 April 2015

⁸⁰ There is an extensive debate as to which came first: the theist or the atheist? This debate is beyond the scope of this thesis.

⁸¹ The Local Government (Religious etc. Observances) Act received Royal Assent on 26 March 2015: “A Bill to make provision about the inclusion at local authority meetings of observances that are, and about powers of local authorities in relation to events that to any extent are, religious or related to a religious or philosophical belief.” This Act follows the High Court ruling in *R (National Secular Society & Anor.) v Bideford Town Council* [2012] EWHC 175 (Admin). Lord Cormack explained that “it was thought appropriate to introduce a Bill that would put beyond any doubt the freedom” to engage in worship at the start of all Council meetings (Lords Hansard 25 Mar 2015. Vol. 760(125) Col 1424).

⁸² An appeal to conscience is made by the Christian owners of another guesthouse who have sought permission to plead their case before the ECtHR.

The relationship between law and religion can be characterised as ‘the vicarious rule of the church’, ie the Church of England.⁸³ In a recent speech,⁸⁴ Sir James Munby (President of the Family Division) criticised the ‘dominant influence wielded by the Christian churches historically’:

Although historically this country is part of the Christian west and, although it has an established church which is Christian, we sit as secular judges serving a multi-cultural community of many faiths, sworn to do justice ‘to all manner of people’. We live in this country in a democratic and pluralistic society, in a secular State not a theocracy.

Unfortunately, there exists a series of factors which together compromise Munby’s idea of a secular British state. The legal and political system is still steeped in Christianity. The House of Lords contains 26 Church of England Bishops, termed the Lords Spiritual. The judicial oath contains the phrase ‘I do swear by almighty God...’.⁸⁵ At the commencement of the legal year, judges attend a service at Westminster Abbey – a tradition which ‘dates back to the middle ages when judges prayed for guidance at the start of the legal term... The service includes prayers, hymns, psalms and anthems; the Lord Chancellor reads a lesson.’⁸⁶ The previous Attorney General recently stated that Christianity remains ‘a powerful force in this country’.⁸⁷ The former Communities and Local Government

⁸³ This phrase was used by Dr Peter Bowen-Walker in his critique of the legal reasoning in *R v Brown*. See <<https://lawyerssecularsociety.wordpress.com/2014/09/15/r-v-brown-twenty-four-years-on-a-critical-secular-perspective-part-2/>> accessed 20 September 2014

⁸⁴ ‘Law, Morality and Religion in the Family Courts’. Keynote address given at the Law Society’s Family Law Annual Conference ‘The sacred and the secular: religion, culture and the family courts’ London 29 October 2013 <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/law-morality-religion-munby-2013.pdf>

⁸⁵ <<http://www.judiciary.gov.uk/about-the-judiciary/oaths/>> accessed 3 May 2015

⁸⁶ <<http://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/term-dates-and-sittings/legal-year/>> accessed 3 May 2015

⁸⁷ Steven Swinford, ‘Dominic Grieve: “British Christians forced to hide belief”’ *The Guardian* (London, 23 August 2014)

Minister, Eric Pickles⁸⁸ and the former Faith and Communities Minister, Sayeeda Warsi⁸⁹ each made public statements endorsing this sentiment during their times in office. The former Education Secretary, Nicky Morgan stated that part of her political mission is ‘to remember the word of God and serve the Lord’.⁹⁰ These factors, combined with the presence of 26 Bishops in the House of Lords, indicate that Munby LJ was somewhat optimistic.

Theonormativity has been further entrenched with the passage of the Local Government (Religious Observances) Act 2015, which provides for the right of all local authority councils to hold prayers at the start of their meetings, and also to support any religious event or any event with a religious element.⁹¹ Pickles described the new law as a victory for ‘freedom to worship over intolerant and aggressive secularism, for long-standing British liberties over modern-day political correctness, and for parliamentary sovereignty over judicial activism’.⁹² His words tie religious faith to British liberty and to parliamentary sovereignty, whereas secularism – ‘the separation of religion and state’⁹³ – is cast as the ‘intolerant and aggressive’ force, while ‘activist’ judges are represented as a threat to democracy. Terms such as ‘British liberties’ and ‘political correctness’ function as empty signifiers in order to enhance the populist appeal of the legislation, by absorbing whatever meanings that readers want to impose upon it.⁹⁴

⁸⁸ John Bingham, ‘Britain still a “Christian Country”’, says Eric Pickles’ *The Telegraph* (London, 27 November 2013)

⁸⁹ Baroness Warsi, ‘We stand side by side with the Pope in fighting for faith’ *The Telegraph* (London, 13 February 2012)

⁹⁰ Matthew Engelke, ‘Christianity and atheism are two sides of the same coin’ *The Guardian* (London, 27 June 2013)

⁹¹ Local Government (Religious Observances) Act 2015 s 1

⁹² Press release: ‘Eric Pickles welcomes council prayers law’ 27 March 2015

<<https://www.gov.uk/government/news/eric-pickles-welcomes-council-prayers-law>> accessed 30 March 2015

⁹³ ‘What is Secularism?’ *The National Secular Society* <<http://www.secularism.org.uk/what-is-secularism.html>> accessed 30 March 2015

⁹⁴ Ernesto Laclau, *On Populist Reason* (Verso, 2005), 232

This approach fails to understand that legal interpretation is essentially political. As the liberal theorist Dworkin acknowledged, ‘There can be no useful interpretation... that is independent of some theory about what political equality is and how far equality is required by justice... reliance on political theory is not a corruption of interpretation but part of what interpretation means’.⁹⁵ The point here is not to reduce law to politics, but instead to recognise the politics internal to law – the politics within legal doctrine. This politics may have entered law decades earlier or longer ago, but it no longer appears as politics because its political aspects have been lost or rendered invisible. ‘Apolitical’ law simply acts out this apoliticality, while in some respects being political to the core.⁹⁶ It could therefore be helpful, and more intellectually honest, to put one’s politics on the table. This thesis will examine the extent to which the conflict between religion and sexuality has scratched away law’s apolitical veneer. It will also consider the role of law in society; whether law is neutral or whether its role is to intervene to uphold certain values and principles – and if so, to explain which, and why.⁹⁷

At present, the combined effect of hetero- and theo- normativities means that laws purporting to offer same-sex equality – but with limitations and religious exceptions – offer little more than a ‘promise of a solution’.⁹⁸ The ‘master’s house’ in the quote at the beginning of this chapter is a helpful allegory as to why. If we visualise law as the master’s house, we can recognise how heteronormativity and theonormativity have shaped its construction. Arguments based entirely within a liberal rights-based framework are akin to using the master’s tools to effect repairs: plastering over cracks while failing to notice that the whole building is damaged. This damage consists of the hetero- and theo- normativities

⁹⁵ Ronald Dworkin, ‘Law as Interpretation’ (1982) *Critical Inquiry* 9 (1), 179, 199

⁹⁶ See also the general discussion on the influence of Christian fundamentalists in the Conservative Party in Sunny Hundal, ‘The right hand of god’ *The New Statesman* (London, 24 April 2010)

⁹⁷ These questions have been discussed at length in the literature, which will be examined in Chapter 2.

⁹⁸ Wayne Morgan, ‘Queer Law: Identity, Culture, Diversity, Law’ (1995) *Australian Gay and Lesbian LJ* (1), 15

already outlined, but also damage on a more structural, socio-economic level. Further, the framing of struggles around sexuality as ‘merely cultural’⁹⁹ serves to mask ‘the real economic situation of poverty and discrimination that affects lesbians and gay men on a daily basis’.¹⁰⁰ The following section highlights the importance of socio-economic status to sexual citizenship for lesbians and gay men.

One of our equalities is missing: the socio-economic equality duty

The legal victories won in the wake of equalities legislation meant that, on the face of it, lesbians and gay men could feel entitled to participate in society without fear of exclusion. However, as Stychin observes in his discussion of issues arising from the 2007 Regulations, ‘It is all too easy to defend sexuality rights that have been achieved, without critically engaging in the politics of these victories.’¹⁰¹ The Regulations ‘protect our rights as consumers in a capitalist society’¹⁰² and such protection is never going to be equally distributed under capitalism. Under capitalism we are all consumers, but we cannot all consume equally. Economic and social benefits continue to be determined by social class in particular, and also by factors such as educational background, skin colour, gender and location.¹⁰³ Moreover, equality legislation in general glosses over structural inequality in favour of individuals who possess certain protected characteristics.

The protection of sexual orientation in the provision of goods and services has highlighted the position of gay people as citizens in a consumer, capitalist society, and the extent to which they are able to participate – as gay people – in the quotidian activities of everyday

⁹⁹ See the debate between Judith Butler, ‘Merely Cultural’ (1998) *New Left Review* 1/227, 33-44 and Nancy Fraser, ‘Heterosexism, Misrecognition and Capitalism: A Response to Judith Butler’ (1998) *New Left Review* 1/228, 140-149

¹⁰⁰ David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Polity Press, 2000), 99

¹⁰¹ Carl Stychin, Closet Cases: “Conscientious Objection” to Lesbian and Gay Legal Equality’ (2009) *Griffith Law Review* 18, 36

¹⁰² Stychin [n 101]

¹⁰³ See for example the data on the Equality Trust website, which indicates that the UK has a very high level of income inequality compared with other developed countries: ‘The Scale of Economic Inequality in the UK’ <<https://www.equalitytrust.org.uk/scale-economic-inequality-uk>> accessed 30 September 2015

life without encountering faith-based homophobic resistance. This thesis contends that class has an important – and under-examined – effect on access to full citizenship in a consumer-oriented society. An understanding of class is crucial to any genuine appreciation of systemic subordination and advantage under capitalism. The liberal focus on individual rights blurs the issues that still prevent lesbians and gay men from participating fully in public space, and fails to link the struggle for gay equality with broader issues of social justice.

Part 1 of the Equality Act 2010 sets out a public sector duty regarding socio-economic equalities, whereby ministers, government departments and local authorities ‘must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage’.¹⁰⁴ However, this part of the Act was not brought into force by the previous Coalition government, and remains listed as ‘prospective’.¹⁰⁵ Even if it were to be implemented, as Bob Hepple points out, ‘it would not confer any private right of action on individuals, and there would be formidable obstacles in the way of seeking judicial review for an abuse of the public body’s use of discretionary powers’.¹⁰⁶ This means that, at present, equality law is not a vehicle through which socio-economic equality can be achieved. This is one reason why equality law can be criticised as being less a means of ensuring genuinely transformational, societal equality and more ‘a market of rights, competitively asserted as against other market actors’.¹⁰⁷

Equality law, then, is concerned primarily with individual protection against discrimination. This individualism has, in turn, enabled religious conservatives to

¹⁰⁴ Equality Act 2010 Part 1 s 1(1)

¹⁰⁵ < <http://www.legislation.gov.uk/ukpga/2010/15/part/1> > accessed 13 September 2016

¹⁰⁶ Bob Hepple, ‘The New Single Equality Act in Britain’ (2010) *The Equal Rights Review* Vol 5, 11, 21

¹⁰⁷ Janet Halley [n 70] It is this individualism, and the hetero- and theo- norms already described, which enable ‘conscience’ discourse to feel justified in seeking a place at the equality table.

appropriate the language of identity.¹⁰⁸ Identity-based movements for race, sex and sexuality equality historically sought to establish oppressed-group identities in order to campaign for official recognition and protection.¹⁰⁹ Religious conservatives now assert a *religious identity* in order to preserve their desire to discriminate against gay people. As Stychin observes, ‘the very language of oppression has now been fully appropriated’ by those opposed to equality for lesbians and gay men.¹¹⁰ Furthermore, this valorisation of individual freedom appeals to both of the philosophies which underpin Western society: (neo)liberalism and capitalism. As D’Emilio observes, ‘two of the most wildly successful identity movements of the last generation have been evangelical Christians and the filthy rich’.¹¹¹ The echo of Margaret Thatcher’s mantra ‘there is no such thing as society’¹¹² persists in a political regime that favours individual enterprise and small government. The combination of religious freedom and business freedom is exemplified by the rise of conscience-based arguments being deployed by individual goods and service providers to justify excluding lesbians and gay men. The debate has now become about the rights of business owners and other individuals, rather than about the hetero- and theo- norms that pervade society.

Class (as a shorthand for socio-economic status) has been overlooked in the mainstream debates, yet an analysis of class is necessary, because ‘without an analysis and appreciation of systemic subordination and advantage, a progressive politics can become

¹⁰⁸ For a general discussion, see Martha T McCluskey, ‘How Queer Theory Makes Neoliberalism Sexy’ in Martha A Fineman, Jack E Jackson and Adam P Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2009)

¹⁰⁹ For further discussion of the historical need to establish oppressed-group identities, see t Chapter 2.

¹¹⁰ Carl Stychin, [n 101], 18

¹¹¹ John D’Emilio, ‘Creating Change’ (2012) *The Scholar and Feminist Online*, issue 10.1-10.2 ‘A New Queer Agenda’ Fall 2011/Spring 2012 <<http://sfonline.barnard.edu/a-new-queer-agenda/creating-change/>> accessed 29 July 2015

¹¹² The full quote reads as follows: ‘I think we have gone through a period when too many children and people have been given to understand “I have a problem, it is the Government’s job to cope with it!” [...] and so they are casting their problems on society and *who is society?* *There is no such thing!* There are individual men and women and there are families and no government can do anything except through people and people look to themselves first.’ *Woman’s Own* (23 September 1987) <<http://www.margaretthatcher.org/document/106689>> accessed 30 September 2015 (emphasis added)

directionless'.¹¹³ Class can be viewed as an 'organising principle' similar to race, age, disability, gender – indeed, to many of equality law's 'protected characteristics'.¹¹⁴ These organising principles affect how power is exercised wherever it operates in society.¹¹⁵ Power relations determine the ability of some sections of society to do things that others are unable to. Class is not a protected characteristic because law views it as lacking the requisite categorical fixity. This view is itself informed by the ideology of meritocracy and social mobility.¹¹⁶ Yet one's class – particularly one's socio-economic status – has an impact on one's choices as to how public space, in its broadest sense, can be accessed. This has implications for lesbian and gay citizenship. As Vaid puts it,

... homophobia does not originate in our lack of full civil equality. Rather, homophobia arises from the nature and construction of the political, legal, economic, sexual, racial, and family systems within which we live. As long as the rights-oriented movement refuses to address these social institutions and cultural forces, we cannot eradicate homophobic prejudice.¹¹⁷

This illustrates the limits of civil rights, which are 'principally mechanisms to gain access, not means to implement fundamental social change'.¹¹⁸ This is particularly important when one considers the current government's ideologically-driven decimation of state-funded public services, in favour of a programme of privatisation and voluntarisation. Liberal democracy has gone from state-building (such as the post-war welfare state) to state-dismantling. It can thus be argued that we should be somewhat suspicious of the government's supportive stance on sexual orientation equality. It represents a diversion

¹¹³ Davina Cooper, *Power in Struggle: Feminism, Sexuality and the State* (Open University Press 1995), 13

¹¹⁴ Equality Act 2010, s 4

¹¹⁵ Davina Cooper [n 113] 24-25

¹¹⁶ For further detail on the theory of meritocracy, see Michael Young, *The Rise of the Meritocracy* (Transaction Publishers, 2008 [1958])

¹¹⁷ Urvashi Vaid, *Virtual Equality: the mainstreaming of gay and lesbian liberation* (Anchor Books, 1995), 183

¹¹⁸ Vaid [n 117], 180

from the government's war on public spending: 'The primary goal of the political elite is to starve the public sector to death'.¹¹⁹ Gay rights do not cost 'the taxpayer' money, so they are acceptable to a government whose main concern is to extinguish demands made on the state through public provision.

In the course of this thesis, the government's LGBT-friendly image will be contrasted with its ideological commitment to austerity and a small state. The government's unwillingness to allocate state resources to welfare (in its broad sense) has heralded an increase in voluntary and charity provision. This has, in turn, provided opportunities for faith groups to be directly involved in service provision, providing more scope for religious influence over working-class, poor and disabled people. The thesis will also contrast the image of "gentrified" gays with the experience of average gay people who want to be able to participate in average activities such as booking hotel rooms and buying cakes. It aims to demonstrate how 'conscience' discourse threatens to bring about a re-emergence of the closet for LGBT people.

Chapter outline

Chapter 2 reviews and engages with the liberal literature on rights but also aims to move beyond it. A Foucaultian critical analysis of rights is concerned with a central question that liberalism tends to overlook: that of power. It may be tempting to view the development of rights as an inevitable process, but a more accurate view is that this development occurred in the context of particular social and political circumstances.¹²⁰ Language can be used to preserve the status quo of power relations, and to privilege some groups while oppressing others. A Foucaultian analysis of equality and power recognises the discursive effects produced by and within legal discourse, including those of subordination. Foucault's

¹¹⁹ D'Emilio [n 111]

¹²⁰ See Costas Douzinas, *The End of Human Rights* (Hart Publishing, 2000); Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010)

concept of power as a complex network of relations existing at a given time, in a given society¹²¹ informs the analysis of how relations of power are revealed in the current debate. Consideration is also given to how rights can be viewed within a Foucaultian critique as ‘conduits’ – as ‘modes for distributing capabilities and forms of power and influence – thus shaping behaviour as much as constraining it’.¹²² Finally, the review examines the literature on citizenship generally and on sexual citizenship in particular. Following Hubbard’s suggestion that ‘a basic right of citizenship is the right to access and use specific kinds of space within a given territory’,¹²³ the thesis argues that religious exemptions exert boundaries on spaces which exclude gay people, and thus render them less than full citizens.

Chapter 3 explores the theories informing the methodology in more detail, drawing on Foucault; on Queer theory more broadly; and on other writers in the field of discourse theory, such as Laclau and Mouffe.¹²⁴ Discourse theory is influenced by poststructuralism, which recognises that language is not a stable, unchanging and totalising structure.¹²⁵ Our ways of talking do not neutrally reflect our world, identities or social relations, but rather play an active role in creating, limiting and changing them. Our access to reality is always through language; language generates and therefore constitutes the social world, and so changes in the discourse are the means by which the social world itself is changed.¹²⁶ Contrary to the Enlightenment view, “truth” is not neutral: ‘Truth operates through the exclusion, marginalisation and even prohibition of other truths. Power is exercised through the production and dissemination of truth’.¹²⁷ This is what Foucault means by his concept

¹²¹ Michel Foucault, *The History of Sexuality Vol 1: The Will to Knowledge* (Penguin, 1978), 140-1

¹²² Duncan Ivison, *Rights* (Acumen, 2008), 180-1

¹²³ Phil Hubbard, ‘Sex Zones: Intimacy, Citizenship and Public Space’ (2001) *Sexualities* 4(1), 51-71

¹²⁴ See for example Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy* (Verso, 1985)

¹²⁵ Michel Foucault, *The Archaeology of Knowledge* (Routledge, 1972), 117

¹²⁶ Marianne Jorgensen and Louise J Phillips, *Discourse Analysis as Theory and Method* (Sage, 2002)

¹²⁷ Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto, 1994), 11

of productive power: ‘power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production’.¹²⁸ The methodology chapter builds on the discussions in the review of the literature in Chapter 2, and goes on to set the groundwork for subsequent chapters.

Chapter 4 analyses the discourses within recent conflicts and the surrounding legal and political arguments. The chapter charts the growth of religious rights-based discourse, which represents both a shift away from morality-based arguments and a reanimation of older homophobic tropes. It examines the Parliamentary debates during the passage of equality legislation and the jurisprudence of domestic courts and the European Court of Human Rights (ECtHR) in subsequent case law. To the casual observer, it appears that lesbian and gay people are “winning” the battle against manifestations of religious belief which discriminate against them, causing religious believers to suffer as a consequence.¹²⁹ However, even as “victory” is toasted, there are discursive costs. Liberal law’s reluctance to address relations of subordination has left swathes of religious discrimination untouched. Furthermore, a liberal rights-based approach can and often does fail even when it succeeds, because of what is lost in the law reform moments. The chapter concludes with a consideration of possible future discursive directions, as a result of resistances to the current binary of religion versus homosexuality.

Chapter 5 builds on the preceding chapter and critiques the concepts of ‘reasonable accommodation’ and ‘conscientious objection’ as justifications for faith-based exemptions from anti-discrimination legislation, focusing on their grounding in the heteronormative and theonormative discursive fields. It looks in some detail at the discursive techniques

¹²⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage, 1995 [1977]), 194

¹²⁹ See for example Steve Doughty and Anna Edwards, ‘B&B owners’ right to bar gay couple crushed by “need to fight discrimination”’ *Daily Mail* (London, 28 November 2013)

deployed in the report of the Christians in Parliament Group, *Clearing the Ground*.¹³⁰

MacDougall and Short draw a useful distinction between forms of religious accommodation:

Religious accommodation is desirable when it facilitates inclusion and does not entail exclusion for others. Otherwise it constitutes a claim for exceptionalism and an ability to exclude others from the usual social and economic fabric. A person ought not to be permitted to make his or her inclusion dependent on the exclusion of another.¹³¹

This chapter acts as a bridge between the analysis of legal discourse in Chapter 4 and the examination of the link between homophobia and harm in Chapter 6. It contends that ‘reasonable accommodation’ and ‘conscientious objection’ operate, in terms of power relations, as harmful homophobic weapons dressed up in the guise of religious equality rights.

Chapter 6 considers the harm caused to lesbians and gay men by discrimination and homophobia. Thomas’s study of US anti-sodomy laws led him to conclude that the main question is not about individual rights but about political power relations; this chapter draws on his arguments to reach a similar conclusion regarding UK equality law. Adopting Foucault’s characterisation of power, Thomas argues that homophobic violence perpetrated by citizens can be viewed as ‘constructive delegation of power’ by the state to those citizens, because private relations have public origins and public consequences.¹³²

Religious exemptions and arguments from conscience in equality law implicate the state in the perpetration and perpetuation of homophobia, through constructive delegation of power

¹³⁰ *Clearing the Ground inquiry: Preliminary report into the freedom of Christians in the UK* (Christians in Parliament February 2012) www.eauk.org/clearingtheground (accessed 11 May 2016)

¹³¹ MacDougall and Short [n 54], 160

¹³² Thomas [n 40], 148

to religious organisations and individuals. The problem is exacerbated by the ideologically-driven programme of austerity and the consequent slashing of social welfare spending, with religious organisations forming part of the voluntary sector plug in this social support gap.

The discussion in Chapter 6 includes analysis of the impact of socio-economic inequalities on lesbians and gay men and the increasing influence of faith organisations in service provision in the wake of cutbacks to LGBT services. The chapter analyses the extent to which Thomas's approach reveals similar issues for the liberal state in the current conflict between religious expression and sexual orientation. When religious organisations take on an active role in civil life, it can be argued that 'such involvement is quasi-governmental in nature, and ought therefore to be subject to the same constraints that would be imposed on a government engaged in such an operation'.¹³³ It argues that religious exemptions from equality law takes gay people below a baseline of equal citizenship, and the liberal state has a responsibility to address this problem. It suggests, further, that they constitute 'degrading treatment' contrary to Article 3 ECHR.

Chapter 7 focuses on the Ashers Bakery case,¹³⁴ for which the appeal judgment is currently pending. It uses the case to explore in more detail the implications of heteronormativity, theonormativity, socio-economic inequality, citizenship and conscientious objection. Foucault's concept of pastoral power is used to analyse the state of equality in Northern Ireland¹³⁵ and the relationship between conservative religion and conservative politics. The chapter also offers a Queer critique of the construction and marketisation of a purported "gay identity". For example, to what extent has the movement for sexual orientation

¹³³ MacDougall and Short [n 54], 141

¹³⁴ Gareth Lee v Ashers Baking Co Ltd and Colin McArthur and Karen McArthur [2015] NICty 2

¹³⁵ The relevant legislation in Northern Ireland is the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and the Fair Employment and Treatment (Northern Ireland) Order 1998

equality been appropriated by individualist consumerism? Has capitalism's fascination with 'the pink pound' become a tool for 'pinkwashing' genuine equality for lesbians and gay men?¹³⁶ These questions are relevant in challenging the assumption that gay people wield significant economic power, and so gay rights issues are 'merely cultural',¹³⁷ rather than also economic. It can be argued that sexuality rights operate through pinkwashing to cloak the effects of aggressive capitalism. Finally, Chapter 8 draws together the arguments presented throughout the thesis and restates its contribution to knowledge in this field.

Contribution to knowledge

This thesis provides an original contribution to the question of how law should adjudicate conflicts between sexual orientation and the expression of religious belief. Notwithstanding the gains that have been made in terms of same-sex equality, the thesis argues that non-heterosexuals continue to be stalked by what can be characterised as the "four horsemen of homophobia": war, famine, pestilence and death.¹³⁸ War - because religious conservatives have often adopted such language to describe their experience vis-à-vis extensions to gay equality.¹³⁹ Famine - because cutbacks to public spending have impacted on LGBT support services, with faith-based organisations increasingly filling the gap in provision.¹⁴⁰ Pestilence - because old tropes of homosexual infection and corruption of youth still persist.¹⁴¹ Finally, death - because conservative religious attempts to curtail sexual citizenship have the effect of causing gay people to be 'socially dead'.¹⁴²

¹³⁶ 'Pinkwashing' is a political or marketing strategy designed to present an image of gay-friendliness. See for example Sarah Schulman, 'Israel and "Pinkwashing"' *New York Times* (New York, 22 November 2011) [n 85]

¹³⁸ The four horsemen of the apocalypse appear in 'The revelation of St John the Divine', 6:1-8, *The Holy Bible* (authorised King James version) (Collins 1957)

¹³⁹ See Chapters 4, 5 and 7 for analysis of religious discourse with reference to gay equality.

¹⁴⁰ See Chapter 6 for discussion on the implications of increased faith-based provision on LGBT people.

¹⁴¹ See Chapter 4, in particular the case of *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* Upper Tribunal, Appeal number FTC/52/2011; see also the discussion in Chapter 6 on

Claims for reasonable accommodation and conscientious objection perpetuate the fallacy that religion deserves special allowances because of a purported necessary relationship between religious belief and disapproval of homosexual acts.¹⁴³ This binary approach not only negates the experience of Queer religious people; it also masks the state's constructive delegation of homophobia through religious exemptions to equality law. These effects represent harms to gay people, constituting degrading treatment contrary to Article 3 of the European Convention on Human Rights. Further, Part 1 s 1(1) of the Equalities Act should be brought into force, so that ministers, government departments and local authorities 'must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage'.

The former Archbishop of Canterbury recently admitted the culpability of the Anglican Church in homophobic discrimination:

I think the church has to put its hands up and say our attitude towards gay people has at times been appallingly violent. Even now it can be unconsciously patronising and demeaning... We have to face the fact that we've deeply failed a lot of gay and lesbian people, not only historically but more recently as well.¹⁴⁴

This thesis suggests ways that the Church and the state can stop failing lesbians and gay men in the future. The thesis focuses on lesbians and gay men because the legal disputes so

the "gay cure" case of *R (Core Issues Trust) v Transport for London and the Mayor of London* [2014] EWHC 2628 (Admin) and *R (Core Issues Trust) v Transport for London and another* [2014] EWCA Civ 34

¹⁴² See Chapter 7. The idea of 'social death' is also explored by M Blasius in *Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic* (Temple University Press 1994)

¹⁴³ The Christian notion of loving the sinner while hating the sin is used by Christian conservatives to disavow homophobia by separating homosexual acts from the people who (may) engage in them.

¹⁴⁴ J Webb, 'The Tab meets Rowan Williams' *The Tab* (London, 14 October 2013)

far have been fought on this basis; however, it recognises that bisexual and trans people are also subject to discrimination from religious conservatives. The arguments pertaining to hetero- and theo- normativities; to harm, degrading treatment and ‘social death’; and to socio-economic inequality can also apply to bisexual people, trans people, and other members of broader queer communities. The thesis contributes to the ongoing discussion between liberal and Queer theories, and informs the development of Queer legal theory.

CHAPTER 2: RIGHTS, IDENTITY AND CITIZENSHIP

*A kiss is not just a kiss when it is performed by a same-sex couple in an everyday location.*¹

This chapter reviews some of the vast liberal literature on rights, with particular reference to religious belief and sexual orientation, and highlights some of the dead ends that have been reached in attempts to resolve the conflict between them. It also interrogates the assumptions regarding religious and sexual identities, using Queer theory to challenge some of the traditional understandings of identity. Finally, the chapter considers the debate regarding how religious expression and sexuality should be treated in the public sphere. It examines the literature on citizenship generally and on sexual citizenship in particular, recognising that ‘a kiss is not just a kiss’ when it is performed by non-heterosexuals in public space. Following Hubbard’s suggestion that ‘a basic right of citizenship is the right to access and use specific kinds of space within a given territory,’² the thesis argues that religious exemptions exert boundaries on spaces which exclude gay people, and thus render them less than full citizens.

These discussions provide the basis for the argument that ‘reasonable accommodation’ of religious desire to discriminate on sexual orientation grounds fails to acknowledge fully (or at all) the costs of so doing for non-heterosexuals. Therefore, this chapter addresses the ethical-political issue of establishing those costs. It also aims to move beyond questions of rights and identity towards questions of power. Foucault’s concept of power as a complex network of relations existing at a given time, in a given society³ informs the analysis of how relations of power are revealed in the current debate. In this context, rights can be understood as ‘conduits’ – as ‘modes for distributing capabilities and forms of power and

¹ Gill Valentine ‘(Re)negotiating the “Heterosexual Street”: Lesbian Productions of Space’ in N Duncan (ed) *BodySpace* (Routledge, 1996), 154

² Phil Hubbard, ‘Sex Zones: Intimacy, Citizenship and Public Space’ (2001) *Sexualities* 4(1), 51-71

³ Michel Foucault, *The History of Sexuality Vol 1: The Will to Knowledge* (Penguin, 1978), 140-1

influence’.⁴ The influence of power relations on the concepts of rights, identity and citizenship, and the knowledges produced by them, has been overlooked in traditional liberal theories. This chapter therefore provides a basis for the methodological discussion in Chapter 3.

Human rights in context

It is tempting to view the development of rights – and rights language – as an inevitable process. The website of the human rights organisation, Liberty, describes the Human Rights Act 1998 as ‘rooted in British culture and history... a proud, 800-year old family tree’.⁵ The image evoked of rights as a venerable oak tree, with its roots grounded firmly in our soil, is an attractive one. However, conceptualising history as a progressive journey of human rights fails to recognise that previous events left open diverse paths to the future, rather than paving a single road towards the current position. It can be tempting to view the development of rights as an incremental process, but a more accurate view grounds it in the context of particular social and political circumstances. Perhaps human rights are ‘best understood as survivors’,⁶ as they came to prevail due mainly to the collapse of previous political ideologies, not unlike the triumph of one combination of genes over another in Darwin’s metaphorical ‘tree of life’.⁷

Political theories and movements are formed and developed within social and historical contexts. This has implications for rights. As Douzinas suggests, rights may not be the outcome of intrinsic human traits but are rather a contingent development which will

⁴ Duncan Ivison, *Rights* (Acumen, 2008), 180-1

⁵ Liberty ‘The History of Human Rights’ <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/history-human-rights> (accessed 15 August 2016)

⁶ Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010), 5

⁷ Charles Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (John Murray, 1859), 129 – see Darwin Online <<http://darwin-online.org.uk/content/frameset?pageseq=147&itemID=F373&viewtype=text>> accessed 15 August 2016

wither away as the need for them expires.⁸ Rights may therefore be symptomatic of a problem that needs to be overcome, rather than a solution *to* problems.⁹ Further, if human rights can be understood as contingent, this has implications for the concept of “humanity” itself. Being human does not necessarily involve a shared, transcendent essentialism whose meaning is constant. Rather, our understanding of what it means to be human is a product of the discourses within society at a given time.¹⁰

Indeed, the ‘human’ rights being protected were in fact *created* by various agreements and declarations¹¹ throughout history, as a response to both the zeitgeist and the state’s needs at the time. As Appiah notes, ‘When the American colonists declared it to be “self-evident” that they had inalienable rights to life, liberty and the pursuit of happiness, they sought to *make it so*’.¹² It can be argued that such extravagant assertions were necessary in order for humanity to succeed “God” as the new locus of meaning. Nature was an early justification for rights; god provided an authority; and the state eventually became the benefactor, restrictor and protector of the human. The irony is that the human rights project accepts modernity’s rejection of religious transcendence, while relying on a transcendence principle for the construction of rights.¹³

Human rights: a universal moral embrace or a means of exclusion?

Rights and equality share a connection in Western liberal thought. Western rights discourse generally understands equal rights as a matter of treating like people alike. The Christian legacy here is notable; St Matthew’s gospel commands that ‘whatever you wish that others

⁸ Costas Douzinas, *The End of Human Rights* (Hart Publishing, 2000)

⁹ William MacNeil, ‘Taking Rights Symptomatically’ (1999) 8 Griffith Law Review 134

¹⁰ Foucault [n 3]

¹¹ See for example the United Nations Declaration on Human Rights and Fundamental Freedoms 1948 and the European Convention on Human Rights 1952

¹² Kwame A Appiah, *The Ethics of Identity* (Princeton University Press, 2005), xi (emphasis in original)

¹³ Douzinas [n 8]

would do to you, do also to them’,¹⁴ as is the focus is on treating others as *you* (ie not *they*) would like to be treated. Behind this understanding is the presumption of a fundamental sameness. The understanding is that everyone is viewed as equal before the law, with equal rights and protections, which purport to offer all people equal opportunities.¹⁵ The discourse of equal rights has become embedded into Western politics,¹⁶ with the concept of respect for equal worth, dignity and identity playing a central role in modern discussions. The discursive focus is on the intrinsic value of individuals by virtue of their human existence.¹⁷ Equality in Western rights discourse, then, is grounded on the very fact of being alive.¹⁸

This thesis, instead, supports the contention that ‘equality is not an independent, objective or self-evident characteristic, but is a socially constructed phenomenon’.¹⁹ As part of this construction process, rights were historically bound up with notions of exclusion; women, people of colour and non-heterosexuals have suffered greatly from political, social and economic exclusion. For example, slavery was abolished in the USA in 1865, but it was another hundred years before the right to vote did not depend on skin colour.²⁰ In Britain, women had to wait until the end of the First World War to be enfranchised.²¹ Moreover, it

¹⁴ Matthew 7:12 *The Holy Bible* (authorised King James version) (Collins, 1957)

¹⁵ Cynthia Ward, ‘On Difference and Equality’ (1997) *Legal Theory* 3, 65

¹⁶ Dominic McGoldrick, ‘The United Kingdom’s Human Rights Act in Theory and Practice’ (2001) *International Comparative Law Quarterly* 50, 901

¹⁷ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000)

¹⁸ Davina Cooper, *Challenging Diversity: Rethinking Equality and the Value of Difference* (Cambridge University Press, 2004)

¹⁹ Scott R Harris, ‘The Social Construction of Equality in Everyday Life’. (2000) *Human Studies* 23, 371

²⁰ The 15th Amendment to the United States Constitution was ratified in 1870, granting African American men the right to vote by declaring that the ‘right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude’. However, it was not until the Voting Rights Act of 1965 that the majority of African Americans in the South were able to vote.

²¹ The Representation of the People Act 1918 granted the vote to women over 30 who met a property qualification. The Equal Franchise Act 1928 enabled women over 21 to vote, finally achieving equivalent voting rights to men.

was not until the mid-1970s that it became illegal in Britain to discriminate on the grounds of gender²² or ethnicity.²³

Interestingly, as women achieved greater emancipation, “effeminate” men were increasingly regarded as a threat, as Greenberg notes:

The preservation of male domination in the face of women’s aspirations to equality depended on men possessing qualities that clearly differentiated them from women. It consequently became necessary to police men who lacked those qualities just as women who exhibited them.²⁴

Gay men did not begin to benefit from a change in official attitudes towards homosexuality until the Wolfenden Report²⁵ was published in 1957, and it was not until the Sexual Offences Act 1967 that consensual male same-sex practices underwent partial decriminalisation. It took another forty years for British LGBT people to gain rights under the Equality Act (Sexual Orientation) Regulations 2007 and later the 2010 Equality Act. The modern history of homosexual exclusion is discussed in more detail in Chapter 4; for the purposes of this review, it is useful to consider the origins and subsequent early development of homosexual exclusion.

Origin and development of homosexual exclusion

Lesbians and gay men have consistently been “othered” throughout history, particularly through the influence of religion on the wider ruling structure. The Bible castigates both adulterous women and homosexuals, viewing their “sins” as morally equivalent. This

²² Sex Discrimination Act 1975

²³ Race Relations Act 1976

²⁴ David F Greenberg, *The Construction of Homosexuality* (University of Chicago Press, 1988), 387-8

²⁵ Report of the Committee on Homosexual Offences and Prostitution (1957) London: Her Majesty's Stationery Office

might suggest that the basis of both inequalities is grounded in notions of family²⁶ and also in heterosexism. Heterosexism (or heteronormativity), as discussed in Chapter 1, ‘denotes prejudice in favour of heterosexual people... rooted in a largely cognitive constellation of beliefs about human sexuality’.²⁷ However, this thesis questions the assumption that religion is special, and that there is a *necessary* link between religious belief and the need to discriminate on sexual orientation grounds. Indeed, it can be argued that the history of lesbian and gay oppression provides revealing examples of the confusion of religious beliefs with popular prejudice.²⁸ For example, in the Christian New Testament, God’s wrath against the unrighteous is described at length in Romans 1: 18-32. Verse 26 is often cited as evidence against homosexuality:

... God gave them up to dishonourable passions. For their women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in themselves the due penalty for their error.²⁹

On the face of it, this passage states that homosexuality is contrary to the word of the Christian god. However, in his study of the interpretation of Romans 1: 18-32, Martin accuses modern religious scholars of being disingenuous when they claim that their distaste for homosexuality is simply an application of the ‘biblical view’.³⁰ Martin concludes that modern accounts of Romans I represent a ‘classic case of homophobia’,

²⁶ Micheline R Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, 2004), 49

²⁷ Patricia B Jung and Ralph F Smith, *Heterosexism: An ethical challenge* (SUNY Press, 1993), 13-14

²⁸ John Boswell, *Christianity, Social Tolerance, and Homosexuality* (Chicago University Press, 1980), 5. Others have criticised Boswell as a Christian apologist; see for example W Johansson and WA Percy, (1996) ‘Homosexuality’ in VL Bullough and JA Brundage (eds), *Handbook of Medieval Sexuality* (Routledge, 1996)

²⁹ *The Holy Bible* (authorised King James version) (Collins, 1957)

³⁰ Dale B Martin, ‘Heterosexism and the Interpretation of Romans 1:18-32’ in M Kuefler (ed) (2006) *The Boswell Thesis: Essays on Christianity, Social Tolerance, and Homosexuality* (University of Chicago Press, 2006), 130

which is not surprising because ‘oppressive ideologies have always in the modern world masqueraded as objective descriptions of the way things are’; these ideological accounts ‘participate in a cultural homophobia... that pervades much of modern Western culture and expresses itself in discourses about sexuality, institutionalized marginalization of lesbian and gay people, and social structures that discriminate against them’.³¹ This is a good example of Foucault’s critique of the supposed neutrality of truth, discussed in Chapter 1.

It is worth examining in a little more detail what these passages from Romans actually mean. In order to do so, it is necessary to go back to classical Greece and ancient Rome. Classical moralists viewed homosexuality as having the same origins as heterosexuality; the problem was ‘not to do with a *disoriented* desire, but with *inordinate* desire. Degree of passion, rather than object choice, was the defining factor of desire’.³² The idea of excessive desire is important in ancient Greek philosophy, which tended to value “moderation” as evidence of self-control and thus fitness to govern. So the original notion of something being ‘contrary to nature’ was because natural desires had been indulged in excessively.

Ancient Greco-Roman moralists considered homosexual sex to originate from the same desire that motivated heterosexual sex. Male attraction to beautiful males was considered “natural”, and homosexual desire was not itself ‘contrary to nature’. Same-sex intercourse, however, was assumed to spring from an excess of desire, and allowing desire to exceed its bounds leads to actions “beyond nature”, in the same way as a glutton does not have inherently perverted desires, but has indulged those desires to excess. Homosexual sex does not have procreation as its goal, and also disrupts the male-female hierarchy, and this

³¹ Martin [n 30], 140-1

³² Martin [n 30], 136 (emphasis in original)

is why it was considered in the classical period as being ‘contrary to nature’.³³ The idea of ‘excessive desire’ is particularly interesting because it echoes modern religious conservative claims that lesbians and gay men now enjoy “excessive equality”. The following section looks at how the classical notion of natural law came to be infused with a Christian morality which persists in law today, and which has had a major influence in the Western concept of rights.

From nature to natural law

The classical cosmopolitanism of the Stoics in ancient Greece is usually presented as the catalyst for modern, universalist conceptions of rights.³⁴ For example, Socrates believed that goodness was universal, refuting the Sophists’ claim that ideas of goodness and justice depended on the customs of each society; Cicero looked to universal laws that transcended customary and civil laws, endorsing the Stoic notion of a ‘citizen of the whole universe’.³⁵ The Stoics believed that human beings contained a “divine spark”, enabling them to live in accordance with nature. The universe had been designed, or ordered, in a particular way, and natural law was the means by which humanity could live in harmony with the universe.³⁶ However, over time, the classical concept of natural law became infused with a Christian version of universalism, and natural law thereby came to be synonymous with “divine command”. Law thus became intertwined with morality.

³³ Martin [n 30], 139. An ancient Greek man’s desire to be penetrated was considered unnatural because he thereby renounced his natural position of male superiority and honour; his desire frustrated the gender hierarchy of “nature”.

³⁴ ‘Cosmopolite’ was the Ancient Greek term for ‘citizen of the world’

³⁵ Micheline R Ishay, *The Human Rights Reader: Major Political Essays, Speeches and Documents From the Bible to the Present* (Routledge, 1997), 26-9

³⁶ According to Plato’s *Gorgias*, this orderly universe is based on ‘forms’: naturally pure examples of the temporal (508a). In *The Republic*, Plato depicts the ideal community as ‘a city which would be established in accordance with nature’ (517b-d). And as Aristotle stated in *Rhetoric*: ‘Universal Law is the law of Nature. For there really is... a natural justice and injustice that is binding on all men... an all-embracing law, through the realms of the sky.’

St Augustine (354-430 CE) played a crucial role in the redefinition of law during the late antiquity period. Considered to be the first Christian philosopher, St Augustine developed a theory of justice in which justice came to mean the love of the highest good, or god. As a result of the Fall of Adam in the Garden of Eden, whereby he disrupted the perfect order established by god, humanity is damned to endure eternally. According to Augustine, the state is a divinely ordained punishment for fallen humanity, serving the divine purposes of punishing the wicked and rewarding the righteous. The state also acts as a panacea for the effects of the Fall, in that it serves to maintain such order as is possible for fallen humanity to enjoy in the present world.³⁷ The concept of “original sin” meant that it was impossible for secular law and justice to redeem people from evil; the state, unlike Augustine’s god, had no intrinsic legitimacy. Nearly a millennium later, Thomas Aquinas (1225-1274 CE) synthesised original classical teachings with Christianity in his development of Canon (ecclesiastical) law. Aquinas’ concept of justice was built on the need for repression of sin and atonement for guilt. He reworked the rediscovered works of the classical Greek philosopher, Aristotle, and reframed his understanding of homosexuality, so that it came to mean “unnatural” in the sense of “sin”.³⁸ Over time, a secularised version of Christian ethics came to influence the development of a broad liberal discourse on human rights.

During the seventeenth century, humanity replaced god at the centre of the universe, and theories of the limits of state power over its citizens reflected this development. Thomas Hobbes believed that politics could only achieve peace if feuding citizens empowered the state to rule over them. In *Leviathan*, Hobbes departed from Cicero’s classical concept of a “social spirit” which is found naturally and universally in humanity. Instead, he hypothesised a ‘state of nature’ where ‘nothing can be Unjust’ in this ‘warre of every man

³⁷ ‘Augustine: Political and Social Philosophy’, *Internet Encyclopedia of Philosophy*
<<http://www.iep.utm.edu/aug-poso/>> accessed 20 August 2014

³⁸ See Fergus Kerr, *Thomas Aquinas: a Very Short Introduction* (Oxford University Press, 2009)

against every man’.³⁹ A rational human being would survive and thrive in this state of nature by acting according to the laws of nature. Having excised ideas of the common good from his theory of law, Hobbes’ Golden Rule became ‘do not that to another, which thou wouldst not have done to thy selfe’ (1996: 79).⁴⁰ We can see here another incarnation of neo-Christianity, and an early illustration of the tension between security and rights-balancing.

In the twentieth century, Finnis’ modern restatement of natural law postulated a series of basic human goods, one of which was religion.⁴¹ His approach has been criticised for being used to support the Catholic Church on a range of controversial moral issues.⁴² For example, Finnis argues that, while the state should refrain from persecuting individuals on the basis of their sexual orientation, it should nevertheless deter public approval of homosexual behaviour. Finnis grounds his argument not on the claim that homosexual sex is ‘a crime against nature’,⁴³ but on the idea that gay sex cannot involve a union of procreation and emotional commitment and is therefore an assault on heterosexual union.⁴⁴ Finnis’ attitude to ‘sexual orientation’ (the fact that he uses quotation marks here is telling), was reflected in Christian-right discourse during the recent same-sex marriage debates.⁴⁵ Section 1(3) of the Marriage (Same-Sex Couples) Act 2013 provides that Canon law on same-sex marriage – that marriage is the union of one man with one woman – is exempt from the centuries-old requirement that ‘no Canons shall be contrary to... laws or

³⁹ Thomas Hobbes, *Leviathan* (R Tuck ed) Cambridge University Press, 1996 [1651]), 72

⁴⁰ Hobbes [n 39], 79

⁴¹ John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980)

⁴² Stephen Buckle, ‘Natural Law’ in Peter Singer (ed) *A Companion to Ethics* (Blackwell, 1997), 171

⁴³ The ‘crime against nature’ was historically a legal term identifying forms of sexual behaviour not considered natural, such as anal sex. See William Blackstone (1753) *Commentaries on the Laws of England*, Book 4, Chapter 15, Section 4 <http://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf> accessed 20 September 2016

⁴⁴ John Finnis, ‘Law, Morality and “Sexual Orientation”’ (1994) *Notre Dame Law Review* 69(5), 1049

⁴⁵ See the discussion in Chapter 4

statutes of this realm'.⁴⁶ As Johnson and Vanderbeck point out, such a divergence between Canon and statute law is without direct equivalence since the 16th century, and 'until such time as it chooses to solemnise same-sex marriage and amend its Canon law, the Church of England can continue to assert a heteronormative framework of marriage in English law'.⁴⁷

These examples illustrate the point made in Chapter 1, that changes in the discourse are the means by which the social world itself is changed. The 'truth' of what the ancient Greeks understood as natural law was modified through the centuries into a Christian 'truth', which in turn has shaped the Western understanding of law and morality. This thesis views these 'truths' through the prism of power relations and the knowledges that are produced through these relations. To repeat Foucault's observation, power 'produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production'.⁴⁸ The next section moves on to examine the production of 'the homosexual' through the power/knowledge axis.

The construction of the homosexual

In his analysis of the development of sexuality, Foucault argued that 'the homosexual' was theorised into existence:

Sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth century homosexual became a personage, a past, a case history, and a childhood, with an indiscreet anatomy and possibly a mysterious physiology... The sodomite had been a temporary aberration; the homosexual was now a species.⁴⁹

⁴⁶ Submission of the Clergy Act 1533 s 3

⁴⁷ Paul Johnson and Robert M Vanderbeck, *Law, Religion and Homosexuality* (Routledge, 2014), 138

⁴⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage, 1995 [1977]), 194

⁴⁹ Foucault [n 2], 43

Current equality law conceptualises homosexuality as ‘being’, whereas faith is still seen as a ‘doing’. For example, Article 9(1) ECHR provides for freedom of religion and belief, but Article 9(2) places restrictions on the manifestation (the ‘doing’) of that belief where, inter alia, it conflicts with the rights and freedoms of others. However, religion seems to view homosexuality as ‘doing’, whereas faith is seen as ‘being’. Nevertheless, religion was never medicalised and categorised in the same way as homosexuality was. In fact, Stychin has argued that law actually ‘desires’ the homosexual as an ‘other’ against which society may coalesce.⁵⁰ This also raises an issue about the vulnerability of heterosexuality, to the extent that it needs bolstering. Part of this discourse on ‘the homosexual’, therefore, involves viewing sexuality as fixed. As Weeks notes, traditionally ‘sexuality pinned you down like a butterfly on a table’.⁵¹ In fact, the notion that sexuality might have been fluid or subject to choice had previously been part of homophobic discourse.⁵² Gay rights campaigns have historically characterised homosexuality as having a fixed quality in order to counteract this homophobia and assert rights to equality. However, Queer theory has challenged the idea of an immutable or essential sexuality,⁵³ and this challenge will be examined next.

It is a testament to heteronormativity that researchers do not seek to establish the “cause” of heterosexuality, while several studies⁵⁴ have sought to determine the “cause” of same-sex desire. These researchers were mindful that gender and sexuality stereotypes have not been helpful in promoting respect for gay people, or in enabling those who do not conform to stereotypes to feel comfortable in their gender and sexuality identities. They believed that the findings were important for those concerned with the mental health of sexual

⁵⁰ Carl F Stychin, *Law's Desire* (Routledge, 1995)

⁵¹ Jeffrey Weeks, *Sexuality* (Routledge, 2010), 10

⁵² Eve K Sedgwick, *The Epistemology of the Closet* (University of California Press, 2008)

⁵³ See for example Stychin [n 50]

⁵⁴ For a review of the literature in this area see Qazi Rahman, ‘The neurodevelopment of human sexual orientation’ (2005) *Neuroscience and Biobehavioral Reviews* 29, 1057. See also Sedgwick [n 52] on the dangers of fixating on purported “causes” of homosexuality.

minorities, as poor mental health in gay populations is partly due to societal stigma and victimisation.⁵⁵ However, this research is not a complete explanation. In the first instance, it fails to account for bisexuality, or for people who move between sexualities.

Research by Kinsey⁵⁶ provided the first major statistical evidence that heterosexuality and homosexuality are not static human sexual orientations. Sexuality is rather a continuum of desires and behaviours, with a large group somewhere in the middle, sharing an amalgam of hetero and homo-oriented feelings. The possibility of human capacity for a mixed sexuality was first recognised in Western literature by Freud, who considered everyone to be born with a ‘polymorphous perversity’,⁵⁷ and that an individual’s sexual orientation evolves through a complex developmental process which is significantly influenced by familial and social factors and norms. Repression of sexuality, Freud thought, was largely the result of the structures of morality and authority erected by society, including heteronormativity and homophobia (although Freud did not use these terms). If everyone is born with a ‘polymorphous perversity’, there is the possibility that their sexuality could develop in either or both directions.

The construction of identity

It seems that biological foundations are limited as a basis for claiming an identity for either sexual orientation or religious belief; however, the degree to which each is grounded in biology might be thought to differ significantly.⁵⁸ This is clear if we remember that biological characteristics need not also be essential ones. As Halley points out, biological causes determine many features of an individual, such as freckles or the ability to roll one’s

⁵⁵ See Chapter 6 for a detailed analysis of the harm caused by anti-gay discrimination.

⁵⁶ AC Kinsey, WB Pomeroy and CE Martin, *Sexual Behaviour in the Human Male* (WB Saunders, 1948); AC Kinsey, WB Pomeroy, CE Martin and PH Gebhard, *Sexual Behavior in the Human Female* (WB Saunders, 1953)

⁵⁷ See Harry Taylor, *Freud and the Polymorphous Perverse* (GRIN, 2012)

⁵⁸ See the general criticism offered by Richard Dawkins in *The God Delusion* (Bantam Press, 2006)

tongue, that are rarely, if ever, considered to *define* her.⁵⁹ However, Ochs⁶⁰ and Yoshino⁶¹ suggest that both heterosexuals and homosexuals share an investment in having stable identities, drawing comfort from this rigid social ordering. They also have their own distinctive investments in stabilizing sexuality categories. For the former, it is an investment in heteronormativity and the retention of privilege; for the latter, it is ‘an investment in the retention of the immutability defense and one in the ability to form an effective political movement’.⁶² Rigid categorisation of sexuality may hold comfort even for those stigmatised within it, because ‘it appears to foreclose on the possibility of drifting back into normality and thus removes the element of anxious choice’.⁶³

Yet homosexuality as an identity can be both empowering and limiting. Halperin highlights the paradox inherent in asserting a gay identity:

Gay identity is absolutely necessary, essential, and crucial, because it is perennially threatened by denial, refusal, suppression, and ‘invisibilization’... But gay identity is also dangerous, even treacherous. It is an identity which must be ceaselessly resisted and rejected, precisely because it normalizes and polices sexuality, because it functions to contain sexual and social difference, both in heteronormative culture at large and in lesbian and gay culture in particular. It is a politically catastrophic identity insofar as it enables society serenely to manage sexual diversity and in fact

⁵⁹ Janet E Halley, ‘Sexual Orientation and the Politics of Biology – A critique of the argument from immutability’ (1994) *Stanford Law Review* 46, 503

⁶⁰ R Ochs, ‘Biphobia: It Goes More Than Two Ways’ in BA Firesteird (ed) *Bisexuality: The Psychology and Politics of an Invisible Minority* (Sage, 2006), 217

⁶¹ K Yoshino, ‘The Epistemic Contract of Bisexual Erasure’ in MA Fineman, JE Jackson and AP Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2009)

⁶² Yoshino [n 61], 206

⁶³ M McIntosh, ‘The Homosexual Role’ in E Stein (ed) *Forms of desire: sexual orientation and the social constructionist controversy* (Garland, 1990), 25, 28

to stabilize and consolidate heterosexual identity itself (which would be a much more fluid, unstable and insecure entity without gay identity to shore it up).⁶⁴

It is true that emerging lesbians and gay men often find solace in the existence of a gay identity. However, as Tatchell observes, ‘gay identity is the product of anti-gay repression. If one sexuality is not prioritised or privileged over another, defining oneself as gay (or straight) will cease to be necessary and have no social relevance or significance’.⁶⁵ Yoshino is correct to suggest that the increased visibility of bisexuality could have transformative consequences for how sexual orientation is viewed, both politically and legally. Tatchell goes further and imagines a future where differences in sexual orientation no longer matter:

Once homophobia declines, we are bound to witness the emergence of a homosexuality that is quite different from the homosexuality we know today. With the strictures on queerness removed, more people will have gay sex, but less of them will identify as gay. This is because the absence of homophobia makes the need to assert and affirm gayness redundant.⁶⁶

The disappearance of heteronormativity and homophobia would enable people to express their sexualities more naturally and spontaneously. Nevertheless, it is undeniable that such a utopia is likely to remain a desire, rather than an actuality, for some considerable time. In the meantime, it seems as though a gay identity will remain important for many people, irrespective of whether sexuality is fixed or fluid. In the absence of utopia, it remains important to recognise both the necessity of identity and the importance of challenging it. A gay (or indeed religious) identity enables collective action, but ultimately such action

⁶⁴ David Halperin, ‘Gay identity after Foucault’ in L Cairns (ed), *Gay and Lesbian Cultures in France* (Peter Lang, 2002), 18

⁶⁵ Peter Tatchell, ‘Future Sex – beyond gay and straight’ *Pink News* (London, 2012)

⁶⁶ Tatchell [n 65]

must be linked to wider social liberation rather than simply gaining incremental rights. In the context of this thesis, social liberation involves full sexual citizenship that is not dependent on socio-economic status.

The preceding discussion illustrates that the question of identity is not straightforward. As Gallop observes, ‘identity must be continually assumed and immediately called into question’.⁶⁷ Identity is felt to be subjectively important, but most people would probably struggle to define what it means objectively, not least because it carries a multiplicity of differences within itself.⁶⁸ Yet identity is a major plank of the debate between faith and sexuality rights. Indeed, it has been argued that the question of sexual identity has taken on increasing importance in the West as the numbers of people actively practising a religion has declined: ‘In the absence of any alternative world outlook to that of religion, sexuality itself has become an arena for thinking about personal destiny and belonging’.⁶⁹ It is important to examine how the meaning of both sexual and religious collective identities might be reshaped to better reflect the diversity of human experience.

Collective identities

According to Appiah, collective identities all seem to have a similar structure.⁷⁰ A collective identity firstly requires ‘the availability of terms in public discourse that are used to pick out the bearers of the identity by way of criteria of ascription, so that some people are recognised as members of the group’. Then, ‘a consensus on how to identify them is applied, usually organised around a set of stereotypes. There is a ‘social conception’ of them’. At the same time, there is ‘internalization of those labels as parts of the individual

⁶⁷ J Gallop, *The Daughter’s Seduction: Feminism and Psychoanalysis* (MacMillan, 1982), xii

⁶⁸ A Borgos, ‘The Boundaries of Identity: Bisexuality in Everyday and Theoretical Contexts’ in R Kuhar and J Takacs (eds) *Beyond the Pink Curtain: Everyday Life of LGBT People in Eastern Europe* (Ljubljana Peace Institute, 2007)

⁶⁹ Jeffrey Weeks, *Sexuality* (Routledge, 2010), 106

⁷⁰ Kwame A Appiah, *The Ethics of Identity* (Princeton University Press, 2005), 66-69

identities of at least some of those who bear the label'. Finally, there exist 'patterns of behaviour towards the group... gender, sexuality, and racial and ethnic identity have all been profoundly shaped (even, in a sense, produced) by histories of sexism, homophobia, racism, and ethnic hatred'. Appiah concludes that identity has ethical and political implications: ethical because 'it figures in identification, in people's shaping and evaluation of their own lives', and political because 'it figures in treatment by others, and that how others treat one will help determine one's success and failure in living one's life'. Identity is clearly important to people, both individually and collectively. How, then, are these identities formed?

Plummer⁷¹ charts four stages of identity formation. It begins with 'sensitization': an awareness of the possibility of being different, and moves on to 'signification': the attribution of a developing meaning to the difference. Then follows 'subculturalization': recognising oneself through involvement with others who share the difference. Finally, there is 'stabilization': full acceptance of one's feelings and way of life. While this approach is useful, it does not provide the full picture. In terms of sexuality, for example, it is not guaranteed that either subculturalization or stabilization will occur. Societal and internalised homophobia and heteronormativity can prevent someone with homoerotic feelings from acting them out, from being part of a gay scene, or indeed ever feeling comfortable in their orientation. In terms of religion, it is possible that those raised in a religious family are less likely to undergo a sensitization or signification process unless they come to question their faith. Class and socio-economic status are also relevant here; working-class gay people may have less access to people and places that can facilitate subculturalization and stabilization. This is discussed further in Chapters 6 and 7.

⁷¹ Ken Plummer, *Sexual Stigma: An International Account* (Routledge and Kegan-Paul, 1975)

The report by the Christians in Parliament Group, *Clearing the Ground*, posits religious identity as more fundamental than sexual identity.⁷² Seglow argues that it is rare for a person's culture to make categorical or prescriptive demands, whereas religion tends to do so.⁷³ Seglow appears not to realise that cultural communities (including lesbian and gay communities) can also impose norms on their members, however implicitly. For example, lesbians who are perceived as "too feminine" can sometimes be subject to covert or even overt ostracism from other lesbians, for buying into society's traditional concept of female beauty; on the other hand, "butch" lesbians have historically been accused of being too male-identified.⁷⁴ One important difference with cultural community (as opposed to religious) norms is that there is no "higher authority" from which such norms are said to flow. By contrast, the religious subject is "grown" in the context of family upbringing, schooling, sacred texts, collective worship, ceremonies and rituals, and so on. Both religious and gay/lesbian identities may be socially constructed, but gay people are simply not "cultivated" and "normalised" in the same way as young people raised within a religious framework.

People tend to be raised in the religion of their parents, and so as children they have little choice in that regard. Article 2 of the First Protocol of the ECHR also provides that the state must respect the right of parents' religious convictions in respect of education and teaching. This aspect of the right is closely aligned to the right to freedom of religion in Article 9. However, this right is not without criticism. For example, Dawkins holds the view that:

⁷² *Clearing the Ground inquiry: Preliminary report into the freedom of Christians in the UK* (Christians in Parliament, February 2012) www.eauk.org/clearingtheground (accessed 11 May 2016), 29

⁷³ Jonathan Seglow, 'Theories of Religious Exemptions' in G Calder and E Ceva (eds) *Diversity in Europe: Dilemmas of Differential Treatment in Theory and Practice* (Routledge, 2010)

⁷⁴ R Beres-Deak, 'Values Reflected in Style in a Lesbian Community in Budapest' in R Kuhar and J Takacs (eds) *Beyond the Pink Curtain: Everyday Life of LGBT People in Eastern Europe* (Ljubljana Peace Institute, 2007); Pat Califia, *Macho Sluts* (Arsenal Pulp Press, 2009 [1988])

A child is not a Christian child, not a Muslim child, but a child of Christian parents or a child of Muslim parents. This latter nomenclature, by the way, would be an excellent piece of consciousness-raising for the children themselves. A child who is told she is a 'child of Muslim parents' will immediately realize that religion is something for her to choose – or reject – when she becomes old enough to do so.⁷⁵

As adults we do have a choice whether to continue to place stock in religion, or prefer to adopt other philosophical approaches to life. In contrast, a heteronormative society tends not to inculcate homosexuality in its children; it actually militates against a person freely orienting themselves towards a homosexual or bisexual identity. If we accept this as true, we might conclude that to this extent Sedley LJ is justified in his distinction between religion and the other protected characteristics in equality law:

... it is to be noted that the same definition is used for all the listed forms of indirect discrimination, relating to age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. One cannot help observing that all of these apart from religion or belief are objective characteristics of individuals; religion and belief alone are matters of choice.⁷⁶

Yet as Davidson argues, religious belief is frequently not experienced as a choice on a subjective level.⁷⁷ Apostasy contains the potential for profound existential loss, quite apart from the loss of family and community support. From the perspective of those who celebrate their religion, identity is not experienced as coercion. However, for most gay people, compulsory heterosexuality *is* experienced as coercion. This suggests that neither

⁷⁵ Richard Dawkins, *The God Delusion* (Bantam Press, 2006), 382

⁷⁶ *Eweida v British Airways plc* [2010] EWCA Civ 80 [40] (Sedley LJ). The characteristics of marriage and maternity are also arguably matters of choice, however.

⁷⁷ MR Davidson, 'When Identities Collide' (2012)

<<http://www.coreissues.org/uploads/When%20identities%20collide.pdf>> accessed 19 April 2012

faith nor sexuality is entirely fixed, but this does not prevent either group from placing an importance on their respective identities. In this regard, it appears that equality arguments based on identity are in danger of resulting in the same zero-sum game as arguments based on equal rights. One reason for this is that, as Cooper highlights, identity-based equality arguments can reinforce a ‘hegemonic norm against which other groups’ demands for equality are judged’. This is because ‘identities, desires, interests, and objectives are shaped by (in)equality, rather than operating as the uncontested, uncontestable site from which equality claims are made’.⁷⁸ In other words, identity is constructed within an unequal society.

The thesis has already discussed the prevailing norm of heterosexuality in Chapter 1. It is necessary to consider, then, to what extent society can offer genuine equality on the basis of sexual orientation. Cooper asks whether heteronormativity means that ‘only the most assimilated or familiar aspects of homosexual life and culture – those most similar to heterosexuality – can achieve equal recognition’.⁷⁹ One response might be to separate acts from identities, treating identities equally but giving differential treatment to acts depending on their basis. Cooper acknowledges that this assumes a separation of the two, which may not always be possible. Indeed, evangelical Christians would say that it is not possible to separate the ‘being’ from the ‘doing’ of Christianity.⁸⁰

Notwithstanding this assertion, it should be possible to distinguish acts based on whether they respect or seek to undermine equality. Cooper gives the example of anti-fascist forces who are responding to a ‘prior politics of inequality – making any claim by fascists to be an oppressed minority absurd’.⁸¹ Conservative groups are now tending to present their

⁷⁸ Davina Cooper, ‘And You Can’t Find Me Nowhere’: Relocating Identity and Structure within Equality Jurisprudence’ (2000) *Journal of Law and Society* 27(2) 249, 250-1

⁷⁹ Cooper [n 78], 255

⁸⁰ See for example *Clearing the Ground* [n 72]

⁸¹ Cooper [n 78], 258

claims through discourses traditionally associated with vulnerable groups; it then becomes necessary to establish whether such groups are in fact defending privilege, as opposed to democracy and equality.⁸² Identity's links with relations of power, such as heteronormativity, mean that identity is as much of a political question as is equality. Both concepts also find themselves subject to a legal gaze. It is here that we can consider the state's role in prescribing the lens through which faith and sexuality are regarded.

State neutrality and the public sphere

Modern western liberalism envisages everyone being free to live according to their own conception of the 'good life' without state interference.⁸³ The idea that the state should be neutral among competing conceptions of the good life is summed up by the liberal claim made by John Rawls that 'the right is prior to the good'. Rawls' priority of the right over the good in modern democratic societies means that individual rights should not be subsumed under the general welfare; and principles of justice must be reached independently of any one conception of the good. Rawls had posited a hypothetical 'original position' as the basis for principles of justice, whereby citizens had to envision what a just society would look like from behind a 'veil of ignorance' so that they did not know in advance what their position in that society would be. This meant that, in theory, rights would not depend on any particular conception of the good life.⁸⁴

Rawls' assessment of what is required by a democratic citizenship includes consideration of religion's place in political deliberations in the public sphere. This is relevant to the discussion of how claims for religious exemptions from equality law should be treated, as

⁸² See Chantal Mouffe, 'On the Itineraries of Democracy: An Interview with Chantal Mouffe' (1996) *Studies in Political Economy* 49, 131 and the discussion in Chapter 1

⁸³ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977)

⁸⁴ John Rawls, *A Theory of Justice* (Harvard University Press, 1971) Similarly, the liberal theorist Dworkin [n 83] suggested that individual rights operate as trump cards held by individuals against state actions or policies that would impose some particular vision of the good on society as a whole.

analysis of the legal debates in Chapters 4 and 5 will show. According to Rawls, religious reasons can be included in public deliberation on fundamental political questions, provided that non-religious, political reasons are subsequently offered in support as well.⁸⁵ Rawls' proviso of 'proper' political reasons refers to reasons based on values and ideals that he views as the baseline conditions for democracy, such as freedom and equality – what he terms an 'overlapping consensus'.⁸⁶ Therefore, religious citizens should, in addition to their faith-based arguments, advance corroborating 'public' (ie non-religious) reasons.⁸⁷ This suggests that Rawlsian liberalism would not accept discrimination against gay people that is grounded solely in religious belief, and appeals to conscience are not a sufficient excuse.

However, Rawls' proviso has been criticised elsewhere in the liberal literature, for imposing an unnecessarily heavy cognitive burden on religious citizens. The argument is that, in cases of conflict, strongly religious people feel somehow compelled to prioritise religious reasons in forming their convictions.⁸⁸ Stychin argues that there is insufficient understanding of how religion is actually experienced by the faithful; a religious conscience is not experienced as a choice, and 'the test of whether the manifestation of belief impacts upon the rights of others also may not be relevant when one is faced with the compulsion to act'.⁸⁹ Stychin is clearly concerned that attempting to qualify the protection given to religion involves an unfair privatisation of the expression of belief; yet elsewhere he observes that there has so far been 'little discursive space for a critique of religion', which appears to – if not entirely contradict – then at least weaken the

⁸⁵ John Rawls, 'The Idea of Public Reason Revisited' (1997) *University of Chicago Law Review* 64(3), 765

⁸⁶ John Rawls, *Political Liberalism*. The John Dewey Essays in Philosophy (Columbia University Press, 1993), 133-72

⁸⁷ Rawls [n 86], 137f

⁸⁸ Christine Lafont, 'Religion and the public sphere: What are the deliberative obligations of democratic citizenship?' (2009) *Philosophy & Social Criticism* 35 nos. 1-2, 127

⁸⁹ Carl Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) *Oxford Journal of Legal Studies* 729-754

persuasiveness of his concern for the religious experience.⁹⁰ The lack of discursive space for a critique of religion is another illustration of the prevalence of theonormativity.

Habermas tries to ameliorate the purported burden on religious citizens by according different weight to religious reasons in public debate, depending on whether the debate is being held at the institutional level or at the wider level. While Habermas accepts Rawls' proviso in the 'formal' public sphere (ie at the institutional level), he would remove any requirement to give corroborating public reasons in the 'informal' public sphere if such reasons were not available. Thus individual citizens, outside of the institutional arena, would have no duty to translate religious reasons into public reasons.⁹¹ Habermas' alternative proviso thus places a more stringent requirement on state actors and institutions than on citizens in general. On his view, then, it appears that individual citizens would be entitled to justify anti-gay discrimination on grounds of conscience alone. It is submitted that, where no non-religious corroborating reasons are available, what remains is a religious veneer over straightforward prejudice. As a consequence, of the two liberal approaches, Rawls' more stringent proviso is to be preferred to that of Habermas.

As Lafont affirms in her critique of Habermas, 'what is at issue is not so much whether religious citizens have the right to *include* their sincere beliefs and reasons in the informal public sphere, but whether they have the right *to do nothing more*'.⁹² Religious citizens should not be able to rely on exclusively religious justifications regarding policy questions because, if they wish to fulfil their democratic obligations in a plural society, 'they cannot remain "mono-glots" in their political advocacy'.⁹³ These democratic obligations are to treat all citizens as free and equal; and reasons advanced in support of policy during public

⁹⁰ Carl F Stychin, 'Closet Cases: 'Conscientious Objection' to Lesbian and Gay Legal Equality' (2009) Griffith Law Review 18(1), 17, 32

⁹¹ Jurgen Habermas, 'Religion in the Public Sphere' (2006) European Journal of Philosophy 14:1, 1

⁹² Lafont [n 88], 137 (emphasis in original)

⁹³ Lafont [n 88], 138

debates must be compatible with such treatment in order to be reasonably accepted by society.

This is important when considering the extent to which religious reasons are taken seriously, even in the ‘informal’, non-institutional sphere. A theonormative society, even if it is not a theocracy, can nonetheless be persuaded to take religious arguments at face value because of the assumption that religion is special. Even if it is not accepted that there is a special religious compulsion to discriminate against gay people, arguments are made that religion is itself a secular value which is capable of contributing to the sum of human wellbeing.⁹⁴ Nevertheless, research indicates that UK society is growing increasingly secular.⁹⁵ As Chapters 4 and 5 highlight, moves towards secularism over the past sixty years or so have encouraged religious conservatives to become strategic polyglots. In recent years, the extension of equality law protection to gay people has spurred religious conservatives to couch exemption claims in the language of rights instead of creedal religious injunctions. They have appropriated the language of rights as a cloak to cover their distaste for homosexuality.

Some advocates of gay rights have nonetheless criticised what is effectively a privatisation of belief in current equality law, arguing that ‘the division between public and private, and manifestation and belief, is a meaningless and, arguably, hypocritical distinction’.⁹⁶ Here, it is instructive to consider the view of Laws LJ in *McFarlane*.⁹⁷ He maintains that the law does, and must, distinguish between the protection of the right to hold *and express* a belief and the protection of the substance or content of a belief by virtue of it being a religious

⁹⁴ See for example T Mackelml, ‘Faith as a Secular Value’ (2000) McGill Law Journal 45, 1; Andrew Koppelman, ‘Is it Fair to Give Religion Special Treatment?’ (2006) University of Illinois Law Review 571

⁹⁵ See for example ‘British Social Attitudes: Church of England decline has accelerated in past decade’ (*NatCen*, 31 May 2015) <<http://www.natcen.ac.uk/news-media/press-releases/2015/may/british-social-attitudes-church-of-england-decline-has-accelerated-in-past-decade/>> accessed 2 July 2015

⁹⁶ Carl F Stychin, ‘Faith in the Future: Sexuality, Religion and the Public Sphere’ (2009) Oxford Journal of Legal Studies 729, 730

⁹⁷ *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880

belief. This distinction must be drawn as a condition of a free society, and it would be unprincipled to privilege a Christian moral position by granting it particular protection. The law must remain neutral, because religious faith, being unprovable, is entirely subjective to everyone except the believers themselves. Therefore, no-one else should be legally bound by such moral precepts, and it is unjustified to call upon the law to protect a purely religious position. To favour the subjective over the objective would be irrational and would also be divisive and arbitrary in a pluralistic society. He is emphatic as to the undesirable consequences of such an action:

The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be *less than citizens*; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.⁹⁸

This is as clear a case as any for secularism in the public sphere. Yet Laws LJ is not arguing for a ‘closeting’ or privatisation of religious belief as such. The implication of his judgment is, rather, that law – in this case, equality law – should not be dictated to by religious belief. This may be a nice distinction, but it is important in terms of the conservative religious charge that current equality law has created a hierarchy of rights in which sexuality is privileged over religion. Where public values are concerned, one should look not for the lowest common denominator but the ‘highest common factor’: the set of

⁹⁸ [n 97] [24] (Laws LJ) (emphasis added)

values at the core of every religious tradition and secular philosophy.⁹⁹ Otherwise, arguments from faith would need to be capable of being translated into terms that others could understand and give rational weight to. Religiously-inspired public engagement is acceptable as long as it does not lead to religion being imbued with special status; it should be treated as any other point of view and be subject to interrogation and justification.

There is a range of views as to whether public expression of religion is an appropriate vehicle for equality law at all. For example, Barry advocates complete state neutrality in matters of religion.¹⁰⁰ He does not deny that the unequal impact of a law may indicate its unfairness; for example, if registrars are required to conduct same-sex marriage (or civil partnership) ceremonies, a conservative religious registrar might experience this as particularly difficult. However, Barry argues that this is never enough on its own; more substantiation is needed to show exactly *why* the law is unfair. Claims for equality should be reserved for rules that treat people differently on the basis of characteristics such as race, gender or sexual orientation. Barry views religion as a preference rather than a personal characteristic. Similarly, Jones¹⁰¹ asserts that people need to bear the consequences of their belief. Judith Thomson's approach¹⁰² adds a further layer of analysis by distinguishing between distress that is mediated by belief and distress that is not. On her account, the state should protect against only the latter type of distress (or harm). One might also distinguish between belief-mediated distress that is rational and that which is irrational. Thomson excludes both, but the argument for exclusion seems more persuasive in the case of the irrational. Thomson's arguments will be examined in more detail in the discussion on harm in Chapter 6.

⁹⁹ British Humanist Association, 'Right to Object?' (2011) <<http://www.humanism.org.uk/news/view/923>> accessed 23 November 2012, 8

¹⁰⁰ Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, 2002)

¹⁰¹ Peter Jones, 'Religion and freedom of expression' (2011) *Res Publica* 17(1), 1

¹⁰² Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1990)

However, it is important to recognise that a heteronormative society is not neutral as regards the value of different sexualities; and a theonormative society can be grounded on the assumption that religion has a place in the public sphere without the need for corroboration. Taking this into account, it can be argued that the very idea of neutrality is chimerical and the state cannot be neutral. This idea is not necessarily anti-liberal; it is the kind of argument advanced by ‘perfectionist’ liberals such as Raz, who proposes that individuals be free to adopt any idea of the good life they choose, as long as they do not expect that all ideas will be equally supported by the state.¹⁰³

One alternative approach is provided by Oakeshott, who believes that what links members of society is not a single substantive idea of the common good, but rather a ‘practice of civility’, or a common language of civil interaction, which he terms ‘respublica’.¹⁰⁴ This approach is said to recognise both pluralism and individual liberty. However, as Mouffe observes, the respublica is still ‘the product of a given hegemony, the expression of power relations’,¹⁰⁵ and whatever forms of agreement may be reached, they are always going to be partial because consensus is necessarily based to some extent on exclusion. In the context of this thesis, the continued existence of hetero- and theo-normative hegemonies has implications for homosexual equality because they shape how the public sphere itself is constituted. As Cooper states, ‘this leaves subordinate sexualities out in the cold, excluded from the public’s collective subjectivity’.¹⁰⁶

Mouffe proposes instead a ‘radical democratic citizenship’, under which citizenship is no longer just a matter of legal status but also a form of identification, based on the collective

¹⁰³ See Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986), 120-1

¹⁰⁴ Michael Oakeshott, *On Human Conduct* (Clarendon Press, 1990), 182

¹⁰⁵ Chantal Mouffe, ‘Democratic Citizenship and the Political Community’ in (Miami Theory Collective ed) *Community at Loose Ends* (University of Minnesota Press, 1991), 70, 78

¹⁰⁶ Cooper [n 78], 267

recognition of the ethico-political values of liberty and equality.¹⁰⁷ Mouffe's concept of citizenship aims to construct a common 'chain of equivalence' among people's differing demands, in line with a principle of democratic equivalence.¹⁰⁸ On the face of it, this is an attractive concept, but on its own it cannot answer the protests of religious people who feel bound by a "higher" law. There might be difficulty establishing a chain of equivalence with respect to conservative religious demands concerning homosexual equality, as they so often seem to represent two opposing world views, each denying 'the foundational value of that which the other finds foundational'.¹⁰⁹ However, if a convincing case can be made that religion is not special and offers no solid basis for opposing homosexual equality, Mouffe's idea may itself prove to have potential.

This idea of a 'radical democratic citizenship' has implications for the realisation of full sexual citizenship in the public, as well as the private, sphere. In Chapter 4 of this thesis, the presence of LGBT resistance in faith communities is offered in support of the argument that there is no special relationship between faith and a requirement to be homophobic. The following section will consider some of the impediments facing non-heterosexuals in their bid for sexual citizenship, including those of a socio-economic nature. First, it is helpful to consider some of the literature on citizenship, and sexual citizenship in particular.

Citizenship and sexuality

In the course of this thesis, it is argued that the use of rights discourse has resulted in a zero-sum game when applied to the conflict between conservative religious expression and sexual orientation. Does this mean that the strategic deployment of rights discourse by the movement for gay equality might usefully be replaced with a discourse focused on citizenship? The argument is not without its attractions. Indeed, part of the rationale for

¹⁰⁷ Mouffe [n 101], 79

¹⁰⁸ Mouffe [n 101], 79-80

¹⁰⁹ Anthony Bradney, *Law and faith in a sceptical age* (Routledge-Cavendish 2008), 42

equality legislation is to remedy the historical oppression faced by particular sections of society; to bring them within the realm of citizenship by protecting them against discrimination on grounds of certain characteristics. If gay people are still subject to restrictions based on their sexual orientation, does reframing the discussion in terms of citizenship remedy this problem?

In recent years, the literature on sexual citizenship has focused more on rights claims, such as the campaign for same-sex marriage, and such successful claims have led to new forms of citizenship for gay people. However, much of the literature has criticised the underlying heteronormative assumptions, along with constructions of race, gender and class, which have shaped the idea of citizenship.¹¹⁰ While there has been some chipping away at the status of heterosexuality as a condition of citizenship,¹¹¹ there remains a debate as to how far the extension of citizenship to non-heterosexuals really does challenge heteronormative assumptions.¹¹² One argument is that the sexual citizenship that has been achieved through successful rights claims is one that is both privatised and depoliticised¹¹³ and one that is liable to lead to a decentring of sexual identity.¹¹⁴ Another critique focuses on how sexual citizenship appears to be ‘primarily about rights to participation in consumer society, linked to marketisation and the consumption of goods and services’,¹¹⁵ with the result that ‘the power that queer citizens enjoy is largely dependent on access to capital and credit’.¹¹⁶

¹¹⁰ See for example David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Polity Press, 2000); Yvette Taylor, ‘Lesbian and gay parents’ sexual citizenship: costs of civic acceptance in the United Kingdom’ (2011) *Gender, Place and Culture* 18(5), 583

¹¹¹ Steven Seidman, *Difference Troubles: Queering Social Theory and Sexual Politics* (Cambridge University Press, 1997)

¹¹² See for example Lisa Duggan, ‘The new homonormativity: The sexual politics of neoliberalism’ in R. Castronova and D. Nelson (eds) *Materializing Democracy: Toward a Revitalized Cultural Politics* (Duke University Press, 2002), 175-194

¹¹³ Michael Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (Harvard University Press, 1999)

¹¹⁴ Steven Seidman, *Beyond the Closet: The Transformation of Gay and Lesbian Life* (Routledge, 2004)

¹¹⁵ Diane Richardson, ‘Rethinking Sexual Citizenship’ (2015) *Sociology* 1, 4

¹¹⁶ Bell and Binnie [n 110], 96

Within the liberal rights realm, Rawls' analysis of the properties of citizenship rights¹¹⁷ can also be criticised for linking supposedly 'egalitarian' principles of justice to market constraints of wealth and income, which underlines the close relationship between the two spheres in Western capitalist democracy.¹¹⁸ There is also an implicit incorporation of a causal relativism, because once such citizenship principles are established, the history of citizenship rights consists of battles over the legitimacy of relative claims. This is not unlike the battles over the legitimacy of relative rights claims in the field of religious conflict with sexual orientation. Indeed, there is some debate in the literature as to whether citizenship discourse is any more helpful for gay equality, beyond its use as a strategic tool. Stychin, for example, argues that citizenship discourse 'may well reproduce rather than resolve many of the exclusions from national identity that outsiders seek to correct'.¹¹⁹

This concern is related to the observation, discussed further in Chapter 7, that the modern Western citizen is increasingly a product of his or her constitution as a consumer.¹²⁰ The modern gay citizen is also subject to this. The gay rights movement of the 1970s was chiefly concerned with breaking out of the heteronormative closet and proclaiming a public, gay identity. Decades later, the increased visibility of gay people in the public, commercialised sphere has offered businesses new marketing opportunities and led to a

¹¹⁷ John Rawls, 'The basic liberties and their priority' in S McMurrin (ed) *Liberty, Equality and Law* (Cambridge University Press, 1987), 21-31. Rawls identifies four properties of citizenship rights. The first property consists of those primary goods (social and natural) which any rational person would want 'whatever his plan of life or social orientation might be'. Second, Rawls' two 'principles of justice', ie that liberties should achieve the most extensive justifiable set of equal basic liberties for all; and that any socio-economic inequalities should serve to improve, ideally to maximise, the life situation of the least advantaged group. The third property concerns how far these two principles of justice influence the distribution of primary goods, so that rights and duties are assigned and monitored. Finally, the legitimate expectations of populations – the extent to which a citizenship culture is accepted as given and in which injustices are challenged – for example, in terms of constitutional rights or state institutional practices such as employment, welfare, etc.

¹¹⁸ David T Evans, *Sexual Citizenship: The Material Construction of Sexualities* (Routledge, 1993)

¹¹⁹ Carl F Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Temple University Press, 1998), 15

¹²⁰ See for example Davina Cooper, 'An Engaged State: Sexuality, Governance and the Potential for Change' (2003) *Journal of Law and Society* 20, 257

‘valorized gay identity’.¹²¹ Stychin’s conclusion, that ‘a model of national citizenship constructed around the citizen as consumer thus seems an inadequate basis for reimagining national identity for lesbians and gay men’,¹²² is well made.

The discourses surrounding sexual orientation equality in goods and services provision, discussed in subsequent chapters, illustrate that the homosexual qua consumer presents a challenge for our understanding of what it means to be a citizen in a capitalist society. This makes sexual citizenship a matter of both culture and capital – and these two aspects of citizenship coalesce in today’s consumer-oriented society. However, there is disagreement within academic opinion regarding how the relationship between homophobic exclusion and socio-economic exclusion should be understood – whether full homosexual equality requires equality of resources, or whether equality of recognition is sufficient.

Judith Butler¹²³ and Nancy Fraser¹²⁴ have debated the extent to which homophobic oppression is a function of capitalism or simply a lack of cultural recognition. Fraser draws a distinction between people who suffer mainly economic inequality and those whom she regards as suffering mainly cultural injustices. Whereas women and black people, for example, are oppressed both culturally *and* economically, Fraser sees gay people as a unique example of a group that requires nothing more than cultural recognition. According to Fraser, any economic inequality faced by gay people does not arise from the capitalist system per se, but from an inequitable system of cultural values.

¹²¹ Steve Valocchi, ‘The Class-Inflected Nature of Gay Identity,’ (1999) *Social Problems* 46(2), 207, 220. For example, it was recently reported that the Doritos snack brand had formed a partnership with the It Gets Better Foundation, a charity which campaigns for LGBT+ equality in the United States. For a \$10 donation, people could buy tortilla chips in colours evoking the rainbow flag (a symbol of LGBT pride). The packets bore the message: ‘There’s nothing bolder than being yourself.’

¹²² Carl F Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Temple University Press, 1998), 15

¹²³ Judith Butler, ‘Merely Cultural’ (1998) *New Left Review* 1/227, 33-44

¹²⁴ Nancy Fraser, ‘Heterosexism, Misrecognition and Capitalism: A Response to Judith Butler’ (1998) *New Left Review* 1/228, 140-149

In contrast, Butler draws on Marxist and socialist-feminist theory to argue that the regulation of sexuality cannot be separated from the organisation of society. Attempts to sever sexuality from the economy fail to recognise that ‘heterosexuality and heteronormativity are intrinsically connected to gender and the sexual division of labour’ which grounds our capitalist system.¹²⁵ Butler characterises the ‘heterosexual family’ as ‘a site for the reproduction of heterosexual persons, fit for entry into the family as social form’.¹²⁶ In Butler’s analysis, both gender and sexuality are intrinsically connected through the function of the family under capitalism.¹²⁷ Thus, if gender is a question of both resource and recognition equality, it follows that oppression of lesbian and gay people is not simply a question of cultural recognition. To unshackle the ‘mutually constitutive politics of class and sexuality’, and to characterise struggles around sexual orientation as ‘merely cultural’, masks the reality of poverty and discrimination that affects gay people under capitalism. Instead, discussions concerning sexual citizenship need to appreciate ‘the impact that class has on the potential to benefit from rights claims.’¹²⁸

At this point, it is useful to contextualise the discussion further. Marshall’s seminal post-war analysis of citizenship describes the evolution since the eighteenth century from civil, to political, to social rights.¹²⁹ His writing places the development of citizenship in the context of Western, liberal, capitalist democracy. Civil rights – rights necessary for individual freedom, including freedom of speech, thought and faith – formed the core of citizenship during the eighteenth century and were indispensable to the growth of a

¹²⁵ Susan B Boyd, ‘Family, Law and Sexuality: Feminist Engagements’ (1999) *Social and Legal Studies* (8) 369, 375

¹²⁶ Butler [n 115], 40

¹²⁷ For a fuller Marxist analysis of the family under capitalism, see Friedrich Engels, *The Origin of the Family, Private Property and the State* (Ernest Untermann tr, Rarebooksclub.com, 2012)

¹²⁸ David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Polity, 2000), 99; 144

¹²⁹ TH Marshall, *Citizenship and Social Class* in Jeff Manza and Michael Sauder (eds) (Norton, 2009 – essay first published 1950), 148-154. This view has been criticised for centring the perspective of the white working-class male: see for example Nancy Fraser and Linda Gordon, ‘Contract versus Charity: Why Is There No Social Citizenship in the United States?’ (1992) *Socialist Review* 22: 45–65

capitalist economy: ‘They gave to each man, as part of his individual status, the power to engage as an independent unit in the economic struggle and made it possible to deny to him social protection on the ground that he was equipped with the means to protect himself.’¹³⁰ Civil rights originated as fundamentally individual entities, which is why they resonated so well with the individualist structure and rhetoric of capitalism.¹³¹

The development of social rights from the end of the nineteenth century correlated with several factors: a rise in income, particularly at the lower level, which reduced the economic distance between skilled/unskilled and skilled/non-manual workers; an increase in small savings, even for the non-propertied classes; graduated direct taxation, which compressed disposable income across the board; and mass production, which enabled poorer people to enjoy material goods more similar to those of the rich.¹³² Social rights, according to Marshall, encompass everything ‘from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society’, and represent the responsibilities that the modern state has towards its citizens.¹³³

Dawn Oliver has noted that, during the 1970s and 1980s, the balance of citizenship rights shifted away from social rights of welfare in favour of civil rights to access the market, such as the right to buy council houses and to purchase shares in privatized industries. She argues that including such rights, which are ‘essentially directed to promoting the individual persona and private economy of the individual rather than citizenship in the sense of the relationship between the individual and the state or the community’, is to

¹³⁰ Marshall [n 129], 150

¹³¹ Marshall [n 129], 152

¹³² Marshall [n 129], 153

¹³³ Marshall [n 129], 149

stretch citizenship to breaking point.¹³⁴ The process continued, so that by the early 1990s, citizenship had become crystallised ‘around the twin statuses of consumer and taxpayer’.¹³⁵

In the context of the current debate, it can be argued that current equality law fixes rights discourse at the stage of civil rights, and has been unable to make the full transition towards full social rights for gay people, for two reasons. First, religious exemptions, operating in a heteronormative and theonormative framework, compromise the opportunities for lesbians and gay men to belong fully to the heritage and life of UK society. Second, the government’s refusal to implement the socio-economic duty in the Equality Act means that rights continue to be individualised and disembodied from the wider political and economic arena. At the same time, rights have absorbed a discourse of individual entitlement, with the focus on the individual ‘choosing’ subject – ‘albeit as good neoliberal responsibilised consuming citizens’.¹³⁶

However, it is possible that consumer capitalism may contain within it the potential for resistance through increased gay cultural visibility, just as ‘reform capitalism’ provided an opportunity for earlier generations of gay people to challenge discrimination on an ‘equal rights’ basis.¹³⁷ The gay person as citizen-consumer may in fact be another site of resistance, along with the gay person as religious adherent. This is an under-explored area of the literature; how extending forms of citizenship to non-heterosexuals may have the effect of disrupting and reconfiguring heterosexual subjectivities.¹³⁸ These opportunities for resistance are discussed further in subsequent chapters of this thesis.

¹³⁴ Dawn Oliver, ‘Active Citizenship in the 1990s’ (1991) *Parliamentary Affairs: A Journal of Comparative Politics* 44(2), 157, 160

¹³⁵ Evans [n 118], 5

¹³⁶ Richardson [n 115], 9

¹³⁷ Steve Valocchi, ‘The Class-Inflected Nature of Gay Identity,’ (1999) *Social Problems* 46(2), 207, 220

¹³⁸ Diane Richardson, ‘Locating sexualities: From here to normality’ (2004) *Sexualities* 7(4), 391

At this point in the discussion, it is necessary to highlight some of the arguments that have been advanced concerning the ability of gay people to act as citizen-consumers at all. Much of the discussion in this area has focused on the idea of liberty. Feldblum (2007) sees the issue as being between two types of liberty: identity liberty (which concerns equality) and belief liberty (which concerns morality and religious freedom). She explains the practical effect of the difference between identity and belief liberty in her discussion of equal access to employment and to goods and services provision, which have been the main foci of the conflict in UK equality law:

Ensuring that LGBT people can live lives of honesty and safety in all aspects of their social lives requires that society set a baseline of non-discrimination on the grounds of sexual orientation and gender identity. If individual business owners, service providers and employers could easily exempt themselves from such laws by making credible claims that their belief liberty is burdened by the law, LGBT people would remain constantly vulnerable to surprise discrimination. If I am denied a job, an apartment, a room at a hotel, a table at a restaurant or a procedure by a doctor because I am a lesbian, that is a deep, intense and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table or a medical procedure from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens. That assault is not mitigated by the fact that others might not treat me in the same way.¹³⁹

¹³⁹Chai R Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) Brooklyn Law Review 72(1), 61, 119

Koppelman's counter-argument,¹⁴⁰ in favour of religious exemptions, is based on the premise that 'an antidiscrimination law with a religious exemption is nothing at all like a regime with no such law'. He pleads for the right of conservative Christians also to 'live lives of honesty' (ie in accordance with their anti-gay beliefs), and suggests that rendering them 'constantly vulnerable' to forced association with gay people would be 'a deep, intense and tangible hurt' to them. He also asks how is the ability of gay people 'to live lives of honesty and safety' threatened by an occasional discriminator? Koppelman finds an unusual bedfellow in Carl Stychin, who thinks that there may sometimes be reasons to allow a religious celebrant to refuse to conduct a marriage service, suggesting that decision-makers should consider 'whether a minimal delay in getting a scheduled date for a marriage ceremony is a significant burden on a same-sex couple'.¹⁴¹ However, the impact on that same-sex couple – and on others – should not be minimised, because 'having to accept even one refusal of service constitutes significant substantive (and even formal) inequality. The hurt and marginalization such refusal will create is magnified when the historical diminution of homosexuals and homosexuality is considered'.¹⁴² Even where there exists a wide choice of alternative provision, the exclusion of non-heterosexuals from access to goods and services provision is not justified.

Koppelman acknowledges that the law needs to suppress homophobic violence, but argues that the discriminator proposes to exclude gay people, not to commit violence towards them. He concludes that the best approach to this whole issue is based upon what Taylor calls 'strong evaluation'.¹⁴³ Because religion in its broadest sense— humanity's various

¹⁴⁰ Andrew Koppelman, 'You Can't Hurry Love: why antidiscrimination protections for gay people should have religious exemptions' (2007) *Brooklyn Law Review* 72(1), 125, 134

¹⁴¹ Carl Stychin, 'Faith in the Future: Sexuality, Religion and the Public Sphere' (2009) *Oxford Journal of Legal Studies*, 729, 752

¹⁴² Bruce MacDougall and Donn Short, 'Religion-based Claims for Impinging on Queer Citizenship' (2010) *Dalhousie Law Journal* 133, 156

¹⁴³ Charles Taylor, 'The Politics of Recognition', in Amy Gutmann (ed) *Multiculturalism: examining the politics of recognition* (Princeton University Press, 1994), 25-73

efforts to address what is fundamentally problematic in the human condition—is an object of strong evaluation that is not reducible to any other good, it should also be given government protection. It is submitted that this is a very naïve criticism of Feldblum’s concerns. It fails to account sufficiently for the feelings of lesbians and gay men in the face of religious licence to discriminate, and does not alleviate current uncertainty over ‘competing rights’. While one can accept that a society with no anti-discrimination law would be far worse for vulnerable groups than the current regime, one can also argue that the very existence of religious exemptions threatens the security of lesbians and gay men in ways which can negate the protection nominally afforded them.

The debate over sexual citizenship, then, encompasses a range of issues, and raises the question as to whether recognition of gay people in the public sphere is sufficient, or whether socio-economic and political conditions have had an impact on the ability of gay people to achieve full citizenship. This thesis argues that socio-economic and political conditions do have an impact on gay access to public space itself, and considers the extent to which gay people can ‘live lives of honesty and safety’¹⁴⁴ in public spaces that have not been designated as ‘gay’ areas or venues. Chapters 5, 6 and 7 examine the combined effects of socio-economic and political conditions, plus the regime of religious exemptions, on gay citizenship.

As well as rights and citizenship discourses, justifications for religious exemptions can also be couched in terms of tolerance. Tolerance has sometimes been suggested as a means of bridging the gap between faith and sexuality rights claims. It is another key element of

¹⁴⁴ Feldblum [n 139]

traditional rights discourse, which has again been subject to extensive debate. However, tolerance also bears a heteronormative shadow. As Richardson observes:¹⁴⁵

Sexual citizenship is heavily circumscribed and simultaneously privatized, its limits set by the coupling of tolerance with assimilation; thus, lesbians and gay men are granted the right to be tolerated as long as they stay within the boundaries of that tolerance, whose borders are maintained through the heterosexist public/private divide.

The next section explores some of the literature concerning tolerance, with a focus on the conflict between expressions of religion and sexual orientation in the public sphere.

Tolerance in the public sphere

The principle of toleration, or tolerance, synthesised from John Stuart Mill's writings,¹⁴⁶ is that people should be free to follow their ideals and lifestyles as long as they do not harm anyone else. Toleration has been described as a deliberate choice not to interfere with the conduct of which one disapproves.¹⁴⁷ Tolerance can be categorised in four ways: 'a resigned acceptance for the sake of peace'; 'passive, relaxed, benignly indifferent to difference'; 'a principled recognition that "others" have rights even if they exercise those rights in unattractive ways'; and, finally, 'openness to the others; curiosity; perhaps even respect; a willingness to listen and learn'.¹⁴⁸ In the political sense, toleration is meant to allow for the peaceful coexistence of differences that do not spontaneously combine in harmony.¹⁴⁹

¹⁴⁵ Diane Richardson, *Rethinking Sexuality* (Sage, 2000), 77

¹⁴⁶ John Stuart Mill, *On Liberty* (Penguin Classics, 1985 [1859])

¹⁴⁷ John Horton, 'Toleration as a Virtue' in David Heyd (ed) *Toleration: An Elusive Virtue* (Princeton University Press, 1998), 28-43

¹⁴⁸ Michael Walzer, *On Toleration* (Yale University Press, 1997), 10-11

¹⁴⁹ John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) *Philosophy & Public Affairs* 14, 223

Critiques of toleration touch on problems of ‘normality’ and ‘difference’ in the public sphere, which is relevant to the conflict between religion and sexual orientation. The social perception of ‘normality’, ‘difference’ and ‘deviance’ is a highly political question. As this thesis argues, lesbians and gay men are still viewed through a heteronormative lens which renders them – however implicitly – ‘abnormal’. This highlights another limitation inherent in the liberal conception of rights that favours state neutrality; it relies on toleration, which itself rests upon a bed of disapproval and confirms the dualism between the ‘norm’ and the ‘other’. A heterosexist social order is represented as ‘equal’ and any challenges to that order are seen as attempts to create inequality, and deployed against attempts to seek full sexual citizenship.¹⁵⁰ Further, as Marcuse observed, ‘tolerance is an end in itself only when it is truly universal’, otherwise ‘the conditions of tolerance are ‘loaded’; they are determined and defined by the institutionalized inequality... of society’.¹⁵¹ This observation echoes the argument made earlier in this chapter, that identity is constructed within a society that is institutionally unequal.

Marcuse coined the term ‘repressive tolerance’, and repression might be viewed as the ultimate effect of tolerance. He states:

The problem of making possible such a harmony between every individual liberty and the other is not that of finding a compromise between competitors, or between freedom and law, between general and individual interest, common and private welfare in an *established* society, but of *creating* the society in which man is no

¹⁵⁰ Chris Brickell, ‘Whose “Special Treatment”? Heterosexism and the Problems with Liberalism’ (2001) *Sexualities* 4(2), 211, 213

¹⁵¹ Herbert Marcuse, ‘Repressive Tolerance’ in RP Wolff, B Moore and M Marcuse (eds) *A Critique of Pure Tolerance* (Beacon Press, 1969)

longer enslaved by institutions which vitiate self-determination from the beginning.¹⁵²

Leiter's view, mentioned earlier, of religion as a 'culpable form of unwarranted belief'¹⁵³ means that it does not lend itself either to tolerance or to being tolerated. For Leiter, two features separate 'religious' states of mind from other world views: religious beliefs involve categorical demands for action; and by virtue of being based on 'faith', they are insulated from ordinary standards of evidence and rational justification. This echoes Rawls' argument requiring religious reasons to be corroborated in order to be given weight in policy debates. Yet Rawls proposed that a just society must tolerate the intolerant; otherwise, society would then itself be intolerant, and thus unjust. This is the liberal "paradox of tolerance". However, Rawls also accepted that society has a reasonable right of self-preservation that supersedes the principle of tolerance: 'While an intolerant sect does not itself have title to complain of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe that their own security and that of the institutions of liberty are in danger'.¹⁵⁴

The idea that the limit of tolerance is intolerance was developed by Karl Popper, who used that as a maxim to resolve the paradox, whereby unlimited tolerance would ultimately lead to the disappearance of tolerance:

Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant

¹⁵² Marcuse [n 151]

¹⁵³ Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2013)

¹⁵⁴ John Rawls, *A Theory of Justice* (Harvard University Press, 1971), 220

will be destroyed, and tolerance with them. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant.¹⁵⁵

The ‘perfectionist’ liberal Raz (introduced earlier) accepts that tolerance facilitates autonomy, which is another key liberal concern. However, he argues that the government should not tolerate those who would deny (or even fail to promote) autonomy.¹⁵⁶ In the current context, Raz’s approach can support the argument that denial of homosexual autonomy is grounds for the law to operate a policy of non-toleration. Such value-based approaches to tolerance have been criticised by some liberal theorists,¹⁵⁷ yet even Rawls has acknowledged that a tolerant society need not tolerate an intolerant group which posed a direct threat to the security of other citizens; in the absence of a direct threat, the liberal state should instead seek to liberalise the group by persuasion and good example.¹⁵⁸ However, Popper’s ‘reciprocal’ approach to toleration is more persuasive. Intolerance should not be tolerated, otherwise tolerance itself would be threatened. Therefore, the stronger a link between the religion and intolerance, the stronger the reason not to grant religious exemptions to anti-discrimination law.¹⁵⁹

Perhaps the most passionate argument in favour of this view comes from Lord Alli, a gay, Muslim member of the House of Lords. During the debate over the 2007 Sexual Orientation Regulations, Lord Alli argued that discriminatory religious views are completely incompatible with democracy:

¹⁵⁵ Karl R Popper, *The Open Society and its Enemies* (Routledge, 1947)

¹⁵⁶ Joseph Raz, ‘Autonomy, Toleration and the Harm Principle’ in R Gavison (ed) *Issues in Contemporary Legal Philosophy* (Clarendon, 1987), 329-31

¹⁵⁷ See for example P Nicholson, ‘Toleration as a Moral Ideal’. In Horton, J & Mendus, S *Aspects of Toleration* (Methuen, 1985)

¹⁵⁸ Rawls [n 133]

¹⁵⁹ Yossi Nehushtan, ‘Religious conscientious exemptions’ (2011) *Law and Philosophy* 30(2), 143, 148

When I read the Koran, it tells me in some passages that I must kill Jews. If I believe strongly enough that I must kill Jews, does that mean that I have the right to say, ‘Exempt me from legislation because I believe it strongly enough. Let me discriminate against Jews, at least, because I believe it strongly enough and it is written in the Koran’?¹⁶⁰

There is a view that religious accommodation could be a tolerant concession that does not necessarily endorse homophobia. However, homosexuality does not seek to deny others’ legitimacy or to exclude their way of life, whereas religious accommodation has the capacity to exclude gay people, both legally and socially. Furthermore, when the state avoids condemning homophobia, it can be seen as sustaining it; ‘it is not far-fetched to interpret non-condemnation as support’.¹⁶¹ The implications of this interpretation are returned to in Chapter 6, as part of the discussion on religious exemptions and accommodation as examples of the state’s constructive delegation of power. To conclude this review, and to form a bridge to the discussion on methodology in Chapter 3, the discussion now turns to consider Foucaultian concepts of rights.

Foucault and rights

For Foucault, rights are not based on a timeless and immutable human essence; rather they are a function of particular formations of power relations and knowledge which combine to configure humanity at any given point. The human is not a transcendent entity; it does not exist outside the networks of power and knowledge in society. If the human is a work of construction, this suggests that rights are similarly political creations, dependent on the discursive and strategic viability of the rights claims that are made, and of the political will to observe and enforce them. Accordingly, rights can be made and unmade, according to

¹⁶⁰ House of Lords Official Report session 4 (2007), vol. 690, col. 1317

¹⁶¹ Nehushtan [n 159], 154

the prevailing political ethos in society.¹⁶² Therefore, rights cannot masquerade as ‘something of an anti-politics – a pure defense of the innocent and the powerless against power’.¹⁶³ Rights are better understood as political tools deployed as a means of constructing particular political visions; tools which engage in combat with other rights and other political visions on a shared terrain.¹⁶⁴ Foucault himself used the language of war when discussing rights; a person who articulates a rights claim wields ‘a truth-weapon and a singular right’ and thereby seeks to insert ‘a rift into the discourse of truth and law’.¹⁶⁵

For Foucault, rights are not only the tools of political subjects; those individual subjects are also the “effects” of rights. This means that, while rights function as tools, the shape of those rights is the effect of pre-existing power relations (such as heteronormativity, theonormativity, race, class etc) which themselves effect, or create, the individual rights-bearing subject: ‘the individual is not... power’s opposite number; the individual is one of power’s first effects. The individual is in fact a power-effect... a relay: power passes through the individuals it has constituted’.¹⁶⁶ Thus individual rights-bearing subjects are not blessed with an immutable essence; instead, they are themselves constructed in and through regimes of rights. As a result, rights do not represent inherent or established identities. Through the legal and political framework of campaigning, enactment and enforcement, rights actually shape the very identities they purport to be recognising. They are ‘performative mechanisms’¹⁶⁷ which bolster the identities based on rights claims.

Further, rights produce discourses of identity which are frequently exclusionary. The binary division drawn between religious and homosexual identities is an example of this; a

¹⁶² Paul Patton, ‘Foucault, Critique and Rights’ (2005) *Critical Horizons* 6(1), 267, 272-3

¹⁶³ Wendy Brown, ‘The most we can hope for... Human rights and the politics of fatalism’ (2004) *South Atlantic Quarterly* 103, 451, 453

¹⁶⁴ Jonathan Simons, *Foucault and the Political* (Routledge, 1995)

¹⁶⁵ Michel Foucault, *Society Must be Defended: Lectures at the Collège de France, 1975-76* (David Macey trans) (Penguin, 2004), 30

¹⁶⁶ Foucault [n 165], 30

¹⁶⁷ Judith Butler, *Bodies that Matter: On the Discursive Limits of Sex* (Routledge, 1993), 188

religious identity claim that involves pleading a right to treat gay people less favourably excludes those gay people who are also religious believers, as well as religious believers who do not consider their faith compromised by treating gay people equally. However, within this analysis of rights lies the scope for change. The identity-based communities produced through rights claims are not stable, nor are they a means of achieving social equilibrium. On the contrary, ‘the very act of summoning “community” through a language of rights may expose the divisions within the community – and even beyond it’.¹⁶⁸ This thesis examines, in subsequent chapters, some of the divisions within religious communities that have been exposed in the course of religious conflict with same-sex equality.¹⁶⁹

Foucault himself advocated an approach to rights based on difference, rather than identity. As Pickett explains, ‘by severing the tie to an arbitrary yet normalizing account of what it is to be human, Foucaultian rights could open potential sites for self-creation’¹⁷⁰ through the right to be different. This right is articulated as a ‘relational right’ – a right to consensual relations of one’s choice – in recognition of the importance of social and sexual relations in people’s development. Traditionally, relational rights were based upon claims to privacy,¹⁷¹ which has come to be viewed as too defensive.¹⁷² Instead, ‘the relational right is pressed, via “coming out” as lesbian or gay, to change the normalizing-disciplinary practices of compulsory heterosexuality in everyday life’.¹⁷³ The question arises, what are the limits to be placed on how different one can be? It is suggested that there cannot be a

¹⁶⁸ Martha Minow, ‘Interpreting rights: an essay for Robert Cover’ (1987) 96 Yale Law Journal 1860, 1911-12

¹⁶⁹ For example, the threat of a split in the global Anglican union over same-sex marriage; the disputes over clergy in same-sex relationships in the UK; and the growing voices of gay people who are also religious.

¹⁷⁰ Brent L Pickett, ‘Foucaultian Rights?’ (2000) *The Social Science Journal* 37(3), 403, 407

¹⁷¹ See for example *Dudgeon v UK* (1981) 45 Eur Ct HR, which held that Section 11 of the Criminal Law Amendment Act 1885 (which criminalised male homosexual acts in England, Wales and Northern Ireland) violated Article 8 ECHR.

¹⁷² Article 8 rights were also claimed by the discriminating party in *Bull v Hall* [2013] UKSC 73

¹⁷³ Mark Blasius, *Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic* (Temple University Press, 1994), 133-4

fixed schedule of rights based on difference, because ‘a particular list of human rights envisions not only an ideal person but also a particular set of political threats to such a person’.¹⁷⁴ This could lead to an ever-increasing list of rights claims, and could thereby weaken the status of rights in general. It could also lead to further conflicts of rights, much as the present regime has done.

It has been argued that a Foucaultian approach to rights would permit rankings, or hierarchies, of rights, in which the right to difference has priority and is able to trump other rights.¹⁷⁵ However, it remains unclear what forms of difference are to be permitted, leaving no means of distinguishing between respective rights of difference. It may be possible to distinguish between types of difference ‘that do not embody a resistance to power nor enrich an art of the self’ and those that do so.¹⁷⁶ In such a scheme, it is fairly clear that race-hate groups, for example, would come under the former category, but it is less than clear how religious lives would be treated. Moreover, it raises the question of who should be given the authority to decide on the levels of difference that are acceptable as a basis for rights claims. A regime of rights, however construed, still requires the support of the legal and political system in order to be effective.

A Foucaultian approach to rights, then, does not aim to provide a template for problem-solving, nor a comprehensive solution to normative questions such as how law should adjudicate conflicts between religion and sexual orientation. Instead, it offers a critical approach; ‘an articulation of provocations, critiques, deployments, interventions and deportments’¹⁷⁷ towards rights, through which a different understanding of humanity and

¹⁷⁴ Jack Donnelly, *The Concept of Human Rights* (St Martin’s Press, 1985), 23

¹⁷⁵ Pickett [n 170], 415

¹⁷⁶ Alexander E Hooke, ‘The Order of Others: Is Foucault’s Antihumanism Against Human Action?’ (1987) *Political Theory* 19, 38, 57

¹⁷⁷ Ben Golder, ‘Foucault’s Critical (Yet Ambivalent) Affirmation: Three Figures of Rights’ (2011) *Social and Legal Studies* 20(3), 283, 286

human rights might emerge. It helps reveal the ‘strategies and tactics’¹⁷⁸ deployed in the conflict between religious and sexual orientation rights and presents them for scrutiny as part of the conversation between liberal and Queer legal theories. The next chapter examines Foucault’s theory in more detail as part of an explanation of the methodological approach taken in this thesis.

¹⁷⁸ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France* (G Burchell trans) (Palgrave Macmillan, 2007), 216

CHAPTER 3: METHODOLOGY

*Language before signifying something signifies for someone.*¹

The preceding chapters sketched out the background to the current conflict between religious expression and sexual orientation and reviewed liberal legal literature pertaining to rights. The traditional liberal conception of rights has been problematised as part of ‘an endeavour to know how and to what extent it might be possible to think differently, instead of what is already known’.² Liberalism’s reliance on universal rights imbues citizens with supposedly immutable, essential identities only to collapse, paradoxically, into ‘contextual particularism’³ when these rights collide in the public sphere. As Torfing notes, ‘it is precisely this claim to universal validity that makes possible a chain of equivalential effects’⁴ whereby people in different situations can make the same rights claims. In the context of the conflict between religion and sexual orientation, the chain of equivalent effects is illustrated by religious conservatives’ deployment of rights talk in order to delimit the recent expansion of rights for non-heterosexuals.

Another shortcoming of liberalism is its tendency to overlook power. Recognition of this gap is why the methodology of this thesis is influenced by Goodrich’s critical analysis of the language of law, by Foucault’s conceptualisation of power, by Queer theory, and by Laclau and Mouffe’s discourse theory. Foucault sees power as something not owned or exercised, but instead as a complex network of relations which are expressed through discourses or practices that form identities and subject positions; ‘those practices that systematically form the objects of which they speak’.⁵ Discourses always involve the

¹Jacques Lacan, *Écrits* (Seuil, 1966), 83

² Michel Foucault, *History of Sexuality Vol. 2: The Use of Pleasure* (Vintage, 1990), 9

³ Ernesto Laclau, ‘Subject of politics, politics of the subject’ (1995) *Differences* 7:1, 145, 156

⁴ Jacob Torfing, *New Theories of Discourse: Laclau, Mouffe and Žižek* (Blackwell, 1999), 181

⁵ Michel Foucault, *The Archaeology of Knowledge* (Sage, 1972), 49

exercise of power, as they are based on a demarcation of ‘insiders’ and ‘outsiders’, and thus affect relations between these different social agents.⁶ This is where Queer theory can assist our understanding. Queer research has been described as ‘any form of research positioned within conceptual frameworks that highlight the instability of taken-for-granted meanings and resulting power relations’.⁷ Using Foucaultian-informed Queer theory and discourse theory to research the current conflict facilitates the analysis of what happens when these hegemonies and privileges of heteronormativity and theonormativity are challenged.

Discourse theory and Queer theory are both influenced by poststructuralism, which recognises, contra Saussure’s structural approach,⁸ that language is not a stable, unchanging and totalising structure.⁹ Nor does our use of language neutrally reflect our world, identities or social relations; rather, it plays an active role in creating, limiting and changing them. Importantly, our access to reality is always through language; language generates and therefore constitutes the social world. Moreover, we are “thrown into” and inhabit a world of discourse, and cannot conceive or think about objects outside of it.¹⁰ This is important when we consider that ‘language too has its violence. In language lie the assumptions of a culture, its rules of conduct, what it will acknowledge as possible and

⁶ Torben Dyrberg, *The Circular Structure of Power: Politics, Identity, Community* (Verso, 1997)

⁷ Kath Brown and Catherine J Nash, *Queer methods and methodologies: intersecting queer theories and social science research* (Ashgate, 2010), 4

⁸ F de Saussure, *Course in General Linguistics* (Peter Owen, 1960). For an overview, see Laclau: http://www.essex.ac.uk/centres/theostud/documents_and_files/pdf/Laclau%20%20philosophical%20roots%20of%20discourse%20theory.pdf

⁹ Foucault [n 5], 117

¹⁰ Stephen Mulhall, *Heidegger and Being and Time* (Routledge, 1996). See also Wittgenstein’s ‘private language argument’ summarised at <<http://plato.stanford.edu/entries/private-language/>> accessed 19 April 2014

permissible'.¹¹ This is where analysis of the relationship with knowledge and power through discourse becomes key.

Law as social discourse

Law is a social discourse. It is situated in both the social and political ethos of the present, and also in the historical decisions and principles that have been developed through statute and case law. In this process of development, law appropriates – and privileges – certain meanings and thereby rejects alternative and competing meanings. This matters because meanings that come to be privileged through law are seen as authoritative; legal language is ‘the argot... of elite or professionalised power’ and as such is seen as ‘the language of authority’.¹² Law holds these privileged meanings to be logical and rational, granting these meanings normative status as the ‘objective, externally given, meaning of human behaviour’.¹³ As discussed in Chapter 2, this appropriation and privileging of certain meanings includes the very definition of the rights-bearing subject, and of those who have been excluded from this meaning and rendered “other than”. The simultaneous process of inclusion and exclusion of meaning – and hence people – is the mechanism by which law’s relationship to power is expressed. Foucault’s observation that the exercise of power in Western societies ‘has always been formulated in terms of law’¹⁴ can be further developed to conceptualise law as ‘a system of communication and non-communication, as the rhetoric of a particular group or class, and as a specific exercise of power and power over meaning’.¹⁵

¹¹ Ann Pellegrini, ‘S(h)ifting the Terms of Hetero/Sexism: Gender, Power, Homophobias’ in WJ Blumenfeld, WJ (ed) *Homophobia: How we all pay the price* (Beacon Press, 1992), 43

¹² Peter Goodrich, ‘Law and Language: An Historical and Critical Introduction’ (1984) *Journal of Law and Society* 11(2), 181

¹³ Goodrich [n 12], 187

¹⁴ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France* (Palgrave Macmillan, 2007), 99

¹⁵ Goodrich [n 12], 173

As Bakhtin noted, ‘every discourse has its own selfish and biased proprietor... who speaks and under what conditions they speak, this is what determines the word’s actual meaning’.¹⁶ The question, “who speaks?” invites more than a simple linguistic analysis of who is speaking at any given time. Instead, it raises further questions:

‘Who is speaking? Who is qualified to do so? Who derives from it their own special quality, their prestige, and from whom, in return, do they receive if not the assurance, at least the presumption that what they say is true? What is the status of the individuals who – alone – have the right sanctioned by law or tradition, juridically defined or spontaneously accepted, to proffer such a discourse?’¹⁷

The question, “who speaks?” asks us to consider how ‘a particular set of socially oriented interests... gain control of a discourse and define the... forms of meaning that are to prevail’.¹⁸ This thesis is concerned with the expression of heteronormative and theonormative power in law, and particularly through the discourse of rights. Chapter 2’s review of the literature considered the role of religion in the public sphere and analysed the process by which religion – as a socially oriented interest – came to influence and define Western liberal democracy as being grounded on “Christian values”, by becoming integral to its ‘regime of truth’.¹⁹ Chapter 4 looks in more detail at this process, focusing on how Christian conservatism’s stance towards homosexuality has developed from a concern with morality towards an appropriation of rights discourse in its pursuit of exemptions to equality law.

¹⁶ Mikhail Bakhtin, *The Dialogic Imagination: Four Essays* (University of Texas Press Slavic Series, 1982), 401

¹⁷ Foucault [n 5], 50-1

¹⁸ Goodrich [n 12], 185

¹⁹ M Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (1980), 131

Legal discourse and the master's house

Chapter 1 opened with a quote from Audre Lorde, in which she says that the master's tools will never dismantle the master's house. This thesis uses Lorde's words as an allegory for law and undertakes a critical analysis of the role of rights in law as a tool (or weapon) in conflicts between religion and sexual orientation. It contends that rights discourse, as 'the argot of professionalised power' in Western liberal democracy, lacks the necessary recognition of how hetero- and theo- normativities have underpinned law's construction. As illustrated in Chapter 2, this has implications for how the conflict between religion and sexual orientation is understood; to view it as simply a conflict of rights is to miss an important step in how rights have been constructed.

Liberalism rightly holds that there is a moral right to be treated equally, grounded on the inherent equality of human beings – by virtue of being human. Legal rights, however, are *granted* rather than inherent; and they are granted usually as a result of social and political struggle and resistance. To understand the conflict solely as one of rights carries the danger of neglecting the history of how rights came to be granted legal status. The inclusion of religion within law's privileging of meaning came much earlier than the inclusion of sexual orientation, as Chapter 2 described. The hetero- and theo-norms underpinning the construction of law as a social discourse have not miraculously disappeared as a result of the belated granting of sexual orientation rights. The master's house may have benefited from the construction of extensions – such as LGBT rights – but work still remains to be done. As part of this work, it is also important to recognise the particular characteristics of legal discourse. Goodrich identifies several distinctive features of legal discourse which can be considered as part of the question "who speaks?": institutionalisation; lexicon and syntax; semantic appropriation; and ideology.

Firstly, legal discourse is institutionalised – that is, it is a socially and institutionally authorised form of speaking. Its utterances are legitimised through the ‘organisational and sociolinguistic insignia of hierarchy, status, power and wealth’,²⁰ and these insignia mark the distinctiveness of legal discourse from its relations in politics, ethics and also religion. This explains the keenness of law’s relations to have their arguments accepted into legal discourse; for example, why religious conservatism persists in arguing for religious exemptions to equality law. Secondly, legal discourse is presented as a ‘context-independent code’, with a vocabulary that is shaped by ‘memory, recognition and usage’ and techniques of textual repetition.²¹ Thirdly, legal meaning operates through semantic appropriation; it ‘arrives after the event to reconstruct the discourse of others and to rewrite the diversity of social languages’ in purportedly neutral terms.²² Through this process of semantic appropriation, the legal text defines its own conception of meaning and, in doing so, excludes alternatives. Goodrich’s analysis here links with Foucault’s ‘five questions’, which will be examined in the next section.

Goodrich characterises the rhetoric of law as ‘the rhetoric of sovereignty and power, of rights and duties.’ It is ‘the discourse of power in a dual sense’: it presumes the universal constant that underpins traditional liberal discourse (as discussed in Chapter 2), but it operates discursively as a means of ‘excluding and obscuring alternative or oppositional readings and meanings’.²³ The presumption of universality – found invariably within declarations of rights and equality – appears desirable on the surface but serves in practice to mask the power relations at play in law’s normative judgments. This leads into the fourth distinctive feature of legal discourse, which is ideology. Law operates as an

²⁰ Goodrich [n 12], 188

²¹ Goodrich [n 12], 188-9

²² Goodrich [n 12], 189

²³ Goodrich [n 12], 189-90

‘axiomatic and imperative normative code’²⁴ which regulates and governs what law defines as the legal subject. Furthermore, law ‘fixes legal meaning to individual acts, conceived in the abstract terms of intention and responsibility’ and, in so doing, ‘the legal text reifies its meaning and obscures or mystifies the real relations which form the content of such actions and the explanation of their motives.’²⁵ All of this serves to underwrite law as ‘the political-administrative discourse of liberal individualism’.²⁶ The characterisation of law as a discourse of liberal individualism illustrates why arguments from conscience, increasingly used by religious conservatives to claim exemptions from equality law, need critical analysis. Chapters 5 and 7 undertake this analysis in more detail.

Five Questions

The framework for the research is based broadly on Foucault’s ‘five questions’,²⁷ designed to reveal the discursive strategies and tactics that have led us to the current position in the zero-sum game of equal rights. First, what are the limits and forms of the *sayable* about same-sex claims to equality, and how is religion implicated in this? Second, what are the limits and forms of *conversation* in influencing which assumptions about homosexuality and religion persist, and which wither away? Third, what are the limits and forms of *memory* in deciding which faith-based discourses about homosexuality endure intact and which are subject to modification? Fourth, what are the limits and forms of *reactivation* in enabling historical religious anti-gay discourse to be resurrected? Finally, what are the limits and forms of *appropriation* whereby individuals and groups can use this religious

²⁴ Goodrich [n 12], 190

²⁵ Goodrich [n 12], 190-1

²⁶ Goodrich [n 25]

²⁷ Michel Foucault, ‘Politics and the study of discourse’ in G Burchell, C Gordon and P Miller (eds) *The Foucault Effect: Studies in Governmentality: with Two Lectures by and an Interview with Michel Foucault* (Chicago University Press 1991), 59-61. See also P Johnson and RM Vanderbeck *Law, Religion and Homosexuality* (Routledge 2014), which utilises a similar Foucaultian framework to analyse Parliamentary discourse regarding homosexuality over the past 50 years.

anti-gay discourse in order to further their legal or political interests? The issues raised by the five questions will be examined throughout subsequent chapters.

There are inherent tensions in a project which seeks to critique liberal rights from an external (Queer) position, but which is located within existing legal structures. For example, the research interrogates some of the assumptions underlying existing equality law, with a view to answering a normative question as to what equality law *should* do, which is a tension in itself. The research also challenges how law positions itself as a ‘neutral protector’ of individual rights, through raising hope that the ‘aberration’ of individual prejudices can be eradicated through anti-discrimination legislation,²⁸ while at the same time denying the historical and structural nature of those prejudices.²⁹ As Foucault observed, ‘in Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law’.³⁰ This thesis seeks to align a Queer approach with particular political and ethical principles and to even welcome the tensions, recognising that ‘the contradictory messiness of social life [is] such that no category system can ever do it justice.’³¹ In the words of songwriter Leonard Cohen, ‘there is a crack in everything; that’s how the light gets in.’³² The tensions and gaps between liberal, Queer and other approaches provide space for insight as to what is happening and what needs to change.

With this in mind, this chapter looks first at Queer theory in more detail, followed by an analysis of Foucault’s approach and then of discourse theory. The chapter explains how a synthesis of discourse and Queer theories enables the current conflict to be re-interpreted

²⁸ Nico J Berger, ‘Putting Gender and Sexuality on the Agenda: Queer Theory and Legal Politics’ in Reza Banakar and Max Travers (eds.) *An Introduction to Law and Social Theory* (Hart Publishing, 2002), 175

²⁹ This is reflected in one of the sub-questions of this research, which asks how the state is implicated in homophobia and what is its responsibility to address it.

³⁰ Michel Foucault, *The History of Sexuality Vol 1: The Will to Knowledge* (Penguin, 1978), 87

³¹ Ken Plummer, ‘Critical humanism and queer theory: living with the tensions’ in Y Lincoln and N Denzin (eds) *The Sage Handbook of Qualitative Research* (3rd ed, Sage, 2005)

³² Leonard Cohen, ‘Anthem’ from *The Future* (Columbia, 1992)

in terms of the legal and political discourses generated and their effects, such as how the language of rights is being used to preserve the status quo of power relations. For example, attempts to placate conservative religious concerns over a ‘hierarchy of rights’ largely ignore how the spectrum of human sexuality has been constructed and stratified into its own hierarchy. This theoretical synthesis is used critically throughout the thesis, to question the underlying assumptions that shape law’s current understanding and treatment of sexual orientation and religious expression; and to consider what the law should do instead.

Queer theory

Like Plummer (and plenty of others), I am ‘a bit of a humanist, a bit post-gay, a sort of a feminist, a little queer, a kind of a liberal, and seeing that much that is queer has the potential for an important radical change.’³³ Engaging in Queer critique involves navigating these tensions and questioning whether Queer is enough to achieve the desired change. In general, Queer undertakes a radical questioning of norms, particularly notions of gender and sexuality.³⁴ Queer, insofar as it can be defined, includes ‘whatever is at odds with the normal, the legitimate, the dominant.’³⁵ Queer theory emerged as ‘a radical challenge to a range of liberal and legal assumptions – evident even in some feminist and gay liberation politics – about human subjectivity, especially those concerning gender and sexuality’.³⁶ This section will first explain in more detail how Queer might function as a methodology, before going on to consider critiques of its capacity to fulfil a methodological function. According to Queer theoretical approach,

³³ <<http://kenplummer.com/publications/selected-writings-2/critical-humanism-and-queer-theory/>> accessed 5 March 2016

³⁴ Cherry Smith, ‘What is this thing called queer?’ in Morton (ed) *The Material Queer: A LesBiGay Cultural Studies Reader* (Westview Press, 1996), 280

³⁵ David Halperin, *Saint Foucault: A Hagiography* (OUP, 1995), 62

³⁶ Adam P Romero, (2009) ‘Methodological Descriptions: ‘Feminist’ and ‘Queer’ Legal Theories’ in MA Fineman, JE Jackson and AP Romero (eds) *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2009), 190

The hetero-homo binary is imagined, parallel to the masculine/feminine trope, as a symbolic code structured into the texts of daily life, from popular culture... to disciplinary knowledges, law, therapeutic practices, criminal justice, and state policies. It frames the way we know and organize personal and social experience, with the effect of reproducing heteronormativity. Queer theory aims to expose the operation of the hetero/homo code in the center of society and to contribute to destabilizing its operation.³⁷

Valdes sees Queer as ‘a theoretical and political enterprise devoted to the education and reformation of legal discourse, culture and doctrine regarding matters of (special) concern to sexual minorities’.³⁸ He suggests eight methods of undertaking queer legal research, which include fighting stereotypes; bridging social science knowledge and legal knowledge; conceptualising ‘sexual orientation’; and promoting positionality, relationality and interconnectivity.³⁹ While recognising that this list is not exhaustive, it is helpful to add, with particular reference to this thesis, Wilcox’s insight that ‘as gender identity and sexual identity remain in a continuous production, then, so must the notion of religious identity’.⁴⁰ It is part of the argument of this thesis that the current conflict has disrupted the supposed universality of religious experience, just as much as the supposed universality of the human experience. This disruption has implications for the future development of religion, which is slowly making progress towards recognition of intersectionality, including the experience of LGBT religious people.

³⁷ Linda Nicholson and Steven Seidman, *Social Postmodernism: Beyond Identity Politics* (Cambridge University Press, 1995), 18

³⁸ Francisco Valdes, ‘Queers, sissies, dykes, and tomboys: Deconstructing the conflation of “sex”, “gender” and “sexual orientation” in Euro-American law and society’ (1995) *California Law Review* 83, 344

³⁹ Valdes [n 38] 364-72

⁴⁰ M Wilcox, *Queer Women and Religious Individualism* (Indiana University Press, 2009), 49

There is, nonetheless, a tension between queer theory and law. Whereas Queer seeks to destabilise rigid, taken-for-granted norms in favour of fluidity, law tends to prefer – and indeed rely on – fixity, categorisation and the reinforcement of dominant norms. Significantly, ‘queer theory and politics emerged in the context of a sexual politics that was suspicious of, and aggrieved by, the state’.⁴¹ Romero’s awareness of this context – and of Halperin’s view that ‘queer method refers not [to] a positivity but to a positionality vis-a-vis the normative’⁴² – persuades him that ‘Queer legal methods ought not to be defined in connection with substantive agendas and commitments’.⁴³ At the other end of the Queer spectrum, if you like, is the argument that Queer’s reluctance to engage with normative jurisprudential questions represents a serious shortcoming of the theory.⁴⁴ Somewhere in between lies the question as to whether there remains a place for Queer theory at all, in light of liberal legal reforms that have extended rights to lesbians and gay men. Stychin concludes that there is still ‘a useful role for this methodological toolbox’ in showing how relationships are ‘constructed, disciplined and normalized’ through the law.⁴⁵

However, as Zanghellini points out, ‘this gives Queer an unduly modest role in legal theory’, precisely because it stops short of claiming that Queer ‘can make sound and original normative recommendations that will improve on these legal liberal reforms’.⁴⁶ It is conceded that Queer legal methods need not be *defined* in connection with normative commitments, but this does not necessarily mean that there is no connection at all. Challenging and critiquing established norms does not automatically mean that we have to resist *any* prescription. Zanghellini points to the value that Queer places on personal

⁴¹ Romero [n36], 191

⁴² David Halperin, *Saint Foucault: A Hagiography* (Oxford University Press, 1995), 62

⁴³ Romero [n36], 193

⁴⁴ Nicholas Bamforth, *Sexuality, Morals and Justice: A Theory of Lesbian and Gay Rights Law* (Cassell, 1997), 229

⁴⁵ Carl F Stychin, ‘Couplings – Civil Partnerships in the United Kingdom’ (2005) 8 New York City Law Review 543, 546

⁴⁶ Aleardo Zanghellini, ‘Queer, Antinormativity, Counter-Normativity and Abjection’ (2009) 18 Griffith Law Review 1, 5

agency and human diversity as an indication that there are indeed some foundational elements to Queer's critique of law.⁴⁷ Others have gone further and identified within Queer a commitment to humanist values in general.⁴⁸

Equality is not a Queer concept as such; for example, the term hardly ever appears in literature published by organisations such as Queer Nation.⁴⁹ Equality discourse is criticised in Queer literature for its focus on gaining a seat at the table in order to be better placed to sweep up what crumbs might be scattered there. This does not challenge the inherently unjust character of the banquet – indeed, it often legitimises and reinforces the very system which reproduces inequalities for non-heterosexuals. As Hamilton observes:

When the equality argument is deployed it becomes a requirement to categorise individuals into classes of sexual orientation, as equality necessitates comparisons to be made between different groups. The categorisation of individuals is harmful as it means that minority groups are asserting their 'other'ness against the 'heteronormal' group.⁵⁰

The harm referred to by Hamilton is the reproduction of the 'norm' and the 'other'. Furthermore, the fight for equality has also been criticised for being based on a 'subordination theory'⁵¹ that views power as something which is wielded in a top-down manner. Halley argues that power should instead be viewed through a Foucaultian lens:

⁴⁷ Zanghellini [n46], 6

⁴⁸ See for example Steven Seidman, *Difference Troubles: Queering Social Theory and Sexual Politics* (Cambridge University Press, 1997), 157

⁴⁹ Kornak, 'Dilemmas of LGBT Politics': 14 in *Rights on the Move: Rainbow Families in Europe* conference proceedings http://www.academia.edu/11861339/Rights_on_the_move_rainbow_families_in_Europe_proceedings_of_the_conference_Trento_16-17_October_2014 accessed 15 July 2016

⁵⁰ Hamilton, 'Gays and the European Court of Human Rights: the Equality Argument': 79 in *Rights on the Move: Rainbow Families in Europe* conference proceedings [n 34]. See also Sedgwick, 2008, for a full discussion.

⁵¹ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006), 119

power is not *puissance* (compulsion) but rather *pouvoir* – the capacity to produce effects. This is what is meant by the Foucaultian idea of ‘relations of power’, and why Halley suggests that ‘if at one time [power] could install itself only in high places whence it lorded itself over low ones, that time is over.’⁵² For Foucault, power – and resistance to power – in modernity has a more flexible nature: ‘one is dealing with mobile and transitory points of resistance, producing cleavages in society that shift about.’⁵³ The discourses that have arisen through the conflict between religion and sexual orientation illustrate this well, explaining how and why Christians have been willing and able to present themselves as a marginalised group who sit lower down the ‘hierarchy of rights’ than LGBT people. The following section examines Foucault’s approach in more detail.

Foucault’s approach

Foucault understood that what is recognised as ‘truth’ is a product of discourse. In other words, discourses generate truth-claims. ‘Truth’ is not produced dispassionately or impartially – it is produced with a *will* to truth (or knowledge) – and gives rise to regimes of truth. This conception of truth pits itself against the Enlightenment view that truth is neutral. Truth operates through the exclusion, marginalisation and even prohibition of other competing truths. Power is thus exercised through the production and dissemination of truth. Foucault’s theory of productive power holds that ‘power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production’.⁵⁴

⁵² Halley [n 51]

⁵³ Foucault [n30], 96

⁵⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage, 1995 [1977]) 194

It is said that legal discourse claims not only to reveal the truth but to ‘authorise and consecrate it’.⁵⁵ Liberal legal discourse conceals the very fact of its own production of truth – law hides the fact that what it presents as normal is only one conception of so-called ‘normality’. Thus, the law positions the field for debate in a particular way and then hides the very fact that it has done so.⁵⁶ This is expressed in the current conflict through the historical construction of the homosexual within a discursive regime of hetero- and theo-normativities. Law involves a distinctive production of truth; the procedures of law provide authorised means by which the truth is discovered and, once enunciated, law provides the guarantee of this truth.⁵⁷ Law is a system that provides a privileged source of truth, which is why Foucault stated that ‘the language of power is law’.⁵⁸ Foucaultian analysis can assist the understanding of law’s role in the current conflict and how law should adjudicate conflicts between religion and sexual orientation. Hunt and Wickham suggest two stages of analysis: first, to identify the powers at work; second, to evaluate the results of the play of these powers – do the cumulative effects give rise to domination or subordination?⁵⁹ This is the analytical process undertaken in this thesis.

Power and sexuality: norms and disciplines

A Foucaultian approach recognises that sexuality is a principal point of access to individual subjectivity for the exercise of power in the modern age. Sexuality provides a domain for the exercise of power is developed through sexuality – including moral and

⁵⁵ Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, 1994), 11-12

⁵⁶ Kay Lalor, ‘Constituting sexuality: rights, politics and power in the gay rights movement’ (2011) *The International Journal of Human Rights* 15 (5), 683, 690

⁵⁷ Hunt & Wickham [n55], 41-2

⁵⁸ Michel Foucault, *Power/Knowledge: Selected interviews and other writings, 1972-1977* (Pantheon, 1980), 201

⁵⁹ Hunt & Wickham [n55], 15

religious influences and edicts.⁶⁰ Foucault's approach emphasises the role of norms: it is through the repetition of normative requirements that the 'normal' is constructed. In the context of this thesis, the norms concerned are heteronormativity and theonormativity. Their normalisation has been achieved through what Foucault terms the 'disciplines'; systems of 'micropower' – 'tiny, everyday physical mechanisms'⁶¹ which act to embed a pattern of norms throughout daily life and to secure them through surveillance.⁶²

Disciplines are systems of micropower that are 'essentially non-egalitarian and asymmetrical'⁶³ in nature. They form a system of hierarchical observation, operating through norms, and deploying a mix of micro-penalties and rewards. As Hunt and Wickham point out, the 'advance of disciplinary techniques is manifest in the rise of regulation – as a distinctive technique of government'.⁶⁴ This is why an appreciation of disciplinary power is important when considering the normative question posed by this thesis. As discussed in Chapter 2, the liberal, humanist framework that prevails in the literature largely accepts the image of 'benign point-of-viewlessness'. This image of liberal legal neutrality misses the importance of law's disciplinary function.⁶⁵ In fact, law can be said to facilitate the operation of disciplinary power 'by constituting spaces which are then traversed and invested by the disciplines'.⁶⁶ It is argued that legal, disciplinary and governmental strategies are interrelated; law forms a central part of the governmental

⁶⁰ Mark Blasius, *Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic* (Temple University Press, 1994), 65

⁶¹ Michel Foucault [n54], 222 in Hunt & Wickham [n 55], 61

⁶² Hunt & Wickham [n 55], 49-50

⁶³ [n61]

⁶⁴ Hunt & Wickham [n 55], 20-22

⁶⁵ Wayne Morgan, 'Queering International Human Rights Law' in Carl F Stychin and Didi Herman (ed), *Sexuality in the Legal Arena* (Athlone Press, 2000), 212

⁶⁶ Beck (1996) 492, cited in B Golder and P Fitzpatrick, *Foucault's Law* (Routledge, 2009), 27

armoury, along with the disciplinary matrix and the human sciences' 'knowledge of man'.⁶⁷

For Foucault, this entails a subtle change in the nature and operation of law: 'it is not a matter of imposing law on men... but of employing tactics rather than laws, or... employing laws as tactics'.⁶⁸ Law seems to provide strong evidence of the existence of strategies and tactics, because 'at particular historical moments, law reflects or incorporates an aggregation or condensation of shifts on the disposition or direction of power'.⁶⁹ The struggle for LGBT equality rights can be viewed through this lens, as can the subsequent use by religious conservatives of rights language and conscience claims, as discussed in Chapters 4 and 5. For now, it is useful to set out a Foucaultian approach to the role of law in rights conflicts.

The role of law in rights conflicts

As Foucault said, 'in Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law'.⁷⁰ Two different aspects of legal power can be identified: judicial power (concerning the enforcement of norms of behaviour) and disciplinary power concerning (the production and normalisation of identity).⁷¹ As discussed in Chapter 4, the very act of legislating about the homosexual contributes to a process which creates the homosexual:

Law does not objectively operate on an already established homosexual identity, but actively works towards its construction and conceptualisation... Homosexuality

⁶⁷ Golder & Fitzpatrick [n 51], 34

⁶⁸ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France* (G Burchell trans) (Palgrave Macmillan, 2007), 99

⁶⁹ Hunt & Wickham [n55], 30

⁷⁰ Michel Foucault [n 2], 87

⁷¹ Morgan [n65], 208-225

is positioned in a particular relation to law – this facilitates the increased visibility of homosexuality – [and] contributes to a process in which the homosexual is created and refined... Law participates in the production of a sexual subject.⁷²

Furthermore, human differences can become neutralised and categorised through the process of granting these rights. Disciplinary power reduces people to definition through these differences, which are then written into law. Thus ‘the law is brought in to manage otherness, but in doing so identities become reified... this reinforces division and separation into spheres of, at best, toleration.’⁷³ It is also argued that rights, ‘when framed in the materialist language of law,’ mean ‘nothing more than access to the courts by individuals asserting a claim of discrimination’.⁷⁴

Law can be said to work in ‘a constant push-pull of emancipation/regulation’,⁷⁵ as it moves continually between determinacy (legal rules and categories) and the pressure to respond to new rights claims that arise both as a result of and a response to the shifts in society’s power relations. This points to what is the core question of law and legal discourse throughout modernity: the link between government and freedom. Hunt and Wickham see law as a ‘dilemma of government and freedom’,⁷⁶ because each presupposes the other while at the same time threatening or challenging the other. Legal rights claims represent one form in which this dilemma reveals itself: ‘rights cannot guarantee freedom, but freedom cannot be achieved without rights’.⁷⁷ However, it is suggested that, rather than simply engaging with human rights norms to achieve concessions from the state, ‘a process

⁷² Kay Lalor, ‘Constituting sexuality: rights, politics and power in the gay rights movement’ (2011) *The International Journal of Human Rights* 15 (5), 683, 686-7. See also Carl Stychin, *Law’s Desire* (Routledge, 1995).

⁷³ Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995), 79-81

⁷⁴ Urvashi Vaid, *Virtual Equality: the mainstreaming of gay and lesbian liberation* (Anchor Books, 1995), 182

⁷⁵ Lalor [n72], 694

⁷⁶ Hunt & Wickham [n 55], 71

⁷⁷ [n76]

is needed by which the body, the lived experience and the space occupied by “others”... become a potential site of challenge, or a means of exposing the internal limits of the law’.⁷⁸ This thesis aims to be part of this process, by recognising that the conflict between religion and sexuality has called the limits and capacities of equality law into question. The following section turns to Foucault’s concept of pastoral power, and how it continues to influence the role religion plays in law, government and politics.

Religious power and pastoral power

Foucault developed the concept of ‘pastoral power’ during a series of lectures given in the late 1970s.⁷⁹ He was less interested in church theologies than in the practical means of shaping behaviour – the disciplines – that originated in the church before being adopted by other social institutions. Instead of analysing religion according to its own discursive framework, Foucault shows how religion functions as a set of power relations in society – irrespective of the reality behind its truth claims: ‘Religion is a political force ... It is a superb instrument of power for itself’.⁸⁰ The idea of pastoral power enabled Foucault to interpret religious phenomena as part of the framework of ‘strategies and tactics’⁸¹ involved in the exercise of disciplinary power.

Pastoral power became central to the forms of social control that developed over recent centuries.⁸² Pastoral power is related to religious power, which itself has four characteristics: detail; an ‘infinite’ or ‘mystical calculus’ which serves as a justification

⁷⁸ Lalor [n72], 691

⁷⁹ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France* (G Burchell trans) (Palgrave Macmillan, 2007),

⁸⁰ Jeremy Carrette, *Religion and Culture by Michel Foucault* (Routledge, 1999), 107

⁸¹ [n79], 215-6

⁸² Jeremy Carrette, ‘Foucault, Religion and Pastoral Power’ in Christopher Falzon, Timothy O’Leary and Jana Sawicki (eds), *A Companion to Foucault* (Wiley-Blackwell, 2013), 368-387. See also Ben Golder, ‘Foucault and the Genealogy of Pastoral Power’ (2007) *Radical Philosophy Review* 10 (2), 157-176.

beyond time and history;⁸³ a focus on the body; and a focus on confession or discourse. These elements do not exist in isolation: the ‘detail’ focuses on the ‘body’, is framed by the act of ‘confession’ and is justified inside a ‘mystical calculus of the infinitesimal and the infinite’.⁸⁴ The ‘infinite’ provides a religious rationale distinct from the ‘technical rationality’ of earthly institutions, enabling the relations of power to be set up ‘for the conquest of salvation’.⁸⁵ All these characteristics of religious power come under the auspices of pastoral power: ‘religious power, therefore, is pastoral power’.⁸⁶

The metaphor of the shepherd and his flock, inherent in the idea of pastoral power, contained the seeds of an effective governance model – of what Foucault termed ‘governmentality’.⁸⁷ Pastoral power is exercised over a ‘flock’ rather than a ‘land’ of people. It is fundamentally a power focused on salvation, much as the shepherd gathers together his flock and saves it from danger. This is seen reflected in the DUP’s discourse, informed by the Free Presbyterian Church, during the “Save Ulster from Sodomy” campaign. For Foucault, ‘salvation’ provides a technology of power based on a scale of ‘faults and merits’.⁸⁸ Pastoral power is also devotional, like the shepherd who keeps watch over his flock, and it is individualising in that attention is given to each member of the flock. For the individual, the scale of ‘faults and merits becomes a process of ‘analytical identification’ grounded in the examination of the self’.⁸⁹

As Carette explains, ‘the theological idea of truth creates a technology of power that creates an inner truth through direction and conduct, which is carried forward as

⁸³ Michel Foucault, Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage, 1995 [1977], 162

⁸⁴ [n83], 140

⁸⁵ [n83], 162

⁸⁶ [n79], 205

⁸⁷ [n79] 124

⁸⁸ [n79] 172

⁸⁹ [n79] 184

subjectivisation’ or the internalisation of that truth as an ‘inner secret’.⁹⁰ The pastor and his flock are bound in a relationship whereby ‘the pastor must really take charge of and observe daily life in order to form a never-ending knowledge of the behaviour and conduct of the members of the flock he supervises’.⁹¹ The pastor’s concern with everyday minutiae necessarily includes guiding the thoughts of his flock – a procedure which involves the production and extraction of ‘a truth which binds one to the person who directs one’s conscience’.⁹² Foucault’s analysis helps to explain why the religious do not experience themselves as having a personal choice over the content of their conscience. It also reveals the earthly, discursive power relations at play, instead of the “divine law” posited by the church.

Modern society retains the pastoral traits of self-examination and servitude: ‘the modern Western subject makes the pastorate one of the decisive moments in the history of power in Western societies’.⁹³ This is how, according to Foucault, the principles of the Christian pastorate provide the origin of governmentality: ‘the real history of the pastorate as the source of a specific type of power over men, as a model and matrix of procedures for the government of men, really only begins with Christianity’.⁹⁴ Foucault placed the shift from pastoral power to governmentality from the 16th century, although pastoral power ‘has never been truly abolished... [it] is doubtless something from which we have still not freed ourselves’.⁹⁵ Indeed, the intersection of pastoral power with other forms of power is illustrated in Chapter 4’s discussion of religious influence, privilege and exemptions in a wide area of public life. First, it is helpful to include some discussion of discourse theory as it relates to the issues raised in the chapters that follow.

⁹⁰ [n80]

⁹¹ [n79] 181

⁹² [n79] 183

⁹³ [n79] 185

⁹⁴ [n79] 148

⁹⁵ [n79] 148

Discourse theory

Laclau and Mouffe's discourse theory⁹⁶ is a synthesis of recent developments in Marxist, poststructuralist and psychoanalytic theory, which can be used to reveal how social practices both articulate and contest the discourses that constitute the society in question.⁹⁷ The theory was intended as a 'reformulation of the socialist project',⁹⁸ by offering a critique of what they saw as Marxism's major flaw, ie that class struggle is the sole dynamic which characterises human society. Instead, they sought to develop a theory that could account for the emerging struggles around gender and race equality and gay rights. These multiple struggles against oppression were viewed as equally valid to the class struggle, because there is no single 'true' analysis of society; only a variety of discursive constructions: 'there is not *one* discourse and *one* system of categories through which the 'real' might speak without mediations'.⁹⁹ Discourses, then, do not reflect the social world, but construct it.

Terminology

It is helpful to define some of the terms employed in discourse theory. The key terms to be drawn on are 'empty signifier', 'floating signifier', 'nodal point' and 'chain of equivalence'.¹⁰⁰ An 'empty signifier' is one that has been emptied of any precise content. As seen in recent press discussions following the government's attempt to inculcate school pupils with 'British values',¹⁰¹ this term means both everything and nothing at the same time, depending on the political vision of the individual or organisation deploying the term.

⁹⁶ See Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy* (Verso, 1985)

⁹⁷ David Howarth, *Discourse* (Open University Press, 2000)

⁹⁸ Chantal Mouffe, 'Introduction: for an antagonistic pluralism' in C Mouffe (ed) *The Return of the Political* (Verso, 1993), 10

⁹⁹ Laclau and Mouffe [n96], 3 (emphasis in original)

¹⁰⁰ See the helpful glossary in Jacob Torfing, [n 4] 298-307

¹⁰¹ See for example 'Promoting fundamental British values as part of SMSC in schools: Departmental advice for maintained schools'. Department for Education, November 2014: 5-6

A ‘floating signifier’, on the other hand, is overflowing with meaning because it is articulated differently within different discourses. With reference to this research, terms like ‘rights’ and ‘equality’ can be seen as floating signifiers.

A ‘nodal point’ is an empty signifier which can be used to fix the content of a range of floating signifiers by articulating them within a ‘chain of equivalence’, whereby a chain of identities is constructed among different elements that are seen as having a quality of sameness.¹⁰² Thus a nodal point is ‘a privileged sign around which other signs are ordered; the other signs acquire their meaning from their relationship to the nodal point’.¹⁰³ Again, with reference to this research, ‘rights’ and ‘equality’ can be viewed as nodal points within liberalism itself, but floating signifiers in the struggle between religious expression and sexual orientation. We can now begin to understand Laclau and Mouffe’s discourse theory, which is based on the following understanding of discourse:

Every discourse is constituted as an attempt to dominate the field of discursivity by expanding signifying chains which partially fix the meaning of the floating signifier. The privileged discursive points that partially fix meaning within signifying chains are called nodal points. The nodal point creates and sustains the identity of a certain discourse by constructing a knot of definite meanings.¹⁰⁴

In other words, discourse attempts to establish itself as hegemony. Hegemony is an important concept that requires more detailed discussion. Laclau and Mouffe define hegemony as ‘an articulatory practice instituting nodal points that partially fix the meaning of the social in an organized system of differences’.¹⁰⁵ Discourses struggle to establish themselves as hegemonical – so dominant, and so entrenched, that their contingent nature

¹⁰² Torfing [n 4], 96

¹⁰³ Marianne Jorgensen and Louise Phillips, *Discourse Analysis as Theory and Method* (Sage, 2002), 26

¹⁰⁴ Laclau and Mouffe [n96], 112

¹⁰⁵ Torfing [n 4], 109

is all but forgotten – until they are revealed and disrupted through *further* struggle. By way of example, a recent speech given by the former Prime Minister, David Cameron, is the latest in a series of attempts to hegemonise the UK as (still) a Christian nation:

I believe we should be more confident about our status as a Christian country, more ambitious about expanding the role of faith-based organisations, and, frankly, more evangelical about a faith that compels us to get out there and make a difference to people's lives.¹⁰⁶

From a discourse-theoretical perspective, Cameron is using Christianity to give content to the otherwise empty concepts of 'the nation' and 'the people', and to cement Christianity as hegemonical within British society. However, 'nodal points like "God" [and] "nation" are not characterised by a supreme density of meaning, but rather by a certain emptying of their contents, which facilitates their structural role of unifying a discursive terrain'.¹⁰⁷ As Hook notes, 'the strongest discourses are those which have attempted to ground themselves on the natural, the sincere, the scientific – on the level of the various correlates of the 'true' and reasonable'.¹⁰⁸ However, attempts to represent societal unity tend to reveal conflicts and antagonisms that have hitherto been masked, or papered over. It is the possibilities of meaning, outside of this supposed unity, that provide the opportunity for critical analysis and change; and these discursive changes are the means by which the social world itself is changed.¹⁰⁹

The theory of the subject is another important element in discourse theory. It is intrinsically related to the discursive struggle for hegemony and to the antagonism that is

¹⁰⁶ David Cameron, 16 April 2014 <<http://www.churchtimes.co.uk/articles/2014/17-april/comment/opinion/my-faith-in-the-church-of-england>> accessed 19 April 2014

¹⁰⁷ Torfing [n 4], 98-9

¹⁰⁸ D Hook, 'Discourse, knowledge, materiality, history: Foucault and discourse analysis' (2001) LSE Research Online, 7 <<http://eprints.lse.ac.uk/archive/956>> accessed 22 May 2014

¹⁰⁹ Jorgensen & Phillips [n103]

inherent within this struggle. It is also important for this research, because the expansion of gay rights, particularly into the arena of goods and services, represents an upheaval of the hegemony of heteronormativity and theonormativity. And – as Torfing suggests – ‘one way to undercut fundamentalist reassertions is to question the whole idea of fundamental values and essentialist identities’.¹¹⁰ As discussed in Chapter 2, legal liberalism views the subject as a rational, self-aware agent who is the source of her own ideas, values and actions. In contrast, a structuralist understanding posits the subject as ‘interpellated’ or entirely constructed by the ideological practices in which they participate.¹¹¹ Laclau and Mouffe base their own concept of the ‘subject’ both on a critique of the shortcomings of both approaches, and on an application of Lacan’s psychoanalytic theory.¹¹² They introduce the idea of ‘subject positions’ whereby the subject is interpellated – brought into being or given identity to – in a number of different positions at once, such as ‘mother’, ‘worker’, ‘black person’ etc.

While acknowledging Althusser’s characterisation of such positions as the result of sedimented structures in social practice, Laclau and Mouffe do not equate them with the subject herself. Social agents understand the world, and their position(s) within it, through discourse. When discursive antagonism occurs, the hegemonic discourse loses its pretence to universality and objectivity. As a consequence, the thoughts and actions of subjects are no longer shaped by the hegemony and it is *here* that the ‘subject’ emerges. Part of this research looks at the respective subject positions of ‘homosexual’ and ‘Christian’ within this discourse-theoretical framework, and considers the implications of the dislocation that the current conflict has caused. The current conflict between religion and sexual orientation lends itself well to a discourse-theoretical methodology. Interesting events are

¹¹⁰ Torfing [n 4], 6

¹¹¹ Louis Althusser, ‘Ideology and ideological state apparatuses’ in *L Althusser: Lenin and Philosophy and Other Essays* (New Left Review, 1971)

¹¹² Lacan [n 1]

taking place in this field of discursivity, which may prove pivotal in our future understanding of both sexuality and religious expression.

This thesis does not use the traditional discourse analysis method, because the latter omits considerations of ‘knowledge, materiality and power’ in favour of looking solely at the language.¹¹³ Foucault warned against reducing discourse analysis to a simple reading of textuality, because ‘the history which determines us has the form of a war rather than that of language: relations of power, not relations of meaning’.¹¹⁴ The thesis is concerned with the broad range of discussion in society about the issue in question - the ‘macrodiscourse’ – rather than the ‘microdiscourse’ which is only concerned with the linguistic sense.¹¹⁵ It considers how ‘truths’ and ‘norms’ pertaining to sexual orientation and religious expression are constructed in law: what is deemed ‘normal’ or ‘good’, and what is pathologised? With reference to the knowledge/power symbiosis, the thesis questions whose interests are being served by these constructions, and what actions and identities are made acceptable by the mode of language used. This relates to the research framework set out in Chapter 1, which introduced Foucault’s five questions. It also reflects Goodrich and relates to the allegory of the master’s tools.

Valverde’s observation that it may be more productive to consider inquiries into effects instead of focusing solely on interests is an interesting one. Taking up Nietzsche’s invitation to analyse social relations in terms of ‘deeds’, she argues that this can free us from ‘the tired dichotomies of agency and structure, freedom and constraint’.¹¹⁶ However, these ‘tired dichotomies’ are pertinent to the current conflict, not only because the

¹¹³ Hook [n108], 36-7

¹¹⁴ Michel Foucault, ‘Two Lectures’ in C Gordon (ed), *Power/knowledge: selected interviews and other writings by Michel Foucault 1972-77* (Pantheon Books, 1980), 114

¹¹⁵ John M Conley and William M O’Barr, *Just Words: Law, Language and Power* (University of Chicago Press, 2005), 7

¹¹⁶ Marina Valverde, ‘Some remarks on the rise and fall of discourse analysis’ (2000) *Histoire Sociale/Social History* 33, 65, 73

language employed by interested parties is often couched in terms of autonomy, freedom and restriction, but also because the conflict enables a critique of how these terms are being used. What is persuasive about Valverde's argument is her endorsement of the need to ask 'larger questions about governance and about forms of power that go beyond the local and the particular'.¹¹⁷ This is why the thesis looks at the role of the state in the current conflict.

Methods

It is important to note that neither Foucault, nor Laclau and Mouffe, ever prescribed a particular method for 'doing' a discourse-theoretical analysis. Nevertheless, there have been attempts to guide the researcher in the process. One example of such guidance is provided by Jorgensen and Phillips,¹¹⁸ who suggest a series of steps to follow. Firstly, identify the nodal points: which signs have a privileged status? Then, consider how other discourses define the same signs – floating signifiers – in different ways. By examining the competing content of the floating signifiers, we can begin to sketch out the struggles taking place over meaning. From there we consider which signs are subject to a struggle over meaning by competing discourses (floating signifiers), and which - if any - have relatively fixed, agreed meanings (moments). Through this we can understand how the discursive structure is constituted and changed.

With reference to the current conflict, a discussion on group formation ("Christians" and "homosexuals", for example) is also helpful. The process of the establishment of chains of equivalence leads to a reduction in possibilities which in turn constitutes a 'group'.¹¹⁹ Group formation has a role to play in 'the struggle over how the myth about society is to be

¹¹⁷ Valverde [n116], 76

¹¹⁸ Jorgensen and Phillips [n103], 30

¹¹⁹ See the example of 'Black' in Stuart Hall, 'Old and new identities, old and new ethnicities' in A King (ed) *Culture, Globalization and the World System* (MacMillan, 1991)

filled with meaning'.¹²⁰ In terms of method, we can search for the nodal point around which identity is organised in order to establish which (individual or group) subject positions are deemed relevant by the discursive structures – such as 'Christian' and 'homosexual'. We can then examine how the nodal point is filled with meaning by being equated with some and contrasted with others. As Jorgensen and Phillips conclude, 'the construction of subject positions and hence identities is a battlefield where different constellations of elements struggle to prevail'.¹²¹

Tensions and Critiques

Several of the critiques of this approach hinge on Foucault's conception of power. For example, Said argues that Foucault's use of power 'moves around too much, swallowing up every obstacle in its path... Resistance cannot equally be an adversarial alternative to power and a dependent function of it, except in some metaphysical, ultimately trivial sense'.¹²² Similarly, Dews argues that Foucault's concept of power, 'having nothing determinate to which it could be opposed, loses all explanatory content and becomes a ubiquitous, metaphysical principle'.¹²³ Taylor suggests that Foucault's idea of power "*does not make sense* without at least the idea of liberation".¹²⁴ It is true Foucault did not use the language of freedom and he was also skeptical of the idea of liberation. However, Foucault *was* concerned about freedom, if we understand it to mean the existence of the possibility of being otherwise.

¹²⁰ Jorgensen and Phillips [n103], 46

¹²¹ Jorgensen and Phillips [n103], 47. Jorgensen and Phillips define an "element" as 'any difference that is not discursively articulated' [n103], 26

¹²² EW Said, *The World, the Text, and the Critic* (Harvard University Press, 1983), 245-6

¹²³ P Dews, 'Power and Subjectivity in Foucault' (1984) *New Left Review* 144, 72, 92

¹²⁴ C Taylor, 'Foucault on Freedom and Truth' in DC Hoy (ed) *Foucault: A Critical Reader* (Basil Blackwell, 1986), 92 (emphasis in original)

It is certainly true that the meta-theoretical character of Foucault's approach can be difficult to apply methodologically. As Torfing acknowledges, 'discourse theory... has no ambition of furnishing a detailed framework for the study of all kinds of social, cultural and political relations'.¹²⁵ However, it is still possible to use a Foucaultian and discourse-theoretical approach to highlight where traditional concepts have floundered. From there, a new perspective can be attempted which is consistent with the assumptions of such an approach.

¹²⁵ Torfing [n 4], 291

CHAPTER 4: A DISCURSIVE ANALYSIS OF STATUTE AND CASE LAW

*Power in our societies functions primarily not by repressing spontaneous sexual drives but by producing multiple sexualities... through the classification, distribution, and moral rating of those sexualities the individuals practicing them can be approved, treated, marginalized, sequestered, disciplined or normalized.*¹

The conflict between religion and sexual orientation provides valuable insights into how legal norms are created and sustained; how they change; and the pressures this creates on legal liberalism. This conflict can also be seen as a microcosm of the wider relationship between law, religion and homosexuality, and the discursive techniques employed by legal actors. As such, it offers an opportunity to examine norm creation in its raw form. This chapter examines and critiques how law deals with the conflict between religious expression and sexual orientation.

As explained in Chapter 3, the methodology used is based on a Foucaultian approach to the study of discourse. Thus the analysis 'is not about codes but about events: the law of *existence* of statements, that which rendered them possible – them and none other in their place'.² This is why the research uses Foucault's five questions; to discover how and why some discourses relating to sexuality were abandoned while others persisted. Foucault views sexuality as an 'historical construct... a great surface network in which... the formation of special knowledges, the strengthening of controls and resistances, are linked

¹ Leo Bersani, *Homos* (Harvard University Press, 1995), 81

² Michel Foucault, 'Politics and the Study of Discourse' (1968) In G Burchell, C Gordon and P Miller (eds) *The Foucault Effect, Studies in Governmentality, with Two Lectures by and an Interview with Michel Foucault* (University of Chicago Press, 1991), 59

to one another, in accordance with a few major strategies of knowledge and power'.³ These resistances will be examined later on in the chapter.

This chapter focuses on the statute and case law relating to sexual orientation under the employment and goods and services provisions of new equalities legislation. It highlights examples which reveal how equality law constructs both sexuality *and* religion. It examines how rights and equality discourses have influenced the relationship in this area between law, religion and sexual orientation, by analysing how conservative religious discourse has adapted both to influence the developing legal framework and to respond to it. The chapter also considers how rights and equality discourses have affected Strasbourg's interpretation of the European Convention on Human Rights (ECHR). This will provide a foundation for moving on, in subsequent chapters, to suggest how the relationship needs to change to ensure substantive equality for lesbians and gay men.

Statute law

Johnson and Vanderbeck's discursive genealogy⁴ of UK statute law is a story of persistent religiously-inspired efforts to give legal voice to homophobia, by presenting Christian morality as established, objective and mainstream. Four broad discursive periods can be characterised by the dominance of particular religious discourses regarding homosexuality. First, in the wake of the Wolfenden Report,⁵ partial decriminalisation of homosexuality⁶ was accepted by the religious establishment as a 'pastoral solution to sexual deviancy'.⁷ Removing the threat of criminal sanction rendered the (male) homosexual more available to *moral* regulation through the influence of the Christian churches. Moreover, the partial

3 Michel Foucault, *History of Sexuality Vol 1* (1978) (page ref)

4 Paul Johnson and Robert M Vanderbeck, *Law, Religion and Homosexuality* (Routledge, 2014)

⁵ Report of the Committee on Homosexual Offences and Prostitution (Cmnd 247), London, Home Office 1957

⁶ Sexual Offences Act 1967

⁷ Johnson and Vanderbeck [n 4], 19

decriminalisation of *private* homosexuality was traded for the primary concern: the increased legal regulation of *public* homosexuality. Furthermore, the 1967 Act did not merely commence a particular regime for regulating gay male sexual intimacy. Rather, it inaugurated the ‘homosexual’ as a legal figure.⁸ Thus, before the 1967 Act, the crime was ‘buggery’ and it was not gender-specific. After the Act, sexual acts such as anal intercourse had discursively become the exclusive domain of gay men, and the link between sodomy and gay identity had been established in law (although it always threatens to unravel, given the actual complexity of sexuality). At the same time, the link between this practice and heterosexuals was erased. This is a good example of how law reform fails even as it succeeds, which is one of the themes of this research. Further, law’s emphasis on homosexual identity (albeit that crimes can only be committed by acts) might be viewed, in the present context, as a precursor of anti-discrimination law, vis-à-vis protected identity categories, and therefore as antithetical to Church teachings around sin and therefore acts.

The post-Wolfenden emphasis on public regulation heralded a prolonged period of legal enforcement of religious morality at the expense of lesbians and gay men. One thinks of the moral panic surrounding HIV and AIDS, and the discursive spectre of children being ‘corrupted’ and ‘endangered’ by homosexuality in schools, which gave rise to Section 28 of the Local Government Act 1988.⁹ By the beginning of the 21st century, however, the discourse of ‘equality’ was in the ascendancy, and the debates that began in the 1990s

⁸ Leslie Moran, *The Homosexuality of Law* (Routledge, 1996)

⁹ Section 28 of the Local Government Act 1988 amended the Local Government Act 1986 to insert section 2A, providing that:

(1) A local authority shall not—

(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;
(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.

culminated in the repeal of Section 28,¹⁰ equalisation of the age of consent¹¹ and – finally – full decriminalisation of homosexuality.¹²

However, this discursive shift simply caused religious opponents of homosexuality to redefine their strategy, stepping back from explicit faith-based homophobia and grounding their opposition instead in pseudo-scientific, medical and “public morality” arguments. As Johnson and Vanderbeck argue,

This denial that faith-based opposition to equality constitutes homophobia has become a central trope of religious opposition to law reform, and has underpinned efforts to resist legislative changes in respect of the adoption of children, education, employment, partnership rights and hate speech.¹³

The final major discursive shift is an extension of this fear surrounding religious expression in the public sphere, as revealed in the contemporary concern over religious rights. There is now a perceived need by religious conservatives for protection from litigious gay people. This shift is expressed through a discourse that is again careful to disclaim homophobia, while bemoaning legal measures that extend the rights of lesbians and gay men at the expense of the religious conscience. As stated in Chapter 1, religious conservatives argue that their own rights are being compromised by restrictions upon the expression of faith in public life: in effect, their religiosity is being closeted. Yet the assertion of ‘religious rights’ against homosexual practice only makes sense if one accepts that there is some sort of special relationship between religion and sexual orientation which makes it necessary for Christian individuals to discriminate – that religious people have a

¹⁰ Local Government Act 2003, s. 122

¹¹ Sexual Offences (Amendment) Act 2000

¹² Sexual Offences Act 2003

¹³ Johnson and Vanderbeck [n 4], 59

fundamental, incontrovertible need to oppose homosexuality. This is not always the case, as is shown later in this chapter.

Sexual orientation equality and religious exemptions

UK law has traditionally been more ready to embrace and formalise rights in favour of religion or belief than homosexuality. Even when gay rights have eventually been granted legal legitimacy, they have been diluted by religious exemptions and exceptions which effectively relegate lesbians and gay men to a lower rank of citizenship. This section discusses four strands of legislation that have extended the arm of anti-discrimination protection to lesbians and gay men: the Employment Equality (Sexual Orientation) Regulations 2003 (EESOR); the Equality Act 2006; the Equality Act (Sexual Orientation) Regulations 2007 (EASOR); and the Equality Act 2010.

The Employment Equality (Sexual Orientation) Regulations 2003

The 2003 Regulations were enacted as secondary legislation to give effect to a European Council Directive requiring equal treatment in employment and occupation.¹⁴ The Regulations made it illegal to discriminate on the basis of sexual orientation in employment and vocational training. They gave protection to lesbians and gay men from direct¹⁵ and indirect¹⁶ discrimination, victimisation¹⁷ and harassment.¹⁸ Prior to European intervention, various domestic attempts at protecting sexual orientation had failed. For example, MP Jo Richardson had argued unsuccessfully for sexual orientation employment rights during the Sex Equality Bill 1983:

¹⁴ Council Directive 2000/78/EC 27 November 2000 required member states to ‘lay down a general framework for combatting discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment’.

¹⁵ Reg 3(1)(a)

¹⁶ Reg 3(1)(b)

¹⁷ Reg 4

¹⁸ Reg 5

There have been many disgraceful cases against both male and female homosexuals purely on the ground that they are homosexuals. No one can have any complaint about being denied a job because they are not qualified, or do not have the skills needed. However, to deny people the right to jobs purely because they are homosexual is wrong. The parliamentary assembly of the Council of Europe said in 1981 that member states should assure equality of treatment, no more, no less, for homosexuals with regard to employment pay and job security, particularly in the public sector.¹⁹

Baroness Turner subsequently made three unsuccessful attempts to prohibit anti-gay discrimination through the Sexual Orientation Discrimination Bill from 1995 to 1998.²⁰

During the 1998 House of Lords reading, Lord Arran gave a speech which captures some of the thinly-disguised hostility expressed towards the idea of lesbian and gay anti-discrimination rights. He argued that it was for ‘those who are gay or of a different sexual orientation... to take care that they do not ostensibly, willingly and arbitrarily offend those with whom they work’.²¹ It is not clear what His Lordship meant by homosexuals ‘ostensibly, willingly and arbitrarily’ offending their colleagues. If we translate his chosen words into synonyms, it seems that we are faced with the prospect of ‘apparent’ offence to colleagues, ‘eagerly’ and ‘capriciously’ caused by homosexuals. The description of homosexuals’ desire (and need) for protection from discrimination, victimisation or harassment at work as capricious implies that it has no legitimate basis in law.

¹⁹ HC debate 9 December 1983 at c 586

²⁰ HL Debate, 13 June 1995, c 1640; HL Debate, 11 December 1995, c 1102; HL Debate, 13 May 1998, c 1080

²¹ HL Debate, 5 June 1998, c 645. It is sobering to note that the current Lord Arran’s father was a passionate advocate of gay rights. The 8th Earl of Arran was the sponsor in the House of Lords of the 1967 Bill which partially decriminalised homosexuality.

Further, this translation reveals two homophobic discursive imaginaries: presumed ‘offence’ - which is not quantified - to ‘others’ who are not specified; and a cohort of lesbians and gay men who are enthusiastically intent on keeping these ‘others’ on tenterhooks, waiting for the next psychic assault on their heterosexual sensibilities through having to witness lesbians and gay men ‘being’ homosexual in the public sphere. During the same debate, the Bishop of Wakefield expressed his concern for ‘some Christian and other religious charities which do not believe that homosexuality is compatible with Christian or other faith beliefs’.²² If we relate this argument to the four major discursive periods highlighted earlier in this chapter, we can see how it correlates to the first move by religious discourse away from explicit homophobia and towards more pseudo-objective intervention.

EESOR 2003 Regulation 7(3)

Following the first draft of the EESOR, religious organisations voiced worries that the exception regarding the ‘genuine occupational requirement’²³ would compromise their wish to exclude lesbians and gay men from their employment. Baroness Young’s criticism that the Directive ‘represented another nail in the coffin of the whole Judaeo-Christian basis of our society’²⁴ is a good example of the discursive device which presents faith-based homophobia as an objective, transcendent ‘given’ and also as part of nationhood - a Christian England - despite the obvious reality of increasing secularisation. In this sense,

²² HL debate, 5 June 1998, c. 649

²³ Reg. 7 enabled an employer to discriminate on grounds of sexual orientation if ‘being of a particular sexual orientation is a genuine and determining occupational requirement’ and ‘it is proportionate to apply that requirement in the particular case’. The Regulation echoed Article 4.1 of Council Directive 2000/78/EC, which allowed member states to provide for a difference in treatment ‘where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate’.

²⁴ HL Debate, 30 June 2000, c.1189

the religious right invokes the past and the discourse of ‘the traditional’ for the purposes of protecting their interests in the present.

Anxious to maintain their own vision of the basis of British society, the Church of England’s response to the draft Bill was aimed at widening the scope of the religious exception. They suggested that ‘nothing in... these Regulations shall render unlawful anything done for the purposes or in connection with an organised religion so as to comply with the doctrines of the religion or avoid offending the religious sensibilities of a significant number of its followers’.²⁵ In fact, the religious exemptions granted in the final version of the EESOR went further than the ‘genuine occupational requirement’ exemption.

Regulation 7(2) kept the original reference to an exemption applying when ‘*being* of a particular sexual orientation is a genuine and determining occupational requirement’ and ‘it is *proportionate* to apply that requirement in the particular case’. On the other hand, regulation 7(3) exempts an ‘organised religion’ applying a requirement ‘*related to* sexual orientation’.²⁶ It is possible that matters ‘related to’ sexual orientation could be used by religious conservatives to echo either Lord Arran’s imaginary of gratuitously offensive homosexuals, or perhaps to reactivate the tired heteronormative script that men and women should exhibit characteristics ‘appropriate’ to their sex.

²⁵ Church of England, ‘Equality and diversity: Church of England response to DTI consultation document’, Archbishops’ Council, 23 January 2003

²⁶ This paragraph applies where –

- (a) the employment is for purposes of an organised religion;
- (b) the employer applies a requirement related to sexual orientation –
 - (i) so as to comply with the doctrines of the religion, or
 - (ii) because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers;
- and
- (c) either –
 - (i) the person to whom the requirement is applied does not meet it, or
 - (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.

The *R (Amicus)*²⁷ case is a telling example of how religious influence has circumscribed laws aimed at extending homosexual citizenship to employment. In the judgment, Richards J observed that ‘Regulation 7(3) was not included in the detailed draft regulations... It was added as a result of the Churches’ intervention, in particular... the Archbishops’ Council of the Church of England’.²⁸ Richards J referred to ‘evidence indicating that one reason for the different terms of regulation 7(3) is to encompass occupational requirements related not to sexuality as such but to sexual behaviour’,²⁹ although a precise definition of ‘sexual behaviour’ was avoided. This ‘evidence’ was a letter signed on behalf of the General Synod and the Archbishop’s Council, which stated:

The difficulty is that regulation 7(2) applies only where being of a particular sexual orientation is a genuine and determining occupational requirement. As explained above, we have no posts or offices where there is a requirement to be heterosexual (or indeed homosexual). Our requirements are in relation to behaviour, not sexuality itself. That is why the new regulations 7(3) and 16(3) refer to a ‘requirement related to sexual orientation’.³⁰

It is unclear why the Archbishops’ Council thinks that orientation is equivalent to practice. It might be said that it fails to advance any material difference, and in this sense points to general confusion around the act/identity distinction. The same letter from the Archbishops demanded that the Church should have ‘freedom to determine what requirements in relation to sexual behaviour should apply’, not least with reference to celibacy and marriage. Such arguments represent a danger of reactivating earlier tropes regarding public displays of homosexuality. As one Member of Parliament put it during the

²⁷ *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin)

²⁸ *Amicus*, [n 27], [90]

²⁹ [n 27], [92], emphasis added

³⁰ W Fittall, ‘Letter to Joint Committee on Statutory Instruments from the Secretary General of the General Synod and the Archbishops’ Council, 9 June 2003, cited by Richards J in *Amicus* [n 27], [92]

1967 debate on the Sexual Offences Act, ‘We cannot have homosexuals parading their homosexuality in public’.³¹ Concern to accommodate the religious dictum that sex outside (heterosexual) marriage is a sin has also created an opportunity for the reactivation of old stereotypes regarding how lesbians and gay men are understood to behave. As previously discussed, such stereotypes are constructed through the heteronormative gaze and thus relate to how ‘proper’ masculinity and femininity are expected to be performed.³²

The Church sought the exemption fully recognising that ‘this might otherwise constitute direct or indirect discrimination in relation to sexual orientation’.³³ Lord Lester had argued (unsuccessfully) in the Lords for the removal of Regulation 7(3) precisely because of this. He said it was ‘both unnecessary and unlawful’, permitting discrimination beyond the remit of the Council Directive, the effect of which was ‘apparently permitting a religious body to refuse to employ not a priest but a cleaner or messenger because of their sexuality’.³⁴ Furthermore, the proportionality requirement found in Regulation 7(2) is absent from Regulation 7(3), meaning that the exemption does not, on the face of it, have to meet criteria that prevent the use of a “sledgehammer to crack a nut”. In addition, Richards J rejected an argument made in *Amicus* that Regulation 7(3) breached the principle of legal certainty.³⁵ Advocating a narrow construction of the wording, the judge saw no difficulty in interpreting them so as to comply with the Council Directive. However, he did not fully address what might be covered by matters ‘related to sexual orientation’. Thus he missed the opportunity to tackle religious interference with the rule of

³¹ W Rees-Davies, HC Debate, 3 July 1967, c 1439

³² For further discussion, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990)

³³ W Fittall, ‘Letter to Joint Committee on Statutory Instruments from the Secretary General of the General Synod and the Archbishops’ Council, 9 June 2003,

³⁴ HL Debate, 17 June 2003, c.755

³⁵ *Amicus*, [n 27] [125]

law. The desirability of legal certainty will be returned to in the case law which is discussed later in this chapter.

The debate in *Amicus* centred more on the perceived need to preserve ‘religious liberty’ than on any discussion of homosexuality or recognition of homophobia. Keeping the focus on sexual behaviour enabled religious conservatives ‘to make opaque their central concern about employing homosexuals’.³⁶ Moreover, these arguments represent an attempt to dissociate sexual behaviour from sexuality itself. If sexual orientation is protected in law, it becomes necessary to distance orientation from behaviour in order to justify religious exemptions. This argument has been adopted repeatedly in the case law, as will be demonstrated later in this chapter.

EESOR: an emerging hierarchy of rights

As stated earlier in this thesis, conservative pro-religious discourse contends that the UK suffers from a ‘hierarchy of rights’ in which faith is relegated below sexual orientation. However, it can be argued that the EESOR 2003 actually began to establish a ‘hierarchy of rights’ in favour of religious privilege. The EESOR debates highlight the discourse that religious sensibilities are somehow special, and are as worthy of exemption from equality law as religious doctrines, which are similarly elevated. Religious organisations enjoy the privilege of a wider exemption regarding sexual orientation equality than that available to any other employer. The exemption for organised religion was retained, albeit in slightly modified form, in the consolidated Equality Act 2010³⁷ which will be discussed later in this chapter. First, the following section charts the statutory genesis of the expansion of lesbian and gay equality rights into the arena of goods, services, facilities and premises.

³⁶ Johnson and Vanderbeck [n 4], 106

³⁷ Schedule 9, Para. 2

The Equality Act 2006 and the Equality Act (Sexual Orientation) Regulations 2007

The 2006 Act extended existing laws prohibiting discrimination in the provision of goods, services, facilities and premises on grounds of race so as to cover religion and faith. Section 57 of the Act permitted religious organisations to restrict membership, goods, services and premises if imposed, inter alia, ‘in order to avoid causing offence, on grounds of religion or belief to which the organisation relates, to persons of that religion or belief’. Despite religious opposition, the Act also included an amendment tabled by the House of Lords, requiring the government to introduce secondary legislation prohibiting discrimination and harassment on grounds of sexual orientation. The ensuing debate illustrates how religious conservatives were careful to disclaim homophobia, couching their opposition instead in terms of the need to balance ‘the right not to be discriminated against on the one hand and the right to freedom of religion on the other’, and calling for ‘early discussions with the Churches and other faith communities on how their interests can be reflected in the provisions’.³⁸

There was also concern for how the law would affect “ordinary people” who provided goods and services such as bed and breakfast facilities in their own homes.³⁹ As Johnson and Vanderbeck point out, ‘religious opposition to equality legislation was concerned with maintaining boundaries between homosexuality and private and domestic dwellings’,⁴⁰ and the image of the beleaguered “ordinary person” who would have to suffer public homosexuality was a key feature of this opposition. However, the government’s consultation document stated that religious exemptions would not apply ‘where the sole or

³⁸ The Bishop of Newcastle (Martin Wharton), HL Debate, 9 November 2005, c.630

³⁹ Lord Stoddart, [n 38], c.631

⁴⁰ Johnson and Vanderbeck [n 4], 108

main purpose of the organisation offering the service is commercial’,⁴¹ and that any exemptions would be ‘limited to activities closely linked to religious observance or practices that arise from the basic doctrines of a faith’.⁴²

Disavowal of homophobia was again present in the religious opposition to this proposal. Pressing for wider exemptions, the Catholic Bishops’ Conference asserted that ‘there appears to be little recognition in the consultation document of the difference between *homophobia* and a conviction, based on religious belief and moral conscience, that homosexual practice is wrong’.⁴³ Note also the inclusion of ‘moral conscience’ here, as an augury of more recent arguments in favour of recognising religious ‘conscientious objection’. This is discussed later in the thesis. For now, it is important to note this discursive technique of disclaiming and denying of homophobia.

Religious objections to the proposals culminated in significant exemptions for Northern Ireland. In an echo of the 2003 Regulations, restrictions against lesbians and gay men were permitted if ‘necessary to comply with the doctrine of the organisation’ or ‘so as to avoid conflicting with the strongly held religious convictions of a significant number of the religious followers’.⁴⁴ Nevertheless, there were moves to have the Regulations annulled, with Lord Morrow arguing that they posed a threat to ‘religious liberty’:

They make it possible for homosexual activists to sue people who disagree with a homosexual lifestyle because of their religious beliefs. Bed and breakfast owners and Christian old people’s homes will be sued for not giving a double bed to

⁴¹ Women and Equality Unit, *Getting Equal: Proposals to Outlaw Sexual Orientation Discrimination in the Provision of Goods and Services*, 2006, at para. 3.35

⁴² [n 41], para. 3.33

⁴³ Catholic Bishops’ Conference of England and Wales, ‘Getting equal – proposals to outlaw sexual orientation discrimination in the provision of goods and services: a submission to the DTI consultation from the Catholic Bishops’ Conference of England and Wales, June 2006

⁴⁴ Reg 16(5) Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006

homosexual civil partners. Wedding photographers will be made to pay compensation for not taking bookings for civil partnership ceremonies. Christians in business could even be sued for sharing their faith with customers. Worst of all, they require religious organisations to choose between obedience to God and obedience to the state.⁴⁵

Lord Morrow paints a vivid image of religious service providers being persecuted by organised homosexuals with a litigious agenda to promote their ‘lifestyle’ (whatever that may be). From the historical view, discussed in Chapter 2, that homosexuals suffered from an excess of desire, ‘homosexual activists’ now appear to be suffering from an excessive desire for equality.⁴⁶

We also see once again an appeal to conscience and to religious concern over a ‘hierarchy of rights’ – which religious conservatives see as operating in favour of homosexuality. This was successfully deployed in a judicial review of the Regulations in Northern Ireland.⁴⁷ As Johnson and Vanderbeck observe in their discussion of the case, Weatherup J’s reasoning ‘legitimises the view that religious believers require exceptions from anti-discrimination law relating to sexual orientation because of their need to manifest their religion through expressions about homosexuality’ and ‘endorses the view that curtailing the manifestation of faith-based hostility to homosexuality amounts to a form of discrimination’.⁴⁸ These discourses construct religious believers as victims of both an oppressive state machine and a perceived eager horde of litigious gay activists.

⁴⁵ HL Debate, January 2007, c.180 (emphasis added)

⁴⁶ Chris Brickell, ‘Whose “Special Treatment”? Heterosexism and the Problems with Liberalism’ (2001) *Sexualities* 4(2), 211

⁴⁷ *An application for Judicial Review by The Christian Institute and Others*, High Court of Justice in Northern Ireland Queen’s Bench Division [2007] NIQB 66

⁴⁸ Johnson and Vanderbeck [n 4], 114

These discourses continue to prevail. As a consequence of the faith-based furore over the Northern Ireland Regulations, provisions prohibiting harassment on grounds of sexual orientation were omitted from the EASOR 2007 which applied to the rest of the UK. Nevertheless, the 2007 Regulations were criticised for being ‘an assault on the freedom of conscience of millions of our fellow citizens’.⁴⁹ This concern emanated from the perceived need to protect religious liberty to ‘promulgate the view that homosexuality is sinful or wrong’.⁵⁰ One member of the House of Lords saw the legislation as proof that the government had ‘taken the view that gay rights trump religious rights’.⁵¹ The Archbishop of York also argued:

The Government are venturing down an unconsidered path through the establishment of a new hierarchy of rights. Rather than levelling the playing field for those who suffer discrimination... this legislation effects a rearrangement of discriminatory attitudes and bias to overcompensate and skew the field the other way.⁵²

This ‘hierarchy of rights’ discourse relies on the religious assertion of a ‘special relationship’ between religion and sexual orientation, which makes it absolutely essential for individual Christians to be able discriminate against homosexuals. This chapter analyses how this presumed ‘special relationship’ influences the case law arising out of the 2003 and 2007 Regulations. First, it is necessary to bring this discussion of statute law up to date by considering the Equality Act 2010.

⁴⁹ G Howarth, HC Committee, 15 March 2007, c.6

⁵⁰ L Burt, HC Committee, 15 March 2007, c. 27

⁵¹ Baroness O’Cathain, HL Debate, 21 March 2007, c.1296

⁵² John Sentamu, HL Debate, 21 March 2007, c.1309 (emphasis added)

The Equality Act 2010

Following reports from The Equalities Review⁵³ and The Discrimination Law Review,⁵⁴ the Equality Act 2010 consolidated and replaced previous equality legislation.⁵⁵ The 2010 Act deems age, disability, race, religion or belief, sex, sexual orientation, gender reassignment, marriage and civil partnership, and pregnancy and maternity to be 'protected characteristics'.⁵⁶ It forbids the use of these characteristics as a basis for both direct⁵⁷ and indirect⁵⁸ discrimination. Service providers are now prevented from discriminating against any of the protected characteristics.⁵⁹ There is also a general duty on local authorities to promote equality.⁶⁰

The extension of this duty to encompass sexual orientation drew strong (albeit unsuccessful) protests from religious groups.⁶¹ Other religious protests against equality were more successful. For example, the Equality Bill sought to include a proportionality test to the employment exemption.⁶² The proportionality test would have required religious organisations to demonstrate that restrictions related to employees' sexual orientation were a 'proportionate means' of adhering to religious doctrine or avoiding offence to the religious convictions of a significant number of the religion's faithful.⁶³ Following opposition from the Church of England and the Catholic Church, the proportionality test

⁵³ Fairness and Freedom: The Final Report of the Equalities Review, HMSO 2007

⁵⁴ Discrimination Law Review - A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain, HMSO 2007

⁵⁵ Equal Pay Act 1970; Sex Discrimination Act 1975; Race Relations Act 1976; Disability Discrimination Act 1995; Employment Equality (Religion or Belief) Regulations 2003; Employment Equality (Sexual Orientation) Regulations 2003; Employment Equality (Age) Regulations 2006; and the Equality Act (Sexual Orientation) Regulations 2007. The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2006 and Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 remain in force.

⁵⁶ Equality Act 2010 Section 4

⁵⁷ Equality Act 2010 Section 13

⁵⁸ Equality Act 2010 Section 14

⁵⁹ Equality Act 2010 Section 29(1)

⁶⁰ Equality Act 2010 Section 149

⁶¹ HM Government, The Equality Bill – Government Response to the Consultation, July 2008, Cm. 7454

⁶² This chapter has already discussed how proportionality came to be removed from regulation 7(3) of the 2003 Regulations.

⁶³ Equality Bill 2009 Sch 9 Pt 1 Para. 2(5)–(6)

was dropped. This gives religion a uniquely privileged status in the Equality Act 2010, because these bespoke provisions allow greater scope for anti-gay discrimination than that available to other employers. There is also a somewhat mixed message to the effect that, while Schedule 9 does not refer to proportionality, the Explanatory Notes (790-791) state that the exception must be applied in a ‘proportionate way’. This mixed message does little to reassure those who are concerned about legal certainty under the rule of law.

During the passage of the Equality Act 2010, religious conservatives sought to widen the remit of religious exemptions that existed in the 2007 Regulations. Familiar arguments and tropes were reactivated in the course of this opposition to extended gay rights. For example, Lord Mackay attempted to include protection for those with a ‘genuine conscientious objection’ who wished to withhold goods and services from lesbians and gay men,⁶⁴ while the Bishop of Chichester warned against the ‘profoundly dangerous tendency’ to try to ‘privatise belief’.⁶⁵ These attempts may have failed, but the new Act nonetheless reproduced the broad scope of exemptions granted to religious organisations, enabling them to lawfully discriminate against lesbians and gay men in the provision and use of goods, services, facilities and premises.

The 2010 Act prohibits a service provider from harassing a service user⁶⁶ and also prohibits harassment in the exercise of a public function.⁶⁷ However, it is worth noting that neither religion or belief nor sexual orientation count as ‘protected characteristics’ for the purposes of harassment. On the face of it, it could be argued that this represents parity in the provision – indeed, this was a central argument invoked by religious conservatives⁶⁸ in the pursuit of ‘equality’ – but it is submitted that the possibility of harm was not taken

⁶⁴ HL Committee, 13 January 2010, cc. 591-592

⁶⁵ [n 64] c.600

⁶⁶ Sch 29(3)

⁶⁷ Sch 29(6)

⁶⁸ HM Government, The Equality Bill – Government Response to the Consultation [n 61]

sufficiently seriously. While MP Diane Abbott argued in support of protection against harassment for sexual minorities, acknowledging that ‘some people use their religion as a vehicle for cultural bigotry’,⁶⁹ MSP John Mason retorted that ‘one person’s bigotry is another person’s belief’ and extending harassment protection to homosexuals would ‘create a risk to free speech’⁷⁰ on the part of religious people. The relationship between homophobia and harm is returned to in Chapter 6 of this thesis.

Statute law: future directions?

The recent consultation by the Equality and Human Rights Commission is part of their three-year programme to ‘strengthen understanding of religion or belief in public life’.⁷¹ Conservative religious campaign groups have encouraged their followers to respond, with the aim of ensuring ‘that freedoms for Christians are protected more effectively, whether at work, school, church or other public setting’.⁷² At this point it is instructive to refer back to the Equality and Human Rights Commission’s 2011 report *Religion or belief, equality and human rights in England and Wales*.⁷³ In its exploration of the relationship of religion to the state, the report acknowledges the view that understanding the ‘importance of religion... and its manifestation will be implicit in the balancing exercise between the interests of religion, the state and individuals in particular instances where these appear to conflict’.⁷⁴ The Report also poses the question ‘as to whether a hierarchical analysis is required in order to resolve what might otherwise be intractable conflicts’⁷⁵ such as that between religion and sexual orientation, but notes that ‘most commentators, viewing rights

⁶⁹ HC Committee, 18 June 2009, c.308

⁷⁰ HC Committee [n 69]

⁷¹ <http://www.equalityhumanrights.com/about-us/our-work/key-projects/religion-or-belief-tell-us-about-your-experiences>

⁷² <http://www.christianconcern.com/>

⁷³ A Donald, *Religion or belief, equality and human rights in England and Wales* (2012) Equality and Human Rights Commission Research Report Series, Research Report 84

⁷⁴ [n 73], 21

⁷⁵ [n 73], 73

as indivisible and interdependent, reject this approach in favour of an analysis that seeks to balance and give importance to each right'.⁷⁶

The purported need for a 'conscience clause' was raised again in Parliament during Prime Minister's Questions. With reference to the current Asher's bakery dispute,⁷⁷ Democratic Unionist Party (DUP) MP Gregory Campbell asked whether religious freedom should be protected by a conscience clause. The former Prime Minister, David Cameron, was apparently unaware of the dispute, although he did say:

I do think a commitment to equality in terms of racial equality, in terms of equality to those of different sexes, equality in terms of people who have disabilities or indeed tolerance and equality of people with different sexualities, all of that is a very important part of being British.⁷⁸

It is interesting to note that 'people with different sexualities' are cited as the only people in need of 'tolerance' as well as equality. Presumably society has gone beyond the construction of women, minority ethnic people and people with disabilities as people whom we should merely 'tolerate', whereas lesbians and gay men are still hampered by this construction. The Prime Minister's recent comments above can be compared and contrasted to a speech he gave earlier in 2014, in which he waxed evangelical about the role of Christianity in public life:

I believe we should be more confident about our status as a Christian country, more ambitious about expanding the role of faith-based organisations, and, frankly, more

⁷⁶ [n 75]

⁷⁷ *Lee v Ashers Bakery and others* [2015] NICty 2. The appeal judgment is currently awaited.

⁷⁸ <http://www.christian.org.uk/news/ashers-commission-only-got-top-advice-after-making-threat/?e260914>

evangelical about a faith that compels us to get out there and make a difference to people's lives.⁷⁹

Similarly, the former Faith Minister warned that 'long standing British liberties of freedom of religion have been undermined by the intolerance of aggressive secularism'.⁸⁰ This suggests that the discourse of 'religious rights' may spawn a reactivation of religiosity in the public sphere. Religious hostility towards homosexuality may have had to change its expression in the face of emerging discourses of equality and human rights. Nevertheless, religion remains central to the process of lawmaking and to legislation itself, the Same-Sex Marriage Act 2013 being the most recent example.⁸¹

Case Law

The developing discourses surrounding a hierarchy of rights and conscientious objection are also regularly being played out in case law. It has become common to claim that religious expression needs protection in cases that have come before the domestic courts and the European Court of Human Rights.⁸² Furthermore, the discourse of 'religious rights' may empower religious conservatives to plead future legal disputes on the basis of 'freedom of conscience' under Article 9 of the European Convention.⁸³ Although Parliament did not include a general conscientious objection clause in either the Equality Act 2010 or the Marriage (Same-Sex Couples) Act 2013, Article 9(1) may imply an absolute protection to freedom of conscience that is not otherwise available to religion or

⁷⁹ David Cameron, 16 April 2014 <http://www.churchtimes.co.uk/articles/2014/17-april/comment/opinion/my-faith-in-the-church-of-england>

⁸⁰ <http://www.telegraph.co.uk/news/politics/david-cameron/11015849/David-Camersons-reshuffle-promotes-Eric-Pickles-in-wake-of-Baroness-Warsis-resignation.html>

⁸¹ The Marriage (same-Sex Couples) Act 2013 contains a 'quadruple lock': Religious organisations must 'opt-in' to solemnise SS marriage in places of worship; No-one can be forced to opt-in; No anti-discrimination law will be contravened by not opting-in; and the Churches of England and Wales are unable to opt-in at all.

⁸² See for example *Bull v Hall* [2013] UKSC 73; *Eweida & Others v UK* [2013] ECHR 37

⁸³ Article 9(1) gives everyone the right to 'freedom of thought, conscience and religion'. Article 9(2) places limitations on the 'freedom to manifest one's religion or beliefs' but arguably implies an unqualified right to freedom of conscience – although this appears to be a minority viewpoint.

belief. It has already been suggested that even where Parliament has not expressly allowed for conscientious objection, such a provision needs to be read into equality legislation so as to be compliant with the Convention.⁸⁴

It is helpful first to sketch a brief genealogy of European case law relating to homosexuality. While the European Court of Human Rights (ECtHR) has played a ‘prominent role’ in developing human rights for lesbians and gay men, its moral reasoning about homosexuality has influenced its use of legal method, and the prevalence of heteronormativity has influenced the Court’s interpretation of the Convention.⁸⁵ The ECtHR adjudicates complaints brought under the European Convention on Human Rights and Fundamental Freedoms, which in turn guarantees those civil and political rights first set out in the Universal Declaration of Human Rights adopted by the United Nations in 1948. The Convention came into force in 1953, but the need to embed universal rights for LGBT people was only recognised by the Council of Europe in 2011, when they stated that ‘there is considerable resistance among many people to discuss the full enjoyment of universal human rights by LGBT persons. Even if this may not be a popular human rights topic, the time has now come to take the discussion forward and make it concrete’.⁸⁶

Hall and Preddy v Bull – County Court⁸⁷

This case involved a gay male couple in a civil partnership, who were refused a double-bed room in a private hotel run by orthodox Christians. The men had booked the room by telephone and thus were not aware of the hotel's policy (stated on the website) that only married couples could be accommodated in double-bed rooms. The gay couple brought a

⁸⁴ See for example <http://ukhumanrightsblog.com/2013/12/11/gay-discrimination-and-christian-belief-analysis-of-bull-v-hall-in-the-supreme-court/>

⁸⁵ Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013), 4-7

⁸⁶ Council of Europe, *Discrimination on Grounds of Sexual Orientation and Gender Identity in Europe*. Strasbourg (Council of Europe Publishing, 2011)

⁸⁷ (2011) Bristol County Court Case No 9BS02095/9BS02096

discrimination claim against the hotel owners under the Equality Act (Sexual Orientation) Regulations 2007. They also argued that their Article 8 right to privacy had been interfered with by the Bulls' refusal to allocate them a double bed. Mr Preddy was quoted as having been 'annoyed and upset' by this refusal, while Mr Hall 'was embarrassed, angry and felt humiliated'.⁸⁸ The hotel owners denied direct or indirect discrimination on the basis that the restriction on having a double room had 'nothing to do with sexual orientation but... everything to do with sex'.⁸⁹ They relied on three Convention rights in their defence: Article 8 (privacy), Article 9 (freedom of religion) and Article 14 (anti-discrimination).⁹⁰

Mr and Mrs Bull's pleadings echo the discourse of "improper" sexual behaviours discussed earlier in this chapter, where anti-gay discrimination is disclaimed and homophobia is denied. 'It's not them as people; it's what they do in bed' is the thrust of the argument. But, as the judge observed, the hotel's policy meant that, in effect,

Two persons of the same sex... in a sexual relationship and who have come to Cornwall intent on a sexually fulfilling weekend may enjoy that weekend to the full in a twin-bedded room. Putting it bluntly the hotel policy allows them to do so albeit in the confines of a smaller bed.⁹¹

With this in mind, it is not entirely clear what the hoteliers aimed to achieve through their policy, other than sending a message to homosexual couples that they were not welcome.

Rutherford J had the task of legal decision-making, and the judge's thought process makes for interesting reading. He began his judgment with a description of four statues to be found in a court building in The Strand: King Alfred, Moses, King Solomon and Jesus.

⁸⁸ [n 87] [59]

⁸⁹ [n 87] [20]

⁹⁰ The Human Rights Act 1998 enabled victims to enforce Convention rights in domestic courts.

⁹¹ [n 87] [34]

Speculating on the reasons for placing statues of these particular figures in a court building, the judge suggested that 'one was to emphasise the Judaeo-Christian roots from which the common law of England was derived'.⁹² He then acknowledged that 'those Judaeo-Christian principles, standards and beliefs which were accepted as normal in times past are no longer so accepted',⁹³ and recognised that 'it is inevitable that such laws will from time to time cut across deeply held beliefs of individuals and sections of society for they reflect the social attitudes and morals prevailing at the time that they are made'.⁹⁴ Accordingly, 'it is no longer the case that our laws must, or should, automatically reflect the Judaeo-Christian position'.⁹⁵ The judge quoted Laws LJ in *McFarlane*: 'The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious imprimatur, but on the footing that *in reason* its merits commend themselves.'⁹⁶

Here, Rutherford J (no doubt unconsciously) echoes Foucault in emphasising the contingency of Judaeo-Christian religious principles, and takes the opportunity to distance himself from the view that they should continue to prevail in law. At the same time, he recognises that legal decisions which reflect this contingency can have devastating effects on those who view the principles as fundamental and transcendent. However, the judge's subsequent choice of words is somewhat unfortunate. In expressing his awareness of 'the deeply held *views* on both sides'⁹⁷ and in stating that 'each side hold perfectly honourable and respectable, albeit wholly contrary, *views*',⁹⁸ the judge seems to equate religious belief with sexual orientation in the sense of their both being 'views', albeit 'valid and

92 [n 87] [3]

93 [n 87] [4]

94 [n 87] [7]

95 [n 87] [8]

96 The *McFarlane* case is also discussed later in this chapter.

97 [n 87] [27], emphasis added

98 [n 87] [28], emphasis added

respectable' ones. This fallacy meant that the remainder of Rutherford J's judgment focused on the technical aspect of the Regulations, rather than on the nature of the rights in question and the principles underlying them.

Thus, the judge was prepared to view the running of a hotel along Christian principles as a manifestation of a religious belief.⁹⁹ However, he viewed the fact that the two men were in a civil partnership as crucial. Regulation 3(4) of the 2007 Regulations (which treats marriage and civil partnership as equivalent for these purposes) applies to both direct and indirect discrimination: 'There is no material difference... between marriage and a civil partnership. If that is right, then on what basis do the defendants draw a distinction if it is not on sexual orientation?'¹⁰⁰ With reference to Article 8, the 'defendants' right to have their private and family life and their home respected is inevitably circumscribed by their decision to use their home in part as an hotel'.¹⁰¹ Rutherford J was clearly correct in law to rely on Regulation 3(4) in his decision-making, but it did prevent him from having to consider the merits of all the arguments. In particular, there was no recognition of the heteronormativity implied in the equivalence of heterosexual marriage and homosexual civil partnerships. In effect, homosexual relationships are considered suitable for legal protection only if they mirror traditional heterosexual ones.

The Regulations also emphasise that accommodation run on a commercial basis must be offered without discrimination against lesbians and gay men, and the judge recognised that 'it is clear that homosexuals as a group are disadvantaged by the practice adopted by the defendants'.¹⁰² The Bulls had argued that a reasonable balance could be struck by not requiring them to promote what they believed to be sinful; such an exception could be

⁹⁹ [n 87]

¹⁰⁰ [n 87] [35]

¹⁰¹ [n 87] [38]

¹⁰² [n 87] [48]

justified by the fact that it was necessary to enable them to live and work in their own hotel as practising Christians. Applying the discourse of a hierarchy of rights, they said that it 'would be unfortunate to replace past legal oppression of one community (same-sex couples) with current legal oppression of another (persons holding the same beliefs as the defendants).'¹⁰³ While upholding the men's claim for discrimination on grounds of sexual orientation, Rutherford J granted the defendants leave to appeal, because 'this decision does affect the human rights of the defendants to manifest their religion and forces them to act in a manner contrary to their deeply and genuinely held beliefs.'¹⁰⁴

*Court of Appeal*¹⁰⁵

The appellants based their appeal on Articles 8, 9, 14 and 17 (abuse of rights) of the ECHR, and on s 13 of the Human Rights Act 1998. This provision was inserted into the legislation following representations from religious organisations. Referring to the right to freedom of thought, conscience and religion expressed in Article 9, section 13 states that 'the court must have particular regard to the importance of that right'. Again, the appellants argued that their religious objection to a particular sexual conduct - sexual relations outside marriage - was the basis for the restriction.¹⁰⁶ The respondents relied on *James v Eastleigh Borough Council*,¹⁰⁷ which held that the test for discrimination is objective and motive is irrelevant. Rafferty LJ regarded *James* as being 'fatal to the Appellants' case.' This, along with the 'clear decision' to include hoteliers within the 2007 Regulations (in Regulation 14), meant that direct discrimination was found to exist and it was therefore 'not necessary to reach a conclusion on the issue of indirect discrimination'.¹⁰⁸ While this reasoning

¹⁰³ [n 87] [50-51]

¹⁰⁴ [n 87] [62]

¹⁰⁵ *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83

¹⁰⁶ [n 105] [12]

¹⁰⁷ [1990] 2 All ER 607

¹⁰⁸ [n 105] [40-42]

benefited the respondents, it represents a missed opportunity to discuss issues of justification with reference to indirect discrimination.¹⁰⁹ Nevertheless, parts of the judgment are telling as regards how the Court of Appeal understands religion and sexual orientation. The judge referred back to the case of *Williamson*, which held that, to fall within Article 9, a belief must be ‘consistent with basic standards of human dignity or integrity, possess an adequate degree of seriousness and importance and be intelligible and capable of being understood’.¹¹⁰ It could be argued that a belief which manifests itself by discriminating against a sector of the population is not quite ‘consistent with basic standards of human dignity or integrity’.

Referring to the judgment in *Ladele*,¹¹¹ Rafferty LJ stated further that ‘it is clear that the rights protected by the article are qualified, and that it is only beliefs which are ‘worthy of respect in a democratic society and are not incompatible with human dignity’ which are protected.¹¹² Is discrimination against lesbians and gay men worthy of respect in a democratic society? Is it compatible with human dignity? Even if *Begum*¹¹³ holds that ‘Article 9 does not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing’, the implication remains that homosexuality renders people second-class: they cannot have full citizenship rights if ‘democratic society’ deems beliefs which discriminate against them to be acceptable. Carl Stychin observed some time ago that there is little opportunity in law to examine ‘the offensiveness of some religious doctrine’.¹¹⁴ Yet the present judgment reveals that:

¹⁰⁹ See Lady Hale’s 2014 speech, discussed later in this chapter.

¹¹⁰ *R v Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* [2005] UKHL 15

¹¹¹ *Ladele v London Borough of Islington* [2009] EWCA Civ 1357

¹¹² [n 107] [47] – citing *Campbell and Cosans v UK* (1982) 4 EHRR 293, 36.

¹¹³ *R v Headteacher and Governors of Denbigh High School, ex parte Begum* [2006] UKHL 15 [47]

¹¹⁴ Carl Stychin, ‘Closet Cases: “Conscientious Objection” to Lesbian and Gay Equality’ (2009) *Griffith Law Review* 18(1) 17

The Respondents were at pains throughout to acknowledge that the Appellants' principled stand was intended to bear witness to their interpretation of Christianity. Arguments on both sides recognized that co-existence in society requires mutual acceptance of differing views and standards and each side readily bowed to the strongly held views of the other.¹¹⁵

Once again, religious belief and sexual orientation are placed in a situation of equivalence for the purposes of a pluralistic balancing exercise. Furthermore, while it is seen to be 'reasonable' to honour the importance of religious belief to the faithful, the idea that sexuality is merely a 'view' (albeit a 'strongly held' one), negates its importance and meaning for the people concerned. Indeed, it negates the people concerned, because it relegates homosexuality to a 'choice'. The judge recognised that, 'the manifestation of... religious beliefs cannot excuse direct discrimination'.¹¹⁶ However, his judgment in favour of the respondents nevertheless betrays a heteronormative attitude, with his observation that:

... the rooms available to the guests are not in the part of the building Mr and Mrs Bull occupy as their home... they are not obliged to provide double bedded rooms at all, but if they do, then they must be prepared to let them to homosexual couples, at least if they are in a civil partnership.¹¹⁷

The judge was reinforcing the point that the law obliges hotel owners to let their rooms without discrimination, and that calling a hotel 'private' does not mean it is not still a commercial enterprise and subject to equality law. Yet his wording might be seen as a subliminal message to lesbians and gay men that their sexuality is something that people

¹¹⁵ [n 105] [45] (emphasis added)

¹¹⁶ [n 105] [64]

¹¹⁷ [n 105] [66]

might not want to have sully their home space. In addition, the reference to civil partnership status reflects the degree of inclusiveness of law at the time of the case. However, it also reflects the idea that homosexuality is best able to be protected if it is displayed in ways as close as possible to heterosexuality. Hooper LJ was the only Court of Appeal judge who considered that ‘it *matters not* in law whether the homosexual couple are in a civil partnership’.¹¹⁸

*Supreme Court*¹¹⁹

Lady Hale mentioned *Black and Morgan v Wilkinson*,¹²⁰ another ‘bed and breakfast’ case which had by then been heard in the County Court. In that case the couple were not in a civil partnership, but the court had felt bound by the Court of Appeal’s decision in *Preddy v Bull*¹²¹ to find direct discrimination (they would have preferred to hold that the discrimination was indirect but not justified). Permission had been given to appeal to the Supreme Court so that both cases could be heard together, but in the event the hotel owner chose not to pursue her appeal. Therefore, as Lady Hale stated: ‘This court is therefore solely concerned to decide the issues as they arise in relation to a same sex couple who are civil partners’.¹²² This represents another missed opportunity to go beyond those gay relationships that simply mirror heterosexuality, because Lady Hale was thus able to say: ‘it does make a difference that this couple were in a civil partnership’.¹²³ She went on to say that, ‘with or without regulation 3(4), I have the greatest difficulty in seeing how discriminating between a married and a civilly partnered person can be anything other than

¹¹⁸ [n 105] [58]

¹¹⁹ [2013] UKSC 73

¹²⁰ [2012] EW (Misc) CC

¹²¹ [n 105]

¹²² [n 105] [14]

¹²³ [n 105] [25]

direct discrimination on grounds of sexual orientation'.¹²⁴ In developing this theme, she added:

Parliament has created the institution of civil partnership in order that same sex partners can enjoy the same legal rights as partners of the opposite sex. They are also worthy of the same respect and esteem. The rights and obligations entailed in both marriage and civil partnership exist both to recognise and to encourage stable, committed, long-term relationships. It is very much in the public interest that intimate relationships be conducted in this way.¹²⁵

Lady Hale is, no doubt, concerned to underline the parity of treatment required in law for both civil partnership and heterosexual marriage, and to emphasise that this demands a finding of direct discrimination which can never be justified in law. Yet her words unintentionally replicate the heteronormative view that relationships matter more when they are long-term, stable and akin to monogamous marriage. Perhaps she is also aware of the old tropes characterising homosexuals as promiscuous and capable only of intimacy of limited duration. Her words leave these tropes untouched with reference to lesbians and gay men who have chosen not to formalise their relationships, for whatever reason. This illustrates the difficulty that legal liberalism still has with relationships that do not conform to the standard model, and why it may benefit from conversations with Queer theory.

Lady Hale's judgment does include an important paragraph acknowledging the history of lesbian and gay oppression. Recognising that 'the expression of sexuality requires a partner, real or imagined',¹²⁶ she stated:

¹²⁴ [n 105] [29]

¹²⁵ [n 105] [36]

¹²⁶ Per Justice Sachs in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1999 (1) SA 6, para 117

Heterosexuals have known this about themselves and have been able to fulfil themselves in this way throughout history. Homosexuals have also known this about themselves but were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognised. Homosexuals can enjoy the same freedom and same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires ‘very weighty reasons’ to justify discrimination on grounds of sexual orientation. It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.¹²⁷

An important part of Lady Hale’s reasoning, therefore, is based upon a desire to remedy centuries of lesbian and gay oppression. This is a huge step forward for same-sex recognition rights. Her references to homophobia undermining gay people’s ‘dignity as human beings’ contrasts with the indulgence afforded to religious belief – including those beliefs which display antipathy towards alternative sexualities and ways of living. Law’s unwillingness to address this aspect of religious belief is ameliorated by the limitations imposed on the manifestation of belief by Article 9(2) of the Convention. Yet law will continue to struggle with religion’s interface with homosexuality, as long as it continues to assume a ‘special relationship’ between the two that enables discriminatory attitudes to appear valid.

¹²⁷ [n 105] [53]

In line with three of her fellow judges, Lady Hale found that the Bulls had discriminated directly against their prospective hotel guests. Two judges found that indirect discrimination was proven. All five judges agreed that, if it were indirect discrimination, it was not justified. Lord Neuberger, while agreeing with Lady Hale, departed from one aspect of her reasoning. He thought that regulation 3(4) simply established that, for the purpose of establishing direct or indirect discrimination, one must assume ‘no material difference’ between civil partnership and marriage. Of itself, it was not a reason for finding direct discrimination, given that it would have been indirect discrimination had the men not been in a civil partnership. Lord Neuberger felt it was important to keep the law in this area clear and consistent, not least so that ‘potential and alleged discriminators and victims, as well as their advisers, know where they stand’.¹²⁸

Lord Hughes set out a five-stage procedure in order to establish whether an act constituted direct discrimination, and highlighted what he saw as a flaw in the fourth stage with regard to the current case. Arguing that sexual orientation is the ground for the hoteliers’ less favourable treatment of the couple ‘concentrates on the characteristics of these claimants rather than on the defendants’ reasons for treating them as they did’.¹²⁹ The judge described Mr Hall and Mr Preddy, in a civil partnership, as a ‘subset of the unmarried’. The hoteliers treated such people the same as the two other subsets of the unmarried: same-sex couples not in a civil partnership; and opposite sex unmarried couples. For Lord Hughes, regulation 3(4) and the public interest in ‘stable publicly-committed unions of both kinds’ do not help resolve the question of which kind of discrimination is operating in this case. Lord Hughes, in categorising the same-sex couple as a ‘subset of the unmarried’, falls into the trap of regarding their relationship – and their sexuality – through the lens of the religious conservative. The Bulls elevated heterosexual marriage to a sanctified

¹²⁸ [n 105] [84]

¹²⁹ [n 105] [88-92]

position and treated all other forms of relationship as less than worthy. Lord Hughes unwittingly does the same.

*Black & Morgan v Wilkinson – County Court*¹³⁰

This case involved a claim in tort for breach of statutory duty under regulation 20 of the 2007 Regulations. The gay couple in question were not in a civil partnership. As in the above case, the matter originated in the County Court, and it is worth looking at these proceedings which set out clearly the hoteliers' arguments. Again, the defendant claimed that her problem was with 'homosexual sexual relations' (as opposed to homosexual orientation) because, along with heterosexual sexual relations outside marriage, they are "sinful". This disclaiming of homophobic intent betrays another homophobic trope of "rampant" (particularly male) homosexuality. The defendant said she had turned away several unmarried heterosexual couples 'where it was obvious that they were unmarried from the fact that they only wanted use of the room during the day for sex'.¹³¹ If one believes that sex is necessarily linked to procreation within heterosexual marriage, one might conclude that a desire to have sex during the day reflected a concern more for pleasure than for baby-making. However, it does not explain why a gay couple who wanted a bed for the night would be presumed to be intent on having sex – unless one believes that all gay men are prone to constant sexual activity – which is itself another homophobic trope.

Interestingly, the defendant does appear to have allowed some unmarried couples to stay in the double rooms because 'it is impossible to know whether a heterosexual couple is married unlike with a homosexual couple and it would be offensive to pry into their

¹³⁰ [n 120]

¹³¹ [n 120]

personal lives either when booking or on arrival’.¹³² This statement suggests that the defendant’s differential treatment of heterosexuals and homosexuals is actually grounded on sexual orientation rather than sexual behaviour. Here the act/identity distinction, whether rendered explicit or remaining implicit, appears to unravel. It also highlights the presumed privacy of heterosexual relationships as opposed to homosexual relationships which are subject to intrusive assumptions and prejudices. Nowhere was it argued that it is not acceptable to have any relationship choices subject to scrutiny by religious service providers. Furthermore, the double bedroom in question is ‘in the heart’ of the defendant’s home and she treats guests ‘as if they are members of her own family’. Accordingly, she has ‘sought to restrict the sharing of the double rooms to heterosexual *preferably* married couples’ and not permitting the gay couple to share a double room ‘in her home’ was a manifestation of her religious belief because she believed their behaviour to be sinful. Yet the word ‘preferably’ suggests again how it is sexual orientation and not marital status or behaviour that presents a problem for her in running her business.

The judge found in favour of the claimants. He considered himself bound by *Bull* to find that the running of a hotel on Christian principles *was* a manifestation of belief, despite the claimants’ protestations to the contrary.¹³³ Going on to discuss the case law with regard to the limitations imposed by Article 9(2), the judge felt able to distinguish *Bull* on the grounds that ‘the Defendant’s establishment is a bed-and-breakfast and not called a hotel, the rooms which are let by the Defendant are on the same floor as the Defendant’s own bedroom and the Claimants are not in a civil partnership.’¹³⁴ In drawing these distinctions, the judge again missed an opportunity to challenge the homophobia present within them,

¹³² [n 120] [44]

¹³³ [n 120] [87]

¹³⁴ [n 120] [90-92]

with the result that this case involved both instrumental and discursive loss. Echoing the Bulls' arguments, Counsel for the defendant had suggested that:

It is not, or should not, be the aim and function of modern human rights practice to cause one section of society to withdraw from participation, otherwise all that will have been achieved is to replace one set of predominant orthodox views with another different set of orthodox views.¹³⁵

However, the judge neglected to challenge the defendant's argument based on an emerging 'hierarchy of rights' and the attempt to make religious belief and sexuality matters of equivalence (in terms of their both being 'views') for the purpose of balancing such 'equivalent' rights. This is another example of what is 'lost' in legal judgments: even where they do protect lesbians and gay men from discrimination, there are discursive costs.

*Court of Appeal*¹³⁶

The hoteliers appealed the decision, but the Court of Appeal dismissed their appeal, finding that this was an instance of indirect discrimination which could not be justified with reference to Article 9(2) or Article 8. Once again, however, it is instructive to highlight some of the discursive tools employed in the reasoning which compromise the County Court victory of the gay men involved. The Master of the Rolls referred back to the Appeal Court's reasoning in the *Preddy* case and expressed 'some difficulty in agreeing with the view that the decision in *James* compels the conclusion that there was direct discrimination in *Preddy*... *Preddy* was not a case of direct discrimination in my view – but it was a case of indirect discrimination because the defendants' policy in that case put homosexual couples at a disadvantage compared with heterosexual couples on the ground

¹³⁵ [n 120] [93]

¹³⁶ *Black & Morgan v Wilkinson* [2013] EWCA Civ 820

of their sexual orientation’.¹³⁷ He considered the case of *Rodriguez* to be more relevant, where the treatment of the gay couple was ‘a form of indirect discrimination which comes as close as it can to direct discrimination’.¹³⁸

On the matter of the respective rights of religious believers and homosexuals, the judge repeated the mantra that ‘neither is intrinsically more important than the other. Neither in principle trumps the other. But the weight to be accorded to each will depend on the particular circumstances of the case.’¹³⁹ He quoted a speech given by Baroness Andrews before the House of Lords during consideration of the 2007 Regulations, where she said ‘the Government have fully recognised what a difficult and complex journey it is to steer a path between the demands of *religious conscience* and those of individual rights’.¹⁴⁰

The judge also quoted Lord Bingham in the *Countryside Alliance* case: ‘The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament’.¹⁴¹ As the judge put it:

The court should give weight to the fact that, after a wide consultation, the matter was carefully considered by the legislature, which produced a scheme which gives priority to religious belief, but only in certain narrowly circumscribed circumstances. The issue of how to strike the balance between the competing interests of homosexual couples and persons who, on religious grounds, believe

¹³⁷ [n 136] [21]

¹³⁸ *Rodriguez v Minister of Housing* [2009] UKPC 52, [2010] UKHRR 144 (Privy Council case from Gibraltar): As same sex couples could never marry, whereas most opposite sex couples could, it ‘comes as close as it can to direct discrimination’ [19]

¹³⁹ [n 136] [35]

¹⁴⁰ [n 136] [43]

¹⁴¹ *R (on the application of Countryside Alliance and others) v Her Majesty's Attorney General and another* [2007] UKHL 52 [47]

that sexual relations should only be permitted between married heterosexual couples involves difficult and controversial questions of moral judgment.¹⁴²

Here, the judge admits that the law gives priority to religious belief, but excuses it because the priority was tightly circumscribed following extensive consultation. He does not mention the extent of the influence of religious organisations on the drafting of this legislation, which was highlighted earlier in this chapter. To move on from that admission to stating a need to balance ‘competing interests’ is something of a jump, particularly when ‘questions of moral judgment’ are brought into play. As the Court of Appeal said in *Bull*, ‘the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is *deeply unprincipled*. It imposes compulsory law, not to advance the general good on objective grounds, but *to give effect to the force of subjective opinion*’.¹⁴³

Furthermore, the Master of the Rolls explained that the courts’ reluctance to ‘make a judgment’ regarding the importance of the manifestation of a belief is based partly on ‘the insensitivity of making judgments of that kind’ because ‘how people choose to manifest their religious beliefs is a matter for their consciences’.¹⁴⁴ Again, the professed need for sensitivity with regard to religious belief contrasts vividly with the historical record of the courts and the legislature with regard to the nature of homosexuality.

¹⁴² [n 136] [49]

¹⁴³ [n 105] [49] (emphasis added)

¹⁴⁴ [n 105] [53] (emphasis added)

The European Court of Human Rights

The ECtHR's methodology

The European Convention on Human Rights neither establishes nor binds the Court to any interpretive framework. Instead, the Court has developed a set of methods in an attempt to encourage judicial objectivity and maintain legal consistency: the margin of appreciation; consensus analysis; and the 'living instrument' principle.¹⁴⁵ Consensus analysis, for example, can be criticised as 'a construct through which the Court legitimises its moral interpretation and because of this its use is unpredictable and variable'.¹⁴⁶ If no clear consensus exists among member states, the Court will generally maintain a state's margin of appreciation (which is discussed in the next paragraph). The 'living instrument' principle is grounded in the Preamble to the Convention, which states a commitment to achieving the greater unity of European nations through the 'maintenance and further realisation' of human rights. It is suggested that the 'living instrument' principle is best understood as 'a framework through which the Court legitimises its role as interpreter of the Convention and underwrites its moral reasoning'.¹⁴⁷

The margin of appreciation principle applies to the qualified rights of the Convention, ie Articles 8-11. A member state's margin of appreciation is assessed with reference to the 'legality, legitimacy and necessity of any restriction by a public authority'.¹⁴⁸ It is based on the assumption – enshrined in case law – that individual states are best placed to decide what limitations may be placed on rights as being necessary in a democratic society.¹⁴⁹

This method has been criticised by legal commentators such as Lord Lester, who called it

¹⁴⁵ Paul Johnson, "'An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights' (2010) *Human Rights Law Review* 10(1), 67

¹⁴⁶ Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013), 77

¹⁴⁷ [n 146], 87

¹⁴⁸ [n 146], 69

¹⁴⁹ *Handyside v UK* [1976] ECHR 5

‘as slippery and elusive as an eel’ and ‘a substitute for coherent legal analysis of the issues at stake’ because ‘it removes the need for the Court to discern and explain the criteria appropriate to particular problems’.¹⁵⁰ Bourdieu adds that the margin of appreciation enables the Court to mask the ‘fuzzy logic’ of its reasoning and thus preserve its appearance of objectivity.¹⁵¹

*Eweida and Others v UK*¹⁵²

This case involved four separate applicants, all of whom were Christians. The common argument was that UK domestic law had failed to protect their rights to manifest their religion. The first applicant, Ms Eweida (a British Airways employee), and the second applicant, Ms Chaplin, (a nurse), were restricted from wearing visible Christian crosses around their necks while at work. The third applicant, Ms Ladele (a Registrar of Births, Marriages and Deaths), and the fourth, Mr McFarlane, (a Relate counsellor) had been dismissed for refusing to perform work that they felt would condone homosexuality, which they believed was incompatible with their religion. The two relevant cases in this hearing are *McFarlane*¹⁵³ and *Ladele*, and so these will now be discussed in more detail.¹⁵⁴ Lilian Ladele was a registrar employed by the London Borough of Islington prior to the introduction of civil partnerships for same-sex couples. She was unwilling to participate in civil partnership ceremonies and was eventually dismissed in line with the local authority’s ‘Dignity for All’ equality and diversity policy. Gary McFarlane was a Relate counsellor who was unhappy about providing counselling and psycho-sexual therapy to same-sex couples. He was eventually dismissed in line with the organisation’s diversity policy.

¹⁵⁰ Dean Spielmann (President, European Court of Human Rights), ‘Whither the Margin of Appreciation?’ UCL Current Legal Problems lecture, 20 March 2014

¹⁵¹ P Bourdieu, *Pascalian Meditations* (Polity Press, 2000)

¹⁵² [2013] ECHR 37

¹⁵³ *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880

¹⁵⁴ *Ladele v London Borough of Islington* [2009] EWCA Civ 1357

Initially, an Employment Tribunal upheld Ms Ladele's complaints of direct and indirect discrimination and harassment. It held that the local authority had 'placed a greater value on the rights of the LGBT community than it placed on the rights of Ladele as one holding an orthodox Christian belief'. An Employment Appeal Tribunal (EAT) reversed the decision, holding that the local authority's actions had been a *proportionate* means of achieving a legitimate aim - providing the registrar service on a non-discriminatory basis.¹⁵⁵ The Court of Appeal upheld the EAT's decision on the following grounds: Ladele was employed by a public authority to perform a purely secular task, which was being treated as part of her job; her refusal was discriminatory and caused offence to at least two of her gay colleagues; her objection was based on her view of marriage, which was not a core part of her religion; and the local authority's requirement did not prevent her from worshipping as she wished. The court ruled that Ms Ladele's desire to have her religious views respected should not be allowed to override Islington's concern to ensure all its registrars manifest equal respect for everyone. From the time the 2007 Regulations came into force, Ladele was designated a Civil Partnership Registrar (as were all Islington's registrars). From this point on the council was not merely entitled but *obliged* to require her to perform civil partnerships.¹⁵⁶ Leave to appeal to the Supreme Court was refused.¹⁵⁷

Ladele complained to the ECtHR under Article 14 taken in conjunction with Article 9. She argued that, in failing to treat her differently from those staff who did not have a *conscientious objection* to registering civil partnerships, the local authority had indirectly discriminated against her and they could reasonably have accommodated her religious

¹⁵⁵ *London Borough of Islington v Ladele* [2008] UKEAT 0453_08_1912 [28]

¹⁵⁶ [n 154] [29] (referring to para. 52 of the CA decision)

¹⁵⁷ [n 154] [30]

beliefs.¹⁵⁸ Her ‘conscientious objection’ was to participating ‘in the creation of a legal status based on an institution that she considered to be marriage in all but name; she did not ‘manifest any prejudice against homosexuals’. Ladele also argued that the local authority (on behalf of the State) did not adequately take into account its ‘duty of neutrality’: it ‘failed to strike a balance between delivering a non-discriminatory service while avoiding discriminating against its own employees on grounds of religion’.¹⁵⁹ This was, she argued, in spite of the fact that the State had chosen not to be neutral by protecting certain categories of people from discrimination.

McFarlane

Mr McFarlane had expressed disquiet to his employer about counselling same-sex couples due to his Christian beliefs. He was eventually persuaded by his supervisor that this did not necessarily imply endorsement of same-sex relationships. He had subsequently voluntarily undertaken a postgraduate diploma in psycho-sexual therapy. It was not possible for him to filter clients, and he failed to convince Relate that he would be able to offer sex therapy to same-sex couples. His supervisor had also been contacted by other Relate therapists concerned that one of the organisation’s counsellors was unwilling to work with same-sex clients on religious grounds. McFarlane acknowledged that there was a conflict between his religious beliefs and psycho-sexual therapy with same-sex couples. Dismissing him for gross misconduct, Relate concluded that McFarlane had paid ‘lip service’ to the policy, but he had no real intention of offering therapy to same-sex clients.

The Employment Tribunal dismissed his claim of direct and indirect discrimination, unfair dismissal and wrongful dismissal. They found no direct discrimination and indirect

¹⁵⁸ [n 154] [70]

¹⁵⁹ [n 154] [72]

discrimination was justified as a proportionate means of achieving a legitimate aim.¹⁶⁰ This was upheld by the EAT, and the Court of Appeal refused leave to appeal against that decision, stating that he had no realistic prospect of succeeding in light of the appellate decision in *Ladele*. Following the Supreme Court's refusal to allow leave to appeal in *Ladele*, McFarlane renewed his appeal application, which was refused because it could not sensibly be distinguished from *Ladele*.¹⁶¹ McFarlane based his ECtHR case upon Article 9 taken alone and in conjunction with Article 14. The relevant domestic law was regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003, and regulation 3 of the Equality Act (Sexual Orientation) Regulations 2007.

ECtHR Judgment

The majority dismissed the appeals. They based their decision on the body of case law regarding the manifestation of religious belief and the margin of appreciation afforded to member states. In order to count as 'manifestation', the act must be 'intimately linked' to the religion or belief. The existence of a 'sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case'.¹⁶² Regarding Ms Ladele, it was found that because the local authority and the domestic courts had not exceeded the wide margin of appreciation generally given to member states, resolution of the case required 'striking a balance between competing Convention rights'.¹⁶³ McFarlane's voluntary enrolment on the diploma was 'not determinative' but was to be 'weighed in the balance' when assessing whether a fair balance was struck between competing rights. In striking that balance, the Court emphasised that 'the most important factor is that the employer's action was intended to secure the implementation of its policy

¹⁶⁰ [n 153] [38]

¹⁶¹ [n 153] [39-40]

¹⁶² [n 152] [82]

¹⁶³ [n 152] [106]

of providing a service without discrimination'.¹⁶⁴ The wide margin of appreciation enjoyed by member states had not been exceeded.

Interestingly, the Court departed from its earlier jurisprudence which had held that 'the possibility of changing job would negate any interference' with the right to manifest one's religion. It concluded that 'the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate'.¹⁶⁵ The Court was not persuaded by the argument put forward by the National Secular Society (one of the intervening parties) that 'freedom to resign is the ultimate guarantee of freedom of conscience'.¹⁶⁶ This perhaps represents a recognition of the difficulty of finding alternative employment in harsh economic times.

Dissenting judgment

Two of the ECtHR judges did find a violation of Article 9 in conjunction with Article 14 in *Ladele*. They submitted a strongly-worded dissent on the matter of freedom of conscience, which is notable for the absence of any attempt to mask underlying homophobia. For them, 'conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and to avoid evil... Conscience may come into collision with the word of a Pope, and is to be followed in spite of that word'.¹⁶⁷ With these words, the judges are elevating conscientious objection above religious expression, and are attempting to separate the two in order to avoid the restrictions placed on the manifestation of belief by Article 9(2). They also appear to place Mrs Ladele on the side of 'good' and the extension of relationship rights to homosexuals on the side of 'evil'.

¹⁶⁴ [n 152] [109]

¹⁶⁵ [n 152] [83]

¹⁶⁶ [n 152] [77]

¹⁶⁷ [n 152] Dissenting judgment [2]

The judges blamed ‘a combination of *back-stabbing* by her colleagues and the *blinkered political correctness* of the Borough of Islington (which clearly favoured ‘*gay rights*’ over *fundamental human rights*)’ for Ladele’s eventual dismissal.¹⁶⁸ Constructing the feelings of Ladele’s gay colleagues as ‘back-stabbing’ and the Islington’s equality and diversity policy as ‘blinkered political correctness’ once again evokes the trope of litigious homosexual activists – this time in league with left-wing councils – that might not seem out of place in a tabloid newspaper. Moreover, excluding ‘gay rights’ (a phrase which they placed within inverted commas) from ‘fundamental human rights’ illustrates their homophobic (as above) stance: gay rights are not to be treated as real, much less equivalent to other human rights. The judges stated that ‘freedom of conscience has in the past all too often been paid for in acts of heroism, whether at the hands of the Spanish Inquisition or of a Nazi firing squad.’¹⁶⁹ This appears disingenuous at best, when one considers that the Spanish Inquisition was a religious-inspired exercise aimed at controlling and eliminating dissent, and the Nazis were themselves anti-gay (and supported by the Catholic church).¹⁷⁰

Case law: future directions?

This chapter has already discussed the possibility of religious reliance on ‘conscientious objection’ being developed as a means of avoiding the limitations of Article 9(2). There is also some dissatisfaction with the distinction between direct and indirect discrimination. In a recent speech, Lady Hale considered the lack of a general defence of justification to be a problem, which has become more acute with the expansion of protected characteristics and the consequent increased possibility of conflict. She argued that ‘a general defence of justification in discrimination law would enable courts and tribunals to get down to

¹⁶⁸ [n 152] [5] (emphasis added)

¹⁶⁹ [n 152] [3]

¹⁷⁰ Peter Stanford, ‘Religion, Rome and The Reich: The Vatican's other dirty secret’ *The Independent* (London, 20 May 2006)

addressing the real issues – legitimate aim, rational connection, proportionality – rather than looking for distinctions which mean that they hold that there was no discrimination at all.’¹⁷¹ In her view, it would be simpler if employers had to make reasonable accommodation for the right of their employees to manifest their religious beliefs, and suppliers of services had to make reasonable accommodation for the right of their would-be customers to use them.

Chapter 5 examines the concepts of conscientious objection and reasonable accommodation in more detail, as part of the analysis of liberal rights discourse undertaken in this thesis. As explained in previous chapters, rights discourse is based on the liberal conception of individuals each possessing essential and universal features common to the whole of humanity. This concept has had consequences for the recognition of both sexual orientation and religious belief as protected rights. It became important to argue that sexual orientation was innate and immutable rather than fluid and on a spectrum, and that religious belief was more fundamental and fixed than a matter of choice. For gay rights campaigners, the argument from essentialism was also an important means of contesting the historical construction of homosexuals as ‘dangerous, abnormal and monstrous deviants who embody and propagate disease and perversion.’¹⁷² It can be argued that there is some gap in logic here, because if one can prove a monster is born a monster, it does not become any less monstrous.¹⁷³ Instead, the key argument here may be that essentialism enables a law reform argument that uncouples homosexuality from culpability. It responds to problematic ideas that take their cue from certain moral philosophical ideas. Essentialist arguments (though problematic) serve to garner legal and political sympathy and detract

¹⁷¹ Lady Hale, ‘Religion and Sexual Orientation: The clash of equality rights’ Yale University, 7 March 2014

¹⁷² Paul Johnson [n 146] 52-3

¹⁷³ See A Sharpe, *Foucault's Monsters and the Challenge of Law* (Routledge, 2010)

from choice (and therefore blame) arguments. However, as MacDougall argues, the essentialist position is both persistent and potentially dangerous when it comes to law:

There are real strengths to the essentialist position, in particular because it does not lend itself to the foible quality many judges assume about homosexuality. While a thoughtful understanding of the constructionist approach does not in fact lead to this conclusion, unfortunately judges (like many others) will search only for the essence of constructionism in which contingency will be construed to mean simply ‘choice’ and ‘changeability’.¹⁷⁴

Queer theorists would like to replace the need for essentialist arguments with a concern to protect sexual choice. It should be emphasized, however, that Queer theory does not equate choice with autonomy, because it rejects liberal notions of ‘the subject’ upon which the idea of autonomy depends. The feminist concept of ‘agency’¹⁷⁵ is perhaps more useful here, for its recognition that ‘choice’ can be exercised in circumstances of constraint, and within particular historical conditions and contingencies.¹⁷⁶

The struggle for lesbian and gay citizenship

This chapter has offered examples of how the conflict between religion and sexuality has discursive origins and discursive consequences. What is at stake is more than a clash of rights; it is also a question of citizenship. As Stychin observes, the current struggle for lesbians and gay men is to ‘construct meaningful categories of belonging’ and to ‘challenge and undermine the fixity of boundaries’ through which they have often been

¹⁷⁴ Brian MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada* (University of Toronto Press, 2000), 44

¹⁷⁵ See for example Lois McNay, *Gender and Agency: Reconfiguring the Subject in Feminist and Social Theory* (Polity Press, 2000)

¹⁷⁶ See for example M Grigolo, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’ (2003) *European Journal of International Law* 14(5), 1023-1044

excluded.¹⁷⁷ The area of access to goods and services – still being contested through case law – is one crucial field in which this occurs. While ‘coming out of the closet is the basis for asserting a human right to have one’s “admitted” and “avowed” private life protected’, it also ‘continues to render individuals excluded from civil institutions’.¹⁷⁸ The remainder of this thesis explores the meaning and significance of citizenship rights for lesbians and gay men; how religious conservatism seeks to limit this citizenship; and how the law should respond. Examples of same-sex clerical challenges to religious exemptions are also presented as examples of resistance to prevailing modes of religious domination.

¹⁷⁷ Carl F Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform* (Hart, 2003), 23

¹⁷⁸ Paul Johnson [n 145], 89-90

CHAPTER 5: ACCOMMODATION, OBJECTION, AND RESISTANCE

*I tell you, commander, it's true that some of the most terrible things in the world are done by people who think, genuinely think, that they're doing it for the best, especially if there is some god involved.*¹

A personal anecdote

The John Lewis seasonal advertising campaign has become something of a modern tradition. In 2014, the advert featured a toy penguin being given a mate for Christmas by his young owner, who had noticed his lovesick expression. The heteronormativity of the happy couples surrounding Monty the penguin in the advert was notable, particularly in view of the observation that penguins are somewhat known for their same-sex proclivities.² I was in what I had considered a safe social environment when this topic arose, but a comment made during the ensuing conversation left me feeling disturbed: “Well, it’s understandable – it is a family advert, after all.” I realised that, even amongst people who are supportive of my same-sex relationship, it may still not be considered suitable for all contexts. Lesbians and gay men remain in the position of the “other”, whose validity is contingent on whether it is deemed appropriate for the (hetero)norm. We can be “othered” at any time, without warning, as this anecdote illustrates.

Aims of this chapter

This chapter will examine how “reasonable accommodation” and “conscientious objection” are used in current debates to “other” lesbians and gay men in order to maintain inequality. Chapter 4 charted the discursive shift in conservative religious opposition to

¹ Terry Pratchett, *Snuff* (Corgi, 2011), 226

² Robin McKie, 'Sexual depravity' of penguins that Antarctic scientist dared not reveal' *The Guardian* (London, 9 June 2012)

reforms which have enhanced the legal position of lesbians and gay men, and highlighted the move over recent decades from explicitly homophobic language towards a vocabulary of rights and equality. This shift is an expression of two developments: first, a response to society's increased distaste for discriminatory language in general; and second, a desire to maintain conservative religious influence over statute and case law. Current equality law is perceived by religious conservatives as going too far, creating a hierarchy of rights in which the expression of religious belief is relegated below homosexuality. Chapter 4 argued that religious exemptions from anti-discrimination law preserve the *existing* heteronormative and theonormative hierarchies, which relegate lesbians and gay men to inhabit a relatively 'narrow space of juridical toleration',³ in spite of the advances made in equality law.

This chapter goes on to consider the current arguments are being deployed to assert the case for (further) religious rights. The chapter analyses the discourses employed by scholars and other legal and extra-legal actors who seek either "reasonable accommodation" of religious expression and/or an extension to the conscientious objection principle to encompass religious-based discrimination against lesbians and gay men. This is important because, just as the gay rights campaign is all at once an activist, legal and scholarly enterprise, so too is conservative religious opposition to same-sex equality. The chapter examines how the scholarly and activist discursive strands of this opposition relate to and inform those in the legal field. This chapter is intended as a bridge between the Foucaultian analysis of legal discourse in Chapter 4 and the Foucaultian examination of the link between homophobia and harm in Chapter 6. It contends that "reasonable accommodation" and "conscientious objection" operate, in terms of power relations, as harmful homophobic weapons dressed up in the guise of religious equality rights. The

³ M Grigolo, 'Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject' (2003) *European Journal of International Law* 14(5), 1023

chapter then goes on to consider the resistances that have arisen to this discourse, from non-heterosexual people of faith, and examines how they are challenging the notion of a special relationship between religion and opposition to gay equality.

The analysis in this chapter is undertaken conscious of the overarching normative question posed by this thesis, regarding how law should respond to the conflict between religion and sexual orientation. It recognises that law seeks to establish, at least provisionally, ‘a single normative position to govern relations within a given social milieu, despite the continuing existence of normative disagreement’.⁴ The existence of any normative order depends upon some matters being governed by a collective position; we acquiesce so that we can obtain the benefits of living in an ordered society governed by a sense of justice, not just by the will of the strong.⁵ One characteristic of a legal normative order is the act of defining a common position in the midst of disagreement. One might think that collective positions could be achieved fairly straightforwardly in matters of equality and anti-discrimination. However, equality law often appears to be highly contestable, as illustrated by cases where religion and sexual orientation conflict.

Certain factors will be weighed and interpreted differently by different parties. In doing so, it becomes clearer that norms are always constructed, always to some extent artificial. In law, judges decide cases by drawing from case law and from their reflection on the issues raised, in order to reach an outcome that provides what they see as a fair interpretation of society’s norms on the question.⁶ This chapter engages in a discursive analysis of the normative options proposed by religious conservatives and their supporters, in order to critique their underlying assumptions and their implications for lesbians and gay men.

⁴ Jeremy Webber, ‘Legal Pluralism and Human Agency’ (2006) *Osgoode Hall Law Journal* 44(1)

⁵ This relates to Hobbes’ idea of the first duty of the state which is to protect its citizens (discussed in Chapter 2)

⁶ See for example Ronald Dworkin, ‘Law as Interpretation’ (1982) *Critical Inquiry* 9 (1), 179

Such an analysis leads us on a journey through the realm of norm creation, towards the role of law in a society where rights come into conflict.

Law's accommodation of moral pluralism

The concept of moral pluralism plays something of a dual role in the conflict between religion and sexual orientation. On the one hand, moral pluralism is invoked by religious conservatives as a dilution of national characteristics (or 'British values'). On the other hand, it is also used as an argument in favour of religious exemptions to equality law. It is helpful first to explain what is understood by moral pluralism and how it relates to normative discussions regarding what law should do. Webber identifies four main themes of pluralism: hermeneutics, plurality, adaptiveness and decentredness.⁷ These themes recognise that norms are formed within particular social contexts, and as such are not universal or abstract. Because normative arguments take place within historical, social and geographical contexts, they will vary across the globe, and this context-dependency means that norms will have adapted to be especially suitable for those contexts. Finally, state law is viewed as merely one normative order among several possibilities which may be negotiated. However, at least moderate pluralists recognise that there may be valid reasons to bring certain normative orders under the umbrella of the state, and 'one will often work back towards a re-justification of the state, perhaps significantly reorganised on more plural foundations'.⁸

Equality and anti-discrimination law has attempted to do this, by including sexual orientation as a protected characteristic alongside religious belief. Pluralism can appear to be an attractive solution in such situations, as it aims to be sensitive to the particular contexts in which equality law might function. Indeed, it could be argued that the ECtHR's

⁷ [n 4], 183-191

⁸ [n 4]

jurisprudence in the field of religion and sexual orientation represents pluralism in action, particularly with regard to the ‘margin of appreciation’ doctrine outlined in Chapter 4. However, it is the attempt at a pluralist approach that has caused religious conservatives such consternation. Yet it is also plurality that religious conservatives are using to ground their claims by appealing to “reasonable accommodation” and/or “conscientious objection”. This double-edged nature of pluralism limits its ability to resolve conflict, which suggests that something more than an appeal to plurality is needed. Indeed, pluralism’s limitations may stem from its failure to recognise that the development of norms always involves a certain level of imposition, whereby people abide by norms that they would not necessarily have chosen themselves: after all, ‘it is only through such narrowing of the normative options that norms come into being’ in the first place.⁹

The safe functioning of a plural society necessitates regulation in order to protect the liberties of others. Equality law is concerned with the overall equality of lives lived, and to permit one group to discriminate against another protected group would contravene the very principles of equality and democracy. However, supporters of religious exceptions to these principles maintain that the current law is unfair and exclusionary, and that the courts have underestimated the personal significance of individual religious convictions. Some take the argument from plurality as far as advocating that ‘religions and the state... be thought of, in some sense, as coequal in law’.¹⁰ Other, more moderate pluralist observers have suggested that the law needs to take a more pragmatic approach to ‘reasonable

⁹ [n 4]

¹⁰ Julian Rivers ‘The secularisation of the British constitution’ (2012) *Ecclesiastical Law Journal* 14(3) 371, 399

accommodation’, such as that found in Canadian jurisprudence,¹¹ which would ‘allow for more nuanced fact-specific conclusions which do not constrain subsequent cases’.¹²

This raises the question: is the ‘triumph of pragmatism over principle’¹³ acceptable? It has been noted that a pragmatic accommodation of religious discrimination could lead to a request to accommodate other religiously-motivated discrimination, such as racism.¹⁴ It is interesting to observe how raising the spectre of racism can be persuasive against accommodation arguments – as it should be – but it seems that the spectre of homophobia is not, by itself, sufficient to give pause. This brings up two points: first, as discussed earlier, the presumed ‘need’ for religious conservatives to be homophobic (whereas we no longer countenance a religious ‘need’ to be racist); and second, the implication that homophobia is somehow more ‘understandable’ than racism.¹⁵ It is argued in this thesis that there is no pragmatic or contextual distinction to be made, because the result is the same: homophobic discrimination.

Stychin contends that ‘balancing and accommodation demands some form of contextual analysis, which engages with the competing interests on the particular facts’.¹⁶ It should be added that any such contextual analysis should include the historical and contemporary context in which heteronormativity and theonormativity combine to produce results which perpetuate homophobia. The Christian idea of “loving the sinner while hating the sin” is –

¹¹ See M Gibson, ‘The God “Dilution”: religion, discrimination and the case for reasonable accommodation’ (2013) *Cambridge Law Journal*, 72(3), 578-616, 604

¹² Russell Sandberg, (2011) *Law and Religion*, 130

¹³ Carl F Stychin, ‘Faith in the Future: Sexuality, Religion and the Public Sphere’ (2009) *Oxford Journal of Legal Studies* 729, 773

¹⁴ In the EAT hearing of *Ladele*, Elias J noted Liberty’s concern that accommodation could “lead to situations which almost everyone would find wholly unacceptable. For example, a racist who objected to performing mixed race marriages or Jewish marriages would have to be accommodated in similar circumstances”: *London Borough of Islington v Ladele* [2008] UKEAT 0453_08_1912 [106]

¹⁵ Such a view underpins – whether consciously or unconsciously – the argument that accommodation should have been allowed in *Ladele*, if not in *McFarlane*, because *McFarlane* must have been aware of the specific parameters of his role when he commenced his post, whereas *Ladele* was in post as a registrar long before the introduction of same-sex civil partnerships.

¹⁶ Stychin [n 13], 749-750

and should remain – protected as a belief. It is only when a person seeks to act publicly upon the hatred of that “sin”, and to discriminate on grounds of sexual orientation, that the principle of equality requires the law to intervene. The state has an obligation, perhaps its primary obligation, one in fact upon which its legitimacy depends (according to Hobbes), a responsibility to create conditions of safety for its citizens and religious exceptions from equality law implicate the state in perpetuating homophobia, heteronormativity and theonormativity.

The following section begins with a discursive analysis of how the *Clearing the Ground* report,¹⁷ produced by the Christians in Parliament Group, uses particular discursive strategies – including an appeal to pluralism – to make the case for further religious rights. Although the report was commissioned by a parliamentary group, it illustrates well the interplay between the legal and the extra-legal in terms of how legal norms are influenced by religious conservatives. The analysis reveals how the report’s arguments appear factual, reasonable, and objective, while acting as a rallying cry for urgent change.

“Clearing the Ground”

The *Clearing the Ground* report’s key finding is that ‘Christians in the UK face problems in living out their faith... mostly caused and exacerbated by social, cultural and legal changes over the past decade’.¹⁸ Indeed, the words ‘challenges’ and ‘problems’ are employed five times on the first page of the Executive Summary. The report paints vivid images of embattled Christians struggling for survival in a hostile environment, and urges intervention to support them. By identifying problems and presenting them as having an external cause, the report achieves two things: it side-steps the challenge that problems

¹⁷ *Clearing the Ground inquiry: Preliminary report into the freedom of Christians in the UK* (Christians in Parliament February 2012) www.eauk.org/clearingtheground (accessed 11 May 2016)

¹⁸ [n 17]

may in fact have arisen from Christians' own discriminatory activities (against gay people, for example); and it presents a case for immediate legal action to be taken so that Christians are free to manifest their religion, notwithstanding the impact of such manifestation on others.

Religious illiteracy

The report contends that 'religious illiteracy' is behind the failure to understand or accommodate religious belief and its manifestation, leading to a 'hierarchy of rights' in which faith is relegated below sexuality.¹⁹ The report draws heavily on this concept of religious illiteracy; however, the concept is never clearly explained in the course of the report. 'Illiteracy' is a word loaded with negative connotations. It sounds much more serious than mere 'misunderstanding', for example, because it implies an inability to do something, rather than something which could easily be rectified through communication. Several examples of this 'illiteracy' are advanced through a series of quotes from participants, with emotive language to bring their experiences to life and add to their impact. The report argues that 'widespread religious illiteracy means that the existence of and necessity for exceptions for religious groups in equalities legislation in order to make it workable is customarily met with hostility, ignorance, misunderstanding and opposition'.²⁰ These words paint a picture for the reader of a huge problem suffered by the religious across the country. They face an unfriendly, almost alien environment under this new equality regime, and must therefore be protected by legal exemptions.

¹⁹ [n 17] 5-6

²⁰ [n 17] 123

Impartiality and rationality

The overarching discourse in the report is one of impartiality and rationality, which is used to emphasise its grounding in evidence-based research and thereby to lend weight to its arguments. The report repeatedly cites ‘evidence’ in support of its argument. The word itself aims to give a sense of authenticity and objectivity to its findings. For example, the report states that its authors ‘sought to maintain a healthy scepticism to ensure we did not too readily accept perceptions within the faith community, without examining the evidence’.²¹ The report gives the impression of consensus in the figures it quotes. For example, ‘Research published by the Evangelical Alliance in 2011 showed that 77% of evangelical Christians felt that it was becoming harder to live as a Christian. A further 81% agreed that Britain was a Christian country and that this should be reflected in its laws.’²² The significance of the word ‘evangelical’ may be missed by the casual reader, who might then be persuaded that the vast majority of Christians felt that they were suffering under current equality law. Yet, according to the 2011 census,²³ most Christians are not evangelical, in the sense that they do not feel they have a mission to spread the Gospel in their daily lives. Nor is there consensus as to what this mission or duty would entail.

Furthermore, the report’s use of the word ‘inquiry’ itself implies an objective exploration into the situation, when it was actually compiled by a group with an interest in promoting the interests of evangelical Christianity. The report glosses over the limits that the ‘inquiry’ itself placed on the gathering of information:

This was not a general call for evidence. However, we were delighted that a number of individuals from churches across the UK did submit evidence of their

²¹ [n 17] 69

²² [n 17] 74-75

²³ <https://www.ons.gov.uk/census/2011census>

experience and opinions... A further restriction on the call for evidence was that we specifically invited only Christian organisations to participate.²⁴

The discourse of war

The war metaphor is one Foucault uses often, such as his references to tactics and strategies discussed earlier in the thesis. It is instructive to consider how the *Clearing the Ground* report uses the discourses of history and nation to bolster its arguments that Christians are embattled. Having identified recent changes in law and society as a challenge to Christians, the report goes on to present Christianity as a venerable contrast to the vicissitudes of modernity, by grounding Christianity in claims to historical authority. The report uses this as a counterpoint to the authority of secular law. This step is necessary because the report contends that modern secular law has unjustly restricted the liberties of Christians to manifest their beliefs. Christianity is presented as embedded in the very character of the nation, with the implication that it is fundamental to its make-up: 'Christianity has a rich cultural heritage in the UK. For more than 1600 years, it has shaped the way people in the British Isles think and act, both personally and publicly. It is by far the most significant single historical influence on our social and political culture...'²⁵

The final paragraph of the report's Executive Summary is given over to a quote from the former Prime Minister, David Cameron. It uses the language of 'we' to give the impression of consensus and thereby to give moral authority to its claims. It also uses the idea of historical pedigree as a rationale for protecting Christianity from contemporary threats:

We are a Christian country. And we should not be afraid to say so... the Bible has helped to give Britain a set of values and morals which make Britain what it is

²⁴ [n 17] 96-97

²⁵ [n 17] 73

today. Values and morals we should actively stand up and defend... I believe the Church – and indeed all our religious leaders and communities in Britain – have a vital role to play in helping to achieve this.²⁶

This is stirring language, not dissimilar to what a Prime Minister might be expected to use on the eve of war. It presents British values and morals as a “set”, implying coherence and ignoring the plurality that exists. It bases these values and morals largely on the Bible, ignoring the plethora of pre-Biblical sources of morality (from classical Greece and Rome, for example). Finally, it renders religion a vital instrument in protecting the whole country.

Overall, the report builds its argument by repeated focus on the ‘problems’ and ‘challenges’ reported by Christian organisations and individuals; by citing the cause as ‘religious illiteracy’ and a legal failure to understand or accommodate Christianity; and by concluding that urgent action is needed to prevent restrictions on the freedom of Christians to manifest their beliefs:

The experiences of Christians in the UK seeking to live out their beliefs and speak freely illustrate a very real problem in the way religious belief, and in particular Christianity is understood and handled. The problem is a pressing challenge to our idea of a plural society.²⁷

In this paragraph, Christianity is highlighted as requiring particular attention. Yet the next sentence references pluralism, even though the plurality of influence on British values and morals was previously overlooked. Moreover, the words ‘our idea’ leave open to interpretation exactly whose idea is being lauded as worthy of protection. Is it ‘our’ as in Britons’ idea, or as in conservative Christianity’s idea? It is possible that this was left

²⁶ [n 17] 60-61

²⁷ [n 17] 25

intentionally vague to encourage the reader to believe it is the people's idea, so that she or he is more ready to buy in (perhaps unwittingly) to what is actually the position of political Christianity. It is akin to the discourse used by a political leader who seeks to persuade a nation that military action is necessary to preserve liberty. A speech made by former British Prime Minister Tony Blair, advocating military intervention in Kosovo, provides a useful comparison. For example, Blair asserted that:

No longer is our existence as states under threat. Now our actions are guided by a more subtle blend of mutual self-interest and moral purpose in defending the values we cherish. In the end values and interest merge. If we can establish and spread the values of liberty, the rule of law, human rights and an open society then that is in our national interests too. The spread of our values makes us safer.²⁸

The word 'values' is deployed four times in this passage, indicating his belief that foreign policy should be grounded in morality. The appeal to liberty and to human rights echoes the modern liberal arguments that have been co-opted by conservative Christianity. Moreover, the repeated use of the word 'spread' perhaps reflect Blair's own evangelical belief that these 'values' must be disseminated globally, for the good of the whole world.

The report cites a series of quotes which provide vivid descriptions of restrictions that have been placed on Christians' dissemination of their beliefs. For example: 'I lost my teaching position for offering prayer to a student who was very ill... I didn't proceed with the prayer as her mother said no... I am sad that it is hard to offer prayer to students'²⁹ and 'I am in trouble with the GMC for offering Christianity to a patient who had left his own faith... It

²⁸ Tony Blair, speech to the Chicago Economic Club, 22 April 1999, at www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html (retrieved 26 January 2015)

²⁹ [n 17] 127

seems to me that Christians are actively discriminated against... we need some defence'.³⁰ These examples are intended to be powerful in eliciting sympathy. Most people would probably be inclined to give this teacher and doctor the benefit of the doubt, and perhaps conclude that the law was indeed treating Christians unfairly. Indeed, one of our fundamental legal principles is that a person is innocent until proven guilty, and the reader might well be persuaded that Christians do need to be protected against such a travesty of justice. There is also quite a vivid sense of Christians as lone, vulnerable victims in a hostile environment, facing attack on several fronts by illiberal forces. This is intended to support their argument that religion is being 'closeted' as homosexuality once was. To extend the war metaphor, it might be said that conservative Christian groups have a "siege mentality".

Summary

Clearing the Ground offers a useful insight into how discursive tropes can be manipulated to support and justify a campaigning position. The combination of impartial and emotive language is intriguing. It recalls debates held around British involvement in war zones like Iraq and Syria, where reliance was placed both on evidence (or the lack of) for a regime's wrongdoing and also on the urgent needs of the suffering people in those countries. Of course, the report is not pressing for a war on non-religious people. However, it is interesting that the presentation of evangelical Christians' experience has a similar effect of encouraging the reader to think that something must be done, and quickly. This "something" is the granting of further rights and protections to religious people and organisations. These rights and protections are "reasonable accommodation" and a

³⁰ [n 17] 129

“conscience clause”. The following section examines the discourses surrounding each in turn.

Reasonable accommodation

Equality law already provides for religious exceptions to the prohibition on sexual orientation discrimination where employment is for the purposes of an organised religion,³¹ which gives religious organisations ‘a zone of liberty to... hire their own members and enforce their own lifestyle norms that are otherwise discriminatory’.³² The case law discussed in Chapter 4 highlights the increasing calls for a similar exception to be granted to individuals seeking personal relief from those equality provisions they consider burdensome. Interestingly, Moon has noted a growing discourse of “dignity” in equality law in general,³³ and advocates of reasonable accommodation often use this to enhance their arguments. For example, Vickers argues that religion is ‘closely related to an individual’s concept of identity and self-respect’, which is ‘protected because it is a key aspect of personality and autonomy, based on personal choices about conceptions of the good.’³⁴ She views the link between autonomy, human dignity and equality as grounds for the legal accommodation of difference. In the current conflict, of course, both sides will claim that their dignity has been compromised, which shows again how the liberal language of autonomy and the pluralist language of accommodation of difference are of limited assistance in determining whose rights should prevail.

³¹ Equality Act 2010, Schedule 9, para. 2

³² A Esau, ‘Islands of Exclusivity: religious organizations and employment discrimination’. (2000) UBC Law Review 33, 719, 750-51

³³ G Moon, ‘Dignity Discourse in Discrimination Law: a better route to equality?’ (2006) EHRLR 6, 610, 625-626

³⁴ Lucy Vickers, ‘Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief’ (2011) Legal Studies 31, 135, 138

Supporters of individual religious exceptions from sexual orientation discrimination law argue that the current law is unfair and exclusionary. For example, in *Ladele*,³⁵ the Court of Appeal held that the Sexual Orientation Regulations 2007³⁶ (under which proceedings were brought) took ‘precedence over any right which a person would otherwise have by virtue of his or her religious belief or faith, to practise discrimination on the ground of sexual orientation’.³⁷ Citing cases like *Ladele*,³⁸ *McClintock*³⁹ and *McFarlane*,⁴⁰ Gibson asserts that a ‘rapidly expanding corpus of UK equality jurisprudence has seemingly diluted the protection of religion or belief interests at work where individual divergence from a norm is required’.⁴¹ It is argued that this dilution is due to the courts having “underestimated the importance of individual religious convictions”.⁴² Rivers makes the point most strongly, and it is worth examining his language and its implications in some detail. He says, ‘courts have shown... bifurcation between an essentialising view of sexuality and a choice model of religion that has rendered irrelevant the concerns of those with tender consciences about complicity in behaviour they consider immoral’.⁴³ Rivers’ sentiment is echoed in the *Clearing the Ground* report, which helps to show the interplay between the legal and the extra-legal: ‘Although sexuality is widely acknowledged in society to be intrinsic to identity, religion is not, and our legal categories have come to reflect this contradiction. The reality is that sexuality is more fluid and religious commitment less fluid than the law assumes’.⁴⁴ Here, it is important to acknowledge that this religious claim is consistent with aspects of Queer theory. Queer recognises the

³⁵ *Ladele v London Borough of Islington* [2009] EWCA Civ 1357

³⁶ SI 2007/1263

³⁷ [n 35] [69]

³⁸ [n 35]

³⁹ *McClintock v Department of Constitutional Affairs* [2008] IRLR 29

⁴⁰ *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880

⁴¹ [n 11]

⁴² N Hatzis, ‘Personal Religious Belief in the Workplace: how not to define indirect discrimination’ (2011) *Modern Law Review* 74, 287, 292

⁴³ Julian Rivers, ‘The Secularisation of the British Constitution’ (2012) 14 *Ecclesiastical Law Journal* 371, 390

⁴⁴ [n 17] 29

complex relationship (which both sexual orientation and religious belief have) with choice and with more determining considerations. Spivak's idea of 'strategic essentialism'⁴⁵ can be useful here. It can be argued that Christians are playing the game of 'strategic essentialism', and perhaps overplaying the embeddedness and lack of choice involved. It is interesting that lesbian and gay identity persists, despite the many attempts to oppress and eradicate it; whereas religious belief can lapse despite huge attempts at indoctrination.

Returning to Rivers, it is not clear precisely what Rivers imagines a 'tender conscience' to consist of, although the word 'tender' evokes something that is delicate and in need of protection. The word 'conscience' is chosen to suggest that this concerns something which is of a higher order than mere feelings or sensibilities. The sentence as a whole can be construed to say, "We are not prudish or old-fashioned. Nor are we opposed to homosexuality due to prejudice. We are not prejudiced. We consider sexuality a deeply moral issue, and morality in turn is grounded in Christianity. This is a matter of conscience, which speaks to something greater than us. Therefore, we deserve protection because we are ourselves seeking to protect something vital". Rivers' use of the word 'complicity' assists this construction: registering civil partnerships or counselling same-sex couples does not render one complicit in homosexual relationships any more than registering opposite sex marriages or couples involves complicity in their relationships. Yet, if we follow the argument that religious opponents of homosexuality are subject to a higher power than earthly law, it becomes clearer why Rivers chose that word. Overall, Rivers' arguments present a valuable example of how conservative religious discourses are developing.

⁴⁵ For further discussion on strategic essentialism, see Gayatri Chakravorty Spivak, *The Post-colonial Critic: Interviews, Strategies, Dialogues* (Routledge, 1990)

There appears to be a backwards direction of travel to some extent, towards the view that religion is special and therefore should be subject to a lighter legal touch by the state.⁴⁶

What religious conservative arguments seem to be saying is that “homosexuality is contrary to God’s law”, and as God’s law is necessarily higher than (mortal, human) state law, they should not be compelled to countenance homosexuality in the course of their working lives. Moon has suggested that ‘the requirement of accommodation may rest on the view that there is something special or significant about religious beliefs in that they are deeply rooted.’⁴⁷ The idea that religion is deeply rooted within the individual lends support to the argument in favour of “reasonable accommodation” on an individual, rather than solely organisational, basis. The idea that religion is deeply rooted also grounds the arguments in favour of extending the “conscience principle” to religiously-based objections to sexual orientation equality, which will be discussed later in this chapter.

Echoing the “religion is special” trope, Sandberg offers a critique of what he describes as ‘the juridification of religion.’⁴⁸ His concern is less with the justice of recent legal decisions than with the reasoning behind them. Looking at Article 9 of the ECHR, he differentiates between the right to believe and to manifest that belief and the qualification to that right contained in the second paragraph.⁴⁹ Using the reasoning in *Begum*⁵⁰ as an example, he expresses concern that there will never be a breach of Article 9(2) as long as a religious belief can be manifested in another way. Sandberg’s contention that religious people should not be required to choose between their faith and their legal rights is the basis for

⁴⁶ This is an illustration of Foucault’s question as to how and when old tropes can be reactivated – see the discussion in Chapter 4.

⁴⁷ R Moon, ‘Introduction: law and religious pluralism in Canada’ in R Moon (ed) *Law and Religious Pluralism in Canada* (2008)

⁴⁸ Russell Sandberg, ‘The Right to Discriminate’ (2011) *Ecclesiastical Law Journal* 13(2) 157

⁴⁹ Article 9(2) ECHR

⁵⁰ *R v Headteacher and Governors of Denbigh High School, ex parte Begum* [2006] UKHL 15

his proposal to extend the principle of “reasonable adjustment” in disability law⁵¹ to religious belief.

However, as Gibson⁵² points out, the reasonable adjustments duty pertaining to disability is by nature asymmetrical. The accommodations granted to an employee with a disability cannot be used by an able-bodied colleague as grounds for a claim against the employer.⁵³ The “disability” model is consequently not ideal. Certainly, approaching religious belief (or no belief) in the same way as disability would not resolve the current conflict. It may even open the floodgates to new conflicts, as members of other protected groups attempt to argue that their characteristic is also a “disability” and should be treated accordingly. It would also devalue the particular meaning and experience of disability itself. Furthermore, people with disabilities do not generally seek to use equality law to discriminate against other protected groups: they merely seek the opportunity to live and work on an equal basis with able-bodied people. Similarly, lesbians and gay men do not generally seek to discriminate against religious people or organisations. It is religious conservatives who seek additional privileges over and above general equality principles. Reasonable accommodation provisions would leave lesbians and gay men remaining vulnerable to discrimination dressed up in the guise of religious freedom.

Conscientious objection

Several of the arguments supporting reasonable accommodation also inform calls for a ‘conscience clause’ in equality law. The traditional form of conscientious exemption was from military involvement, generally bestowed upon pacifists (typically Quakers). However, conscientious objection has also been sought from laws governing drug use,

⁵¹See the Equality Act 2010

⁵² [n 34], 593

⁵³ See *Archibald v Fife Council* [2004] UKHL 32

school uniform requirements, prison, animal slaughter, Sunday trading, and the provision or receipt of medical care. Such provisions have generally been justified in legal liberalism out of respect for the objector's autonomy or respect for his or her freedom of religion.⁵⁴ The current conflict has also precipitated calls for a religious conscience-based exception to laws protecting sexual orientation as a characteristic. These calls are based on the premise that a person compelled by conscience to act, or to refrain from acting, does not have a genuine choice. Such a person seeks a legal right to act upon this conscience – to have the right to do what he or she would do anyway, because of the experience of an absence of choice.

It is interesting to note that conscience can matter from both a religious perspective and also as part of a critique of the traditional schema of liberal rights. For example, Stychin concedes that liberal, choice-based understandings of religion are limiting because they do not reflect how religion is actually experienced by the faithful. A religious conscience is not experienced as a choice, and 'the test of whether the manifestation of belief impacts upon the rights of others also may not be relevant when one is faced with the compulsion to act'.⁵⁵ Stychin is clearly concerned that attempting to qualify the protection given to religion may involve privatisation of belief. This is seen as important because, as Leiter argues, 'Many of the arguments trade, at bottom, on a simple idea: namely, that being able to choose what to believe and how to live... makes for a better life. Being told what you must believe and how you must live, conversely, makes lives worse'.⁵⁶ It is true that we do not (yet) know why and how a person develops one kind of conscience and not another. One can also accept that a person cannot change their beliefs at will, and appreciate that a

⁵⁴ For further discussion of these examples, see Yossi Nehushtan, *Intolerant Religion in a Tolerant-Liberal Democracy* (Hart, 2016)

⁵⁵ Carl Stychin, Closet Cases: "Conscientious Objection" to Lesbian and Gay Legal Equality' (2009) Griffith Law Review 18, 36

⁵⁶ Brian Leiter, 'Why Tolerate Religion?' (2008) 25 Constitutional Commentary 1, 25

conscientious objector does not experience a genuine choice about whether to act according to conscience, because the consequences of not so acting would be experienced as distressing. However – as discussed later, in Chapter 6 – it is not clear that distress is considered robust enough to constitute harm.

Nevertheless, to have a genuine choice (a concept questioned by Queer theory) implies the existence of a sufficient number of meaningful choices, but the objector feels that the only meaningful choice is to act upon his or her conscience. The lack of sufficient valuable choices means that the objector does not experience a genuine choice. However, it is important to note that the ‘lack of choice’ argument applies equally to religious conscientious objections and to non-religious ones, which underlines the point that religion is not special. It may be more useful to look at the values that might lie behind the objection, and the following section considers some of the ‘perfectionist’ liberal arguments regarding values.

Conscience and values

This thesis has developed the argument that faith-based objections to sexual orientation equality are homophobic, notwithstanding the disclaiming of homophobia by the Christian right. The normative question, ‘how should law treat the conflict between religion and sexual orientation?’ becomes ‘how should the law treat faith-based homophobia?’ As Nehushtan observes, ‘The demand to respect the other... or to consider him as equal is a proper demand but far-fetched for the homophobe, and therefore politically useless.’⁵⁷ Indeed, if the religious and the secular are, for all intents and purposes, speaking different languages,⁵⁸ the question again becomes one about incommensurability: is a common language and understanding possible? Nehushtan suggests that a ‘realistic and reasonable

⁵⁷ Yossi Nehushtan, *Intolerant Religion in a Tolerant-Liberal Democracy* (Hart Publishing, 2015), 14-15

⁵⁸ Anthony Bradney, *Law and faith in a sceptical age* (Routledge-Cavendish 2008), 42

initial demand' would be to refrain from harming the 'other', grounding this demand in the principles of tolerance:

Demanding that the homophobe be tolerant applies a certain (yet very limited) understanding towards the homophobe. It appreciates the fact that the homophobe is required to make a sacrifice and to suffer, as the homophobe is required to rise above any good reason he might have in his view to harm the other and to accept the other's right not to be harmed despite his 'wrong' way of life.⁵⁹

This scenario describes an ideal liberal-democratic state in an ideal liberal-democratic society. However, just as the term 'homophobe' is rejected by conservative Christianity, the term 'intolerant' is considered by some not to be the sole preserve of the right-wing. For example, McConnell accepts that a homophobe who supports the use of the law to restrict homosexuality is intolerant. Yet he maintains that a gay person who supports the use of the law to 'legitimise' same-sex desire is also intolerant.⁶⁰ He concludes that neither should use the law to promote their views. This is a false equivalency, which can be challenged by using an adult version of "you started it" as a means of guiding legal decision-making: 'who was the first to restrict (in the broadest sense possible) the freedom of the other because he has a negative opinion of the other or of his values?'⁶¹ As an illustration, homosexuality (insofar as it can be defined) does not involve the denial, condemnation or exclusion of others' ways of life. Moreover, the 'legitimation' of homosexuality through the law does not involve judging others negatively and using this as a basis for harming them. The same cannot be said for religious or conservative homophobia, which – on the contrary – involves negative judgments and the desire to exclude homosexuals and homosexuality from civic life.

⁵⁹ [n 57]

⁶⁰ M McConnell, 'The Problem of Singling Out Religion' (2000) 50 DePaul Law Review 1, 43-44

⁶¹ [n 57], 50

In his own discussion of tolerance and harm, the liberal theorist Raz argues that the government should not criticise negative portrayals of homosexuality that arise in response to the move towards legitimising gay people. He equates this with the negative portrayals of Muslims that arose in response to the *Satanic Verses* furore.⁶² However, there is a false equivalency between these two examples, because:

One can argue that *by avoiding condemnation of attacking speech against gays, the government can be seen as sustaining such speech. It is not far-fetched to interpret non-condemnation as support*, and while supporting (by not condemning) attacks on Muslims' intolerant response to offending literature coincides with the limits of liberal tolerance, supporting (by not condemning) attacks on gays fails to respond properly to intolerant views and results in harming the non-intolerant powerless.⁶³

This passage reflects Popper's well-known argument that, in a liberal society, the limit of tolerance is intolerance.⁶⁴ One can go further, and argue that the passage also reflects Kendall Thomas's characterisation of individual and organisational homophobia as constructive delegation of state power. As discussed in Chapter 6, homophobia is a harm; organisational homophobia is expressed in religious exemptions to equality law; individual homophobia is expressed in hate crime but also in faith-based conscientious objections to equality provisions; if the state permits exemptions or objections it is not condemning them, and – as the passage above says – ‘it is not far-fetched to interpret non-condemnation as support’.

Value-based liberalism, then, provides a useful perspective on the debate around this case.

Insights from a class-informed Foucaultian/Queer perspective can add a further layer of

⁶² J Raz, ‘Autonomy, Toleration and the Harm Principle’ in R Gavison (ed), *Issues in Contemporary Legal Philosophy* (OUP 1987) 313, 320

⁶³ [n 57], 51 (emphasis added)

⁶⁴ Karl Popper, *The Open Society and Its Enemies. Volume 1, The Spell of Plato* (1945, Routledge)

understanding. Chapter 2 argued that a Foucaultian understanding of rights is possible and can be used to enhance the liberal approach. Foucault's prioritisation of 'difference' led him to argue that forms of difference that strongly conflict with furthering such ethical goods as equality are not legitimate. Given the flexibility of modern power, it may prove difficult to specify a particular set of threats to human difference,⁶⁵ but when such threats are identified a Foucaultian concept of rights can aid their evaluation. Where rights conflict, the right to difference has priority and would thus trump other, lesser rights (although conflict that did not involve this 'elemental' right would be more difficult to resolve).⁶⁶ While this approach has merits, it does not provide the whole answer to the problem. Chapters 6 and 7 discuss the problem in more detail, framing them in terms of harm, constructive delegation of state power, and sexual citizenship in a consumer-oriented society. This chapter concludes with a brief assessment of possible future directions for conscientious objection, before highlighting the resistances that are happening from gay people of faith.

Conscientious objection – future directions?

It is useful to look at how 'the struggle for control of discourses'⁶⁷ is conducted in this debate. Johnson and Vanderbeck point to factors external to Parliament, including 'increasingly active conservative lobby groups'.⁶⁸ This is highly pertinent in light of the recent consultation by the Equality and Human Rights Commission (EHRC) as part of their programme to "strengthen understanding of religion or belief in public life".⁶⁹ Conservative religious campaign groups strongly encouraged their followers to respond, to

⁶⁵ BL Pickett, 'Foucaultian Rights?' (2000) *The Social Science Journal*, 37(3) 403-421, 410-11

⁶⁶ [n 65], 415

⁶⁷ Michel Foucault, *Discipline and Punish: the birth of the prison* (Penguin, 1991) 60

⁶⁸ Paul Johnson and AM Vanderbeck, *Law, Religion and Homosexuality* (Routledge, 2014), 209

⁶⁹ <http://www.equalityhumanrights.com/about-us/our-work/key-projects/religion-or-belief-tell-us-about-your-experiences>

ensure ‘that freedoms for Christians are protected more effectively, whether at work, school, church or other public setting’.⁷⁰

The *Ashers Bakery* case⁷¹ is the latest dispute (this time from Northern Ireland) to involve faith-based claims for exemption from equality law on grounds of conscience. An appeal from the County Court has already been heard in the Court of Appeal; at the time of writing judgment has not been handed down, but it is likely to develop significantly the jurisprudence regarding conscience clauses. Ashers, a Christian-owned bakery, refused a request from a gay rights campaigner to bake a cake bearing a slogan in favour of same-sex marriage, illustrated by an image of the Sesame Street characters Bert and Ernie. The refusal was on the basis of religious objection to any change to the traditional legal definition of marriage as being between one man and one woman.

The Equality Commission instituted proceedings against the bakery for contravening anti-discrimination legislation, while the bakery was supported by the Christian Institute, which campaigns for individual religious exceptions to equality provisions. As part of its Ashers campaign, the Christian Institute paid for advertising space in several newspapers seeking donations. The wording of the advertisement is instructive:

We’re supporting Ashers Baking Co as they face court for upholding marriage. The taxpayer-funded Equality Commission is taking Ashers Baking Company to court for refusing to decorate a cake with the message ‘support gay marriage’. The Christian Institute’s Legal Defence Fund supports Christians facing difficulties for

⁷⁰ <http://www.christianconcern.com/>

⁷¹ *Lee v Ashers Baking Co Ltd & McArthur & McArthur* [2015] NICty2

holding to their religious beliefs in an increasingly secular society. Help us help Ashers and others like them.⁷²

The bakery is elevated to the position of ‘upholding marriage’, and – echoing the discourses deployed in the Clearing the Ground report – religious conscientious objectors are painted as lonely stalwarts, bravely standing up to increasing challenges from secularism. Reminding readers of the newspaper that the Equality Commission is publicly funded feeds off the contemporary concern over public spending. The case is discussed in detail in Chapter 7 of this thesis.

So far this thesis has shown how, once the appropriation of rights discourse by religious conservatives had proved less than successful in the case law,⁷³ a different strategy was adopted – the appeal to conscience, and to a higher ‘natural’ law.⁷⁴ This appeal is made against the backdrop of a resurgent discourse of ‘Christian values’.⁷⁵ However, this modern ‘higher authority’ discourse differs from the discourse of medieval institutional theocracy, where the church governed all aspects of an individual’s life. Modern appeals for reasonable accommodation and conscience clauses now take place at the crossroads of the individual and the institutional; the private and the public. This crossroads is now the main site of battle in the conflict between religion and sexual orientation. The growth of human rights discourse since the Enlightenment had already placed the individual in an elevated position vis-à-vis the state. Latterly, the legal protection of sexual orientation has enabled lesbians and gay men to move from the private into the public sphere: they are increasingly

⁷² <http://www.christian.org.uk/case/ashers-baking-company/> accessed 19 February 2016

⁷³ See *Bull v Hall* [2013] UKSC 73; *Eweida v British Airways plc* [2010] EWCA Civ 80; *Ladele v Islington LBC* [2010] 1 WLR 955 ; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 and *Eweida and others v UK* [2013] ECHR 37

⁷⁴ See Nicholas Bamforth, *Patriarchal Religion, Sexuality and Gender: a Critique of New Natural Law* (Cambridge University Press, 2008) for further critique of the new natural lawyers such as Finnis, who seek to base their homophobia on a higher natural order in the manner of Aquinas et al. See also the discussion in Chapter 2 of this thesis.

⁷⁵ <http://www.theguardian.com/politics/2014/dec/24/david-cameron-christmas-message-ed-miliband> (accessed 26 March 2015)

visible as students, teachers, employees, and as buyers of goods and services. In response, institutional religious conservatism⁷⁶ is beginning to rebrand the old Christian discourse of individual suffering and martyrdom to enhance its appropriation of individual rights discourse. These have been re-deployed to press for wider anti-gay exemptions from equality law through devices such as ‘conscience clauses’. However, these discursive strategies and tactics have been met with resistance. The final section of this chapter looks at current challenges to the idea of a special relationship between religion and opposition to homosexuality.

Resistances

Foucault holds that discourse transmits and produces power/knowledge. Discourse can reinforce power/knowledge, but discourse also ‘undermines and exposes it, renders it fragile and makes it possible to thwart it.’⁷⁷ This possibility relates to the ‘tactical polyvalence of discourses’⁷⁸ in that they can be used as opportunities for resistance. This chapter has considered the arguments in favour of accommodating religious belief. It has highlighted the familiar tropes that religion and homosexuality are mutually exclusive; that religion and homosexuality are equivalent in terms of rights claims; and that religious believers are oppressed by the state. However, it is also important to recognise the resistances that are taking place within religious organisations and communities, with the voices of gay people of faith now beginning to be heard. The old tropes have been challenged by religious individuals, some of whom are also gay. For example, Reverend Sharon Ferguson of the Lesbian and Gay Christian Movement states that ‘no one religion

⁷⁶ See for example the National Secular Society’s critique of Christian Concern, one of the conservative religious organisations involved: <http://www.secularism.org.uk/blog/2014/06/will-the-equality-act-be-battered-into-submitting-to-religious-exemptions> (accessed 1 July 2014)

⁷⁷ Michel Foucault, *The History of Sexuality Vol 1: The Will to Knowledge* (Penguin, 1978), 101

⁷⁸ Paul Patton, ‘Foucault, Critique and Rights’ (2005) *Critical Horizons* 6(1), 267, 273-4

should be able to influence to such an extent the laws that we put into place.’⁷⁹ The Christian policy organisation, Ekklesia, observed that ‘the Church has become conditioned to think theologically and practically from a top-down perspective using instruments of the state to get what it wants... It has to have its arguments accepted on merit rather than privilege; it has to lead by example.’⁸⁰

A significant aspect of this resistance is to do with clergy’s desire to have and to formalise their same-sex relationships. For example, the current Bishop of Grantham is the first Bishop to declare that he is in a same-sex (albeit celibate) relationship.⁸¹ Notably, a senior bishop from the Church’s evangelical wing has called for far-reaching change in the church’s attitudes to homosexuality and a welcome to Christians in same-sex relationships.⁸² Unfortunately, words have not translated into Church action so easily. Jeremy Pemberton, a gay clergyman, was prevented from taking up a post as a hospital chaplain after marrying his partner. He recently lost an employment tribunal against the Church, but has been given the right to appeal.⁸³

⁷⁹ A Donald, *Religion or belief, equality and human rights in England and Wales* (2012) Equality and Human Rights Commission Research Report Series, Research Report 84, 25

⁸⁰ [n 63]

⁸¹ Harriet Sherwood, ‘Bishop of Grantham first C of E bishop to declare he is in gay relationship’ *The Guardian* (London, 2 September 2016)

⁸² Harriet Sherwood, ‘Senior bishop calls for change in C of E attitudes to gay people’ *The Guardian* (London, 16 June 2016)

⁸³ Press Association, ‘Gay clergyman to appeal after losing discrimination claim’ *The Guardian* 15 March 2016

CHAPTER 6: HARM AND CONSTRUCTIVE DELEGATION OF HOMOPHOBIA

*Homophobia is like racism and anti-Semitism and other forms of bigotry in that it seeks to dehumanize a large group of people, to deny their humanity, their dignity and personhood.*¹

Chapter 4 charted how the justification for homophobia in religious anti-gay discourse has undergone a shift from an explicitly religious imperative, through the discourses of ‘contagion’ discourse surrounding HIV and AIDS and the ‘corruption of youth’ around Section 28, to the appeals to heteronormative family life made to oppose same-sex marriage. It also showed how Christianity’s historical influence on determining sexual citizenship² persists in current statutory religious exceptions and in the principles of reasonable accommodation and proportionality developed through case law. Chapter 5 considered how this influence persists in the case law and argued that perpetuating influence by allowing individuals to use religious ‘conscience’ to deny goods and services is problematic. It allows religious conservatives to dictate legal policy and use equality law to restrict lesbians’ and gay men’s access to that which is offered to others.

This chapter develops the argument that, by permitting religious discrimination against non-heterosexuals in equality law, the state is itself implicated in perpetuating homophobia. There are three reasons for this. First (as the political theory of Hobbes makes clear), the first duty of the state is to ensure the safety and security of its citizens,³ and homophobia denies lesbians and gay men equal rights to safety and security as embodied individuals. Second, law’s historical relationship with religion continues to be

¹ Coretta Scott King’s address, *Chicago Defender*, April 1 1998. See also a summary of research conducted by Janet Baker at the University of Cincinnati: ‘Homophobia, racism likely companions, study shows’, *Jet*, January 10 1994, p.12

² A phrase coined by Jeffrey Weeks in ‘The Sexual Citizen’ (1998) 3 *Theory, Culture, Society* 15: 35-52

³ See Chapter 2 for further discussion.

the vehicle whereby ambivalence or even distaste for homosexuality finds expression in the statute book. The disclaiming of homophobia and the assimilation of rights arguments by conservative religion disguises what is still a discourse grounded in heteronormativity. Third, homophobia denies lesbians and gay men equal sexual citizenship and thus equal dignity as human beings. A political and legal regime that professes to be concerned with equality should attend to those parts of the law that compromise equal citizenship, dignity and security by legitimising homophobia.

The chapter argues that homophobia is a harm – the scope and degree of which is analysed by examining a variety of sources. It is argued that a Foucaultian analysis of harm offers greater analytical precision while also opening up further possibilities as to how harm can be assessed. The chapter continues to engage with liberal analysis, but also argues that a straightforward pursuit of reform – for example, through Article 3 of the ECHR⁴ – can fail to account for key issues of sexual citizenship. The concept of homophobia as a threat to sexual citizenship was introduced in Chapter 1. At this point, it is helpful to revisit the concept and discuss in more detail both institutional and individual homophobia.

Homophobia revisited

The leader of the United Kingdom Independence Party (UKIP) recently suggested that the need for race equality legislation had passed.⁵ Farage's rationale echoes the discursive shift which has arisen in response to increasing equality for gay people: these people - these 'others' - now have too much equality; the pendulum has swung too far the other way and the law must redress the balance.⁶ These emerging discourses share three broad

⁴ Article 3 states: 'no-one shall be subjected to torture or to inhuman and degrading treatment or punishment'.

⁵ <http://www.bbc.co.uk/news/uk-31846453> (accessed 12 March 2015). Note Farage's outdated reference to the old Race Relations Act which has been superseded by subsequent legislation, most recently the Equality Act in 2010.

⁶ See Chapters 4 and 5.

similarities. First, they are both grounded partly in a narrative that beckons a return to ‘British values’⁷ which espouse rights and justice through the rule of law. There is an underlying caveat to this, however: the small print reminds us that hardworking, preferably white, Christian heterosexual families are the preferred model. Others may be tolerated magnanimously in the spirit of Western liberalism. Second, they both represent their proponents’ underlying desire to move away from structural understandings of inequality and discrimination towards a more individual approach. This is manifested in the rise of arguments from conscience being employed by individual goods and service providers to justify excluding lesbians and gay men. Finally, they both illustrate how vulnerable legal rights are to such discursive shifts whereby liberal rights discourse is appropriated to achieve illiberal aims.

The term ‘homophobia’ is commonly used to describe a range of negative attitudes and behaviours towards same-sex desire and relationships. It can be manifested in critical or hostile words or behaviour, from distaste or disapproval, through discrimination, to verbal and physical violence. As this thesis contends, these negative attitudes and behaviours have become so sedimented within legal, social and political discourse that, even when equality provisions are extended to LGBT+ people, they remain tainted by homophobia. Introducing the debate on the Wolfenden Report,⁸ which paved the way for the partial decriminalisation of homosexuality,⁹ Kenneth Robinson MP stated:

⁷ See for example ‘Promoting fundamental British values as part of SMSC in schools: Departmental advice for maintained schools’. Department for Education, November 2014: 5-6.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/380595/SMSC_Guidance_Maintained_Schools.pdf (accessed 26 March 2015). See also critiques of the guidance by the British Humanist Association <https://humanism.org.uk/2014/12/01/first-gcse-now-british-values-government-deletes-atheism-humanism-study/> (accessed 26 March 2015) and the National Secular Society <http://www.secularism.org.uk/news/2014/12/dfe-issues-new-guidance-for-promoting-fundamental-british-values> (accessed 26 March 2015)

⁸ Wolfenden Committee, Report of the Committee on Homosexual Offences and Prostitution. Cmnd. 247 (London: HMSO, 1957)

⁹ Sexual Offences Act 1967

I have no wish to suggest that I regard homosexuality as a desirable way of life... It is undesirable because it leads so often to unhappiness, to loneliness and to frustration, because it entails in many cases heavy burdens of guilt and shame on those affected by it and because it seldom provides a basis for a stable emotional relationship. It may also possibly be undesirable on moral grounds because it is a sin, but these are matters on which I am not competent to pass judgment. Surely all this suggests that these unfortunate people deserve our compassion rather than our contempt.¹⁰

It might be expected that these tropes of the lonely homosexual, burdened by shame and sin and unable to form 'normal' relationships, would prevail amongst even the supposedly enlightened back in the 1950s and 1960s. Yet, as illustrated in previous chapters, such tropes persist even as the discourse shifts in response to changing societal mores. As Goodall notes,

In 1960 – even with the growing support of broadsheet editors and moderate clergymen – it was a brave decision to speak in favour of the motion. Today, it is opponents of equality who regard themselves the brave ones to speak out. The arguments they use, from accusations of paedophilic tendencies¹¹ to the description of same-sex sexual orientation as a sin and an abomination,¹² were however used almost fifty years ago.¹³

¹⁰ HC Deb., col.1454-1455, 29 June 1960

¹¹ See Stonewall's evidence to the Public Bill Committee examining the Criminal Justice and Immigration Bill, HC Deb., col.75, 16 October 2007.

¹² Northern Ireland Assembly member, Iris

Robinson. http://news.bbc.co.uk/1/hi/northern_ireland/7482263.stm (accessed 1 April 2015)

¹³

<http://www.academia.edu/8342431/Challenging_hate_speech_incitement_to_hatred_on_grounds_of_sexual_orientation_in_England_Wales_and_Northern_Ireland> (accessed 1 April 2015)

The psychologist George Weinberg, who is credited with the origin of the term, described homophobia in medical terms.¹⁴ Interestingly, he also defined it with explicit reference to religion; it was ‘a fear of homosexuals which seemed to be associated with a fear of contagion, a fear of reducing the things one fought for – home and family. It was a religious fear and it had led to great brutality as fear always does’.¹⁵ “Holy” books can be used as authority for a range of prejudices. For example, as Curtis argues, faith-based homophobia echoes the biblical justifications for racism and sexism historically relied upon by religious conservatives in the United States: ‘Slavery, racial discrimination and segregation, and opposition to women’s rights were all supported by strong religious arguments bolstered by citations to the Bible.’¹⁶ Selected passages from the Christian bible were cited by a US Senator in opposition to the 1964 Civil Rights Act,¹⁷ and in 1967 a US judge reasoned that his god had put the races on separate continents because ‘he did not intend for the races to mix’.¹⁸ As Curtis recognises, ‘as with race and gender, the greatest harm may be to the human spirit, the harm inflicted when gays internalize the message sent by hostility and discrimination.’¹⁹

The internalisation of homophobic discourse can also affect people from religious backgrounds. A recent study found that students who came from rigidly anti-gay domestic

¹⁴ See Foucault (1978): 104-5 for discussion on how sexuality became subject to medicalisation through a discursive process of categorisation. ‘Homosexuality’ only came into existence when it was categorised as deviant, as a perverse pleasure. It could be argued that the resistance to the term ‘homophobia’ as a medical phobia has influenced the discursive shift of religious conservatism from explicit hostility towards LGBT+ people towards the discourse of rights as individual bearers of conscience.

¹⁵ George Weinberg, *Society and the Healthy Homosexual* (St Martin’s Press, 1972)

¹⁶ See for example MK Curtis, ‘A Unique Religious Exemption From Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context.’ *Wake Forest Law Review*, 5 April 2012 http://wakeforestlawreview.com/2012/04/a-unique-religious-exemption-from-antidiscrimination-laws-in-the-case-of-gays-putting-the-call-for-exemptions-for-those-who-discriminate-against-married-or-marrying-gays-in-context/#_ftn82 (accessed 30 March 2015)

¹⁷ [n 16] note 71

¹⁸ [n 16] note 73

¹⁹ [n 18]

backgrounds were the most likely to reveal repressed same-sex attraction.²⁰ Religious edicts against homosexuality permeate society and its laws to the extent that they have become enmeshed and embedded within them. As a consequence, homophobia can be perpetrated by people who do not profess any particular religious belief, yet have internalised religious and patriarchal messages concerning masculinity and femininity. The researchers suggested that this is why some religious conservatives who denounce homosexuality are subsequently found to have clandestine same-sex relations: ‘these people are at war with themselves and are turning this internal conflict outward’. It is interesting to note how the reference to war echoes the discourse used by religious conservatives to present themselves as embattled victims of equality law.²¹

Institutional Homophobia

Institutional homophobia includes both religious and state-sponsored homophobia. Indeed, in many countries there is a strong correlation between the two. In 2014, the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) published its most recent report on state-sponsored homophobia.²² State-sponsored homophobia comprises criminalisation, hate speech from government members and other forms of discrimination, violence and persecution of LGBTI people. The report finds that ‘in many places, LGBTI people are still living under intensive situations of homophobia which is directly or

²⁰ ‘Why Homophobes Hate’. <http://www.scientificamerican.com/article/homophobes-might-be-hidden-homosexuals/> (accessed 3 March 2015). See also Wilkerson, JM et al (2012) ‘Religiosity, internalized homonegativity and outness in Christian men who have sex with men’. *Sexual and Relationship Therapy* Vol. 27 No. 2 May 2012: 122-132

²¹ See Chapter 5.

²² Lucas Paoli Itaborahy & Jingshu Zhu, 2014. ‘State-Sponsored Homophobia. A world survey of laws: Criminalisation, protection and recognition of same-sex love.’ The report includes a global overview of developments of legislation pertaining to a variety of legal issues: criminalisation and decriminalisation of consensual homosexual acts between adults; the emergence of so-called ‘homosexual propaganda’ laws; equalisation of ages of consent for homosexual and heterosexual acts; prohibitions of discrimination based on sexual orientation in employment; hate crimes based on sexual orientation considered as aggravating circumstance; incitement to hatred based on sexual orientation; prohibition of incitement to hatred based on sexual orientation; marriage and partnership rights for same-sex couples; and joint adoption by same-sex couples. <http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf> accessed 2 March 2015

implicitly sponsored by unfavourable state law'.²³ Private, consensual homosexual acts are illegal in over 75 countries; five states (and parts of two others) punish homosexuality with the death penalty; and four more may also be implementing the death penalty for homosexuality under the Sharia code.²⁴ Since the report was published we have been subjected to news reports of gay men being executed for their sexuality in the Islamic State, which is vehemently homophobic.²⁵

Yet there are other acts of state-sponsored homophobia that do not directly result in the death of gay people, but which contribute to an environment in which to be gay is to enjoy less than full citizenship.²⁶ For example, nine UN countries have laws prohibiting the 'promotion' of homosexuality, usually grounded in morality arguments and fears around the 'corruption' of children. 16 states retain different ages of consent according to sexual orientation. Only 61 countries prohibit discrimination against non-heterosexuals in employment; a mere 14 permit same-sex marriage; and 15 allow adoption by same-sex couples. Very few nations (27) recognise sexual orientation as an aggravating factor in hate crime, and only 28 prohibit incitement to hatred on sexual orientation grounds.²⁷ As with the Human Rights Watch report on Russia, the ILGA report found some evidence to indicate a link between institutional homophobia (laws restricting gay citizenship) and individual acts or expressions of social homophobia. ILGA's report specifically notes that

²³ [n 22] 7

²⁴ [n 22] 18: 'In the case of Iraq, unlike the other three countries in this category, it appears the State is unwilling or unable to intervene in areas of the country where militias (non-State actors) target LGBTI people for persecution, including enacting a death penalty. According to a Human Rights Watch report 'They Want Us Exterminated: Murder, Torture, Sexual Orientation and Gender in Iraq' (New York: HRW, 2009) at 5: "in Iraq, armed groups still are free to persecute and kill based on prejudice and hatred; the state still greets their depredations with impunity".'

²⁵ <<http://edition.cnn.com/2015/03/05/middleeast/isis-lgbt-persecution/>> accessed 25 March 2015

²⁶ [n 22] 18-29

²⁷ [n 22] 16-29

‘in Uganda and Nigeria the situation got worse with the passing of new anti-gay laws’.²⁸

This suggests a link between state-sponsored homophobia and harm.

It is also worth noting the recent Human Rights Watch report²⁹ on violence towards LGBT people in Russia since a law was passed ‘aimed at protecting children from information promoting the denial of traditional family values’.³⁰ The report was based on field research conducted in seven Russian cities and on via email, telephone and Skype interviews with participants across Russia. In-depth interviews were conducted with 78 LGBT people who had experienced violence because of their sexual orientation or gender identity, and 46 LGBT activists who were attacked or harassed by counter-demonstrators, including 30 who were detained by the police.³¹ The data reveals that the number of homophobic attacks has since risen and that their brutality has worsened.³² Although the Russian law does not have an explicitly religious basis, the discourses employed by Putin’s government in justification nonetheless echo the discourses historically employed by religious conservatives in the UK. Appeals to traditional family values and the need to protect minors from corruption have their counterparts in the rationale behind Section 28 of the Local Government Act 1988.³³ The report highlights the influence of the church on law in post-Soviet Russia:

Russian Orthodox Church leaders have made public inflammatory statements about gay people, and the strong and growing influence of the [...] Church fuels existing homophobic sentiments. In 2014, for example, one high-level church official said

²⁸ [n 22] 9

²⁹ ‘Licence to Harm: Violence and Harassment against LGBT People and Activists in Russia’ http://www.hrw.org/sites/default/files/reports/russia1214_ForUpload.pdf (accessed 14 March 2015)

³⁰ Federal Law of June 29, 2013 No. 135-FZ, ‘On Amendments to Article 5 of the Federal Law on Protecting Children from Information Harmful to their Health and Development’ <<http://www.rg.ru/2013/06/30/deti-site-dok.html>> accessed 14 March 2015

³¹ ‘Licence to Harm’: 11

³² ‘Licence to Harm’: 14

³³ See Chapter 4 for further discussion.

that same-sex relations should be ‘completely eliminated’ from Russian society, preferably through ‘moral persuasion’ but if necessary through a public referendum on recriminalizing homosexuality.³⁴

The contents of the report, based on the lived experience of Russian LGBT people, do suggest a causal link between the new law and increased homophobic violence, exacerbated by the authorities’ reluctance to prosecute the perpetrators. It also implicates the church in the creation of an environment where homophobia is able to grow. Thus an empirical claim about the relationship between homophobic law and harm begins to form. Such a claim does not solely apply to other, less “democratic” jurisdictions; it can also be made of the UK. In the three months following the recent UK referendum, which approved the UK’s exit from the European Union, it was reported that homophobic hate crime had risen 147%, as well as a spike in hate crime against ethnic minorities and foreign nationals.³⁵

The relationship between institutional and individual homophobia

The writer of LGBT television series ‘Cucumber’ recently said that ‘To live as a gay man in the world, even here in the west, means skirting round violence every day’.³⁶ A recent episode of the drama contained a viscerally disturbing scene in which a character was bludgeoned to death by a man who was clearly wrestling with his sexual orientation and his own internalised homophobia. Homophobia can be internalised when a person projects inwards the negative stereotypes, stigma and prejudice about gay people, whether or not

³⁴ ‘Licence to Harm’: 13

³⁵ Nick Antjoule, *The Hate Crime Report 2016: Homophobia, Biphobia and Transphobia in the UK* (2016) <<http://www.galop.org.uk/wp-content/uploads/2016/10/The-Hate-Crime-Report-2016.pdf>> accessed 18 October 2016

³⁶ See Owen Jones ‘The homophobia in Cucumber is so scary because it taps into a grim reality’, 27/02/15 <<http://www.theguardian.com/commentisfree/2015/feb/27/homophobic-murder-cucumber-gay-viewers-grim-reality-sexual-insecurity>> accessed 27 February 2015

that person identifies as gay themselves. Internalised homophobia also includes conscious or unconscious behaviours that let a person conform to societal expectations of heteronormativity. As in ‘Cucumber’, this can involve extreme repression and denial, coupled with external displays of heteronormative or anti-gay behaviour, including extreme violence and murder. It can also be expressed in much more subtle, but no less ‘othering’, behaviours. As Owen Jones observes:

Reminders... that you’re not quite equal are pervasive: the look of horror on a straight man’s face when he’s “accused” of being gay...; the use of gender-neutral “partner” because it’s been a long day and you can’t be bothered coming out again for the 987th time; someone’s OTT attempts to prove that they’re OK with people being gay, a form of being patronised that reminds an LGBT person of their inferior status nearly as much as straightforward abuse. For some, the background noise of homophobia can feel like living under an authoritarian regime underpinned by informants, forcing them to remain undercover. You don’t dream of holding hands with a partner: a graph of “likelihood of being verbally or physically assaulted” appears in your head, and the line surges upwards if you do... [Cucumber] tapped into a profound, embedded sense of our own vulnerability and precariousness, even now, in Britain, in 2015.³⁷

This is a vivid description of some of the challenges that gay people face in attempting to live out an authentic existence, and why the ‘closet’ continues to be both a place of refuge and oppression.

Several studies, here and in the US, have identified a link between homophobic discrimination and harm suffered by lesbians and gay men. A systematic review of mental

³⁷ [n 36]

disorders, suicide and self-harm amongst LGB (lesbian, gay and bisexual) people in England found that ‘the social hostility, stigma and discrimination that most LGB people experience is likely to be at least part of the reason for the higher rates of psychological morbidity observed.’³⁸ Citing ‘difficulties growing up in a world orientated to *heterosexual norms and values and the negative influence of social stigma against homosexuality*’, a lead researcher suggested that ‘people who feel discriminated against experience social stressors, which in turn increases their risk of experiencing mental health problems’, adding that *greater efforts are needed to prevent these issues arising*.³⁹

These greater efforts should include active work on behalf of the state to challenge homophobic violence. A previous Hate Crime Report on homophobia, biphobia and transphobia in London⁴⁰ found that 1 in 8 LGB people experience homophobic or biphobic crime each year; and 1 in 14 experience violence each year (compared with 1 in 33 heterosexuals). 57% of these victims do not report it, and 25% of those who do are dissatisfied with the police response. Here, it becomes possible to argue that the state is implicated in homophobic violence through the relative failure of its police force to tackle homophobic crime. It can also be argued that the state is implicated in harm caused to gay people through discriminatory laws. For example, a US study investigated ‘the modifying effect of state-level policies on the association between lesbian, gay or bisexual status and the prevalence of psychiatric disorders’. The results indicated that:

Compared with living in states with policies extending protections [to non-heterosexuals], living in states without these policies predicted a significantly

³⁸ M King et al, (2008) ‘A systematic review of mental disorder, suicide and deliberate self-harm in lesbian, gay and bisexual people’ (2008) BMC Psychiatry 8, 70

³⁹ A Chakraborty et al, ‘Mental health of the non-heterosexual population of England’ (2011) British Journal of Psychiatry, Vol 198, 143-48 (emphasis added)

⁴⁰ Nick Antjoulle, *The Hate Crime Report: Homophobia, biphobia and transphobia in London* (2013) Galop <<http://www.galop.org.uk/wp-content/uploads/2013/08/The-Hate-Crime-Report-2013.pdf>> accessed 9 October 2013

stronger association between lesbian, gay or bisexual status and psychiatric disorders in the past 12 months... Policies that reduce discrimination against gays and lesbians are urgently needed to protect the health and well-being of this population.⁴¹

A 2011 survey conducted by the Lesbian and Gay Foundation⁴² serves as a useful illustration of how the closet continues to operate in the present day. 42% of their respondents said that they had realized that they might be lesbian, gay or bisexual between the ages of 13 and 15, but only 14% had ‘come out’ at that age. A quarter of those surveyed had not yet come out by the age of 25, and 3% of all respondents had never come out at all. This is perhaps understandable when one considers the extent of homophobic bullying (verbal and physical) and discrimination in schools, colleges and workplaces. Homophobic verbal bullying and discrimination in the workplace was reported by around a third of the survey respondents: 13% had experienced verbal bullying and 18% had experienced discrimination from their boss, while 15% and 13% had experienced these from customers at work. The report also indicates the impact of homophobia on the emotional wellbeing of lesbians and gay men, with 59% of respondents reporting that they had experienced three or more mental health problems.⁴³

In schools and colleges, half of respondents had experienced verbal bullying; nearly 1 in 3 physical bullying; and 44% discrimination from other students. 11% had experienced

⁴¹ ML Hatzenbuehler et al, ‘State-Level Policies and Psychiatric Morbidity in Lesbian, Gay and Bisexual Populations’ (2009) *American Journal of Public Health* Vol 99, No 12, 2275-2281, 2275

⁴² “I Exist” <<http://www.lgf.org.uk/policy-research/i-exist-survey-research-into-LGB-needs-and-experiences/>> accessed 10 November 2014

⁴³ Low self-esteem 71%; depression 58%; isolation 54%; anxiety 50%; suicidal thoughts 40%; self-harm 23%; eating disorders 19%; and attempted suicide 15%. In addition, the most recent National Health Interview survey in the US, which collected responses from approximately 68,000 participants, revealed substantially higher reported rates of severe psychological distress, heavy drinking and smoking, and impaired physical health in homosexuals than in heterosexuals. See Gilbert Gonzales, Julia Przedworski and Carrie Henning-Smith, ‘Comparison of Health and Health Risk Factors Between Lesbian, Gay, and Bisexual Adults and Heterosexual Adults in the United States: Results From the National Health Interview Survey’ (2016) *JAMA Intern Med* 176(9), 1344-1351

verbal bullying and 16% had experienced discrimination from teachers or other staff while at school.⁴⁴ Teachers and leaders at some schools have also faced a backlash from parents, apparently fuelled by religious conservatism, when they have attempted to implement diversity programmes such as Challenging Homophobia in Primary Schools (CHiPS).⁴⁵ Ofsted has described Sex and Relationships Education (SRE) in schools as ‘not yet good enough’,⁴⁶ with the quality even lower with regard to LGBT+ pupils. This has precipitated an ongoing campaign to make age-appropriate SRE compulsory in all schools, with a legal requirement to address the needs of LGBT+ young people.⁴⁷ An amendment to the Children and Families Bill, which would have achieved this, was defeated by the Government in the House of Lords in 2014. When the Sex and Relationships (Curriculum) Bill was introduced to Parliament later that year, in a second attempt to introduce compulsory SRE, it faced opposition going so far as to call for all sex education to be abolished. The opposition was led by Phillip Davies MP, who is a member of the Cornerstone Group, a grouping of Conservative MPs dedicated to ‘faith, flag and family’ and to upholding ‘traditional marriage’.⁴⁸ The influence of traditional ‘spiritual values’⁴⁹ on Cornerstone’s opposition to inclusive SRE is clear. This is one example of the continuing legacy of Section 28.⁵⁰

⁴⁴ See McCormack (2012) *The Declining Significance of Homophobia: How Teenage Boys are Redefining Masculinity and Heterosexuality* for an interesting counterpoint to these statistics on homophobia in schools.

⁴⁵ See for example <<http://www.independent.co.uk/news/uk/home-news/gay-birmingham-teacher-resigns-after-parents-complained-that-they-did-not-want-him-to-teach-their-children-9243922.html>> accessed 10 April 2014 and <<http://www.theguardian.com/education/2014/nov/11/primary-school-headteacher-attacked-fighting-homophobia>> accessed 1 December 2014

⁴⁶ <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370024/Not_yet_good_enough_personal_social_health_and_economic_education_in_schools_-_report_summary.pdf> accessed 31 March 2015

⁴⁷ <<http://www.petertatchellfoundation.org/sex-education/make-gay-sex-education-mandatory-all-schools>> accessed 31 March 2015. The United Kingdom Department for Children, Schools and Families, *Sex and Relationship Education Guidance*, DfEE 0116/2000, stipulates that parents may withdraw their children from these lessons.

⁴⁸ See <<http://cornerstone-group.org.uk/about/>> accessed 31 March 2015

⁴⁹ [n 48]

⁵⁰ Local Government Act 1988

Homophobic Speech

(i) On the Buses

A recent judicial review case⁵¹ demonstrates the courts' recognition of a link between anti-gay speech, homophobia, and the risk of harm to lesbians and gay men. The case concerned an advertisement which the Core Issues Trust sought to run on London buses. The Core Issues Trust is a Christian organisation that 'works with people who seek to change from a 'gay' lifestyle to a gender-affirming one'.⁵² The advert's slogan: 'Not gay! Ex-gay, post-gay and proud. Get over it!'⁵³ was partly intended as a riposte to a bus advert by Stonewall which had run previously, using the slogan: 'Some people are gay. Get over it!'⁵⁴

In the course of protracted legal proceedings, the court upheld the ban placed on the Trust's advert by Transport for London, finding, *inter alia*, that Article 9 ECHR was not engaged and there was no interference with ECHR Article 10. It was held that the advert was likely to have caused widespread offence and interference with the Article 8 rights of lesbians and gay men;⁵⁵ it was also liable to 'encourage homophobic views, and *homophobia places gays at risk*'.⁵⁶ Lord Bingham considered that the Stonewall advert 'was intended to promote tolerance of homosexuals and discourage homophobic bullying', whereas the Trust's message was 'encouraging "gay rejection" by implying offensively and controversially that homosexuality can be cured'.⁵⁷ Lord Bingham's idea of risk is

⁵¹ R (Core Issues Trust) v Transport for London and the Mayor of London [2014] EWHC 2628 (Admin) and R (Core Issues Trust) v Transport for London and another [2014] EWCA Civ 34

⁵² <<http://www.core-issues.org/>> accessed 1 April 2015

⁵³ R (Core Issues Trust) v Transport for London and the Mayor of London [2014] EWHC 2628 (Admin) [2]

⁵⁴ [n 53] [4]

⁵⁵ R (Core Issues Trust) v Transport for London and another [2014] EWCA Civ 34, per Lord Justice Bingham at [84]

⁵⁶ [n 55] [85] (emphasis added)

⁵⁷ [n 55] [88]

useful here; even if concrete harms cannot be demonstrated, serious risks cannot be ignored by the state, especially if those risks pertain to injuries of some gravity.

Lord Justice Briggs, while conceding (obiter) that Stonewall's advert was aimed at promoting tolerance and discouraging bullying, expressed concern at the effect of such a slogan on religious conservatives:

There are many people... who have been brought up and taught to believe that all homosexual conduct is wrong... many... continue sincerely to hold that belief, and some regard a departure from it as inconsistent with the maintenance of their faith. Some would rather give up their jobs, or discontinue their businesses, than act in a way which they believe condones such conduct... the advice to 'get over it' is a confrontational message which is likely to come across to many... as at least disrespectful of their sincerely held beliefs...⁵⁸

There does appear to be a genuinely-held view amongst some religious people that faith-based opposition to homosexuality is not equivalent to homophobia, being based on a belief in the 'revealed word' of their god, and not simply on an irrational fear of gay people. The 'holy' books of the world's three main creedal religions⁵⁹ can be interpreted as forbidding homosexuality, and many believers accept these interpretations as moral imperatives. Leaving aside the argument that religious belief is inherently irrational,⁶⁰ this denial of homophobia is not only an example of sophistry; it also negates the lived experience of lesbians and gay men who have suffered – and continue to suffer – at the

⁵⁸ [n55], 104-5

⁵⁹ The Islamic Qu'ran and the Christian and Jewish bibles.

⁶⁰ See for example Richard Dawkins, *The God Delusion* (Bantam Press, 2006). For a contrary view, see K Ward, *Is Religion Irrational?* (Lion Hudson, 2011)

hands of religious conservatism.⁶¹ It is also worth noting here that Christian religious texts that refer to same-sex practice are very limited; the meaning of those that do exist (such as the story of Sodom and Gomorrah) has also been contested.⁶² In other words, even if we are to take seriously religious belief, it should not be conceded that the texts are static or unquestionable. They have been contested, reworked, reinterpreted over time and so their meanings have shifted. This does not (necessarily) mean that believers are insincere in their beliefs; however, it does permit a challenge to religious claims in their own terms. That is, they are not only problematic in terms of rights conflicts, but also in terms of internal consistency and logic. Their followers' argument that they are bound by a fundamental, unchanging and unchangeable text does not bear scrutiny in broader historico-cultural-political terms.

In any event, such arguments would no longer be acceptable with regards to faith-based edicts on race, yet they doggedly persist with reference to sexual orientation. The reference to 'homosexual conduct' buys in to the old trope that sexual orientation is akin to a 'lifestyle choice' and thus can be changed – which is precisely what 'gay cure' organisations such as the Core Issues Trust seek to propagate. The governing bodies of mental health professionals have now publicly opposed this type of therapy. For example, the Royal College of Psychiatrists state: 'There is no sound scientific evidence that sexual orientation can be changed. Furthermore, so-called treatments of homosexuality create a setting in which prejudice and discrimination flourish'.⁶³ Furthermore, suggesting that Stonewall's message might be 'confrontational' echoes the modern trope that gay people now have too much equality and are using their position to attack the rights of religious

⁶¹ See comments made by drag artist and gay rights campaigner, Panti Bliss, in response to religious conservatives in Ireland: <<https://www.youtube.com/watch?v=WXayhUzWnl0>> accessed 28 January 2015

⁶² See John Boswell, *Christianity, Social Tolerance, and Homosexuality* Chicago University Press, 1980

⁶³ Memorandum of Understanding on Conversion Therapy in the UK: published Jan 2015
<<http://www.psychotherapy.org.uk/news/memorandum-of-understanding>> accessed 10 March 2015

believers. Briggs LJ's comments serve as an illustration of my contention that, even where gay people can toast 'victory', there are still discursive costs.

(ii) Derby Pride

Three men were convicted in 2012 of distributing threatening written material intended to stir up hatred on the grounds of sexual orientation, contrary to the Criminal Justice and Immigration Act 2008,⁶⁴ which amended the 1986 Public Order Act to include sexual orientation.⁶⁵ The men had distributed hundreds of leaflets through letterboxes in residential areas during the lead-up to Derby's annual Gay Pride event. Two versions were not the subject of criminal charges, because they were not explicitly threatening, albeit offensive: 'G.A.Y. God Abhors You' and 'Turn or Burn'.⁶⁶ The leaflet which was subject to charges, titled 'The Death Penalty?', contained an image of a mannequin hanging from a noose, accompanied by Islamic texts advocating capital punishment – whether it be burning, throwing from a high place, or stoning – as the only way to rid society of the corrupting influence of homosexuality. Evidence adduced at the trial included testimony from four gay men, all of whom had felt threatened by the leaflets. The judge's comments on harm, made in the course of sentencing, are instructive:

I have to consider not only the culpability of the offender, but also the harm that was caused, or was intended to be caused, or might foreseeably have been caused.... Looking at the harm done, I have considered the threat felt by the individuals that gave evidence at the trial, and the likelihood that others were

⁶⁴ Part 5, Section 74 and Schedule 16. S.74 states: Hatred on the grounds of sexual orientation Schedule 16 - (a) amends Part 3A of the Public Order Act 1986 (c. 64) (hatred against persons on religious grounds) to make provision about hatred against a group of persons defined by reference to sexual orientation, and (b) makes minor amendments of that Part. The 2008 Act Part 6 para. 79 also abolishes the common law offence of blasphemy without replacement.

⁶⁵ The Racial and Religious Hatred Act 2006, Part 3A. The Act had previously been amended in 2006 to prevent the stirring up of hatred on religious grounds.

⁶⁶ This particular phrase is the vernacular equivalent of the message of the Core Issues Trust.

similarly affected. I have borne in mind that the residents of the streets who received this leaflet do not seem to have changed their attitude or behaviour towards their gay neighbours... That said, you have been convicted of intending to stir up hatred. It follows that your intention was to do great harm in a peaceful community... No-one seems to have been tempted to copy you... However, it is hard to ascertain exactly how much harm you have caused by distributing this leaflet outside the Mosque.⁶⁷

So, according to Burgess J, it is not necessary to be able to measure the precise level of harm caused by homophobic speech. The fact that intent to foment hatred was proven was sufficient to find that ‘great harm’ was also intended. Hatred on grounds of sexual orientation is viewed judicially as harm.

(iii) The Stoke-on-Trent ‘Monk’

The Crown Prosecution Service (CPS) recently declined to press charges against a man dressed as a monk who distributed anti-gay leaflets in Stoke-on-Trent and elsewhere. The leaflets contained homophobic statements such as: ‘The practice of homosexuality is both blasphemy against God and rebellion against nature’; ‘Homosexuality, as well as being a sin and a vice, is essentially a neurosis, a pathological condition, the result of several factors including childhood experiences’; and ‘Homosexuality has become a cult, and by the indoctrination of school children and regular propaganda through the media, it seeks converts.’⁶⁸

⁶⁷ *R -v- Ijaz Ali, Razwan Javed and Kabir Ahmed* (unreported). Sentencing Remarks of HHJ Burgess 10 February 2012 <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/sentencing-remarks-r-v-ali-javed-ahmed.pdf>> accessed 1 April 2015

⁶⁸ <<http://www.pinknews.co.uk/2015/01/23/charges-dropped-against-monk-who-delivered-leaflets-comparing-gays-to-paedophiles/>> accessed 24 January 2015

The CPS justified their refusal to prosecute under the 2008 legislation because ‘While these leaflets were ill-informed and caused offence to members of the community targeted by this individual, they did not cross the high criminal threshold for prosecution...’.⁶⁹ The CPS recommended alternative means of dealing with the man’s behaviour; however Staffordshire Police declined to bring proceedings for an Anti-Social Behaviour Order or a civil injunction, stating that there was ‘insufficient evidence’ to do so. The CPS based its decision on Schedule 16 to the 2008 Act, which states (at paragraph 14): ‘In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred’. This is generally known as the “free speech” defence.

It is accepted that the contents of these leaflets is not as incendiary as the contents of the Derby leaflets, to the extent that there is no call for gay people to be put to death. However, the wording once again reactivates old tropes concerning contagion and the spectre of a ‘gay agenda’. It also hints at the need for the kind of ‘gay cure’ that was found by the court in *Core Issues Trust*⁷⁰ to be homophobic and therefore harmful. This type of publication does little to make gay people feel safe, and yet it is not seen to be threatening unless it explicitly exhorts death. It is submitted that the CPS should pay closer attention to the reasoning in *Core Issues Trust* and in *Ali, Javed and Ahmed* before making similar decisions in future.

⁶⁹ [n 68]

⁷⁰ *R (Core Issues Trust) v Transport for London and another* [2014] EWCA Civ 34

Eric Heinze has written extensively⁷¹ on the free speech debate, arguing that bans on ‘hate speech’ have no legitimate role in democratic societies.⁷² For the purposes of this discussion, this section will focus on his analysis of the relationship between hate speech and harm. Heinze refutes claims that hate speech necessarily harms those groups on the receiving end of the hatred, arguing that ‘no statistically reliable causation from patterns of publicly aired hate speech to patterns of hate crime has been demonstrated...’.⁷³ However, the UK law requires evidence of the stirring-up of hatred, not of any crime that may have been caused by the stirring-up of hatred, perhaps recognising the difficulty of proving causation in the absence of a violent homophobe announcing that it was the leaflet that made him or her physically attack a gay person. Goodall points to research on racist discourse by way of response to Heinze:

The impact of repeated discriminatory speech operates in an insidious way... when it is successful, hate discourse acts as strategic persuasion, reinforcing and regenerating prejudiced beliefs and unequal treatment, and promoting – or more accurately, undermining – social solidarity by distinguishing outsiders.⁷⁴

Making the link between racist and homophobic discourse, she recognises that ‘the current UK incitement laws have been enacted where there is some evidence of a history or culture of stirring up hatred against those particular groups’, because ‘homophobic aggression remains a serious problem’.⁷⁵ At this point, it is necessary to consider in more detail the concept of harm itself. The following section looks first at the classic liberal position and

⁷¹ See for example ‘Cumulative Jurisprudence and Human Rights: The Example of Sexual Minorities and Hate Speech’, *International Journal of Human Rights Special Double Issue: Protection of Sexual Minorities since Stonewall: Progress and Stalemate in Developed and Developing Countries* Vol.13 Nos.2/3 (2009)

⁷² Eric Heinze, ‘The case against hate speech bans’ <<http://www.eurozine.com/articles/2014-04-09-heinze-en.html>> accessed 1 April 2015

⁷³ [n 72]

⁷⁴ ‘Challenging Hate Speech: incitement to Hatred on Grounds of Sexual Orientation in England, Wales and Northern Ireland’ <<http://dspace.stir.ac.uk/bitstream/1893/911/1/Goodall%201%20-%20IJHR%202009%20STORRE%20v%20%20May%202012.pdf>> accessed 1 April 2015

⁷⁵ [n 74]

considers Raz's 'perfectionist liberal' critique. It then moves on to considering a Foucaultian analysis of harm, drawing on Thomas's analysis of sodomy laws in the United States and using it to argue that this approach offers some interesting possibilities for ensuring the continued protection of sexual minorities in equality law.

Harm

The liberal position

The 'harm principle' as espoused by Mill holds that the need to prevent harm to persons other than the actor is the only morally relevant reason in support of state coercion of the individual.⁷⁶ The general liberal position is that the need to prevent harm to others is always a relevant reason to engage the criminal law, if not necessarily fully determinative.⁷⁷ In his extended study of the moral limits of the criminal law, Feinberg distinguishes between normative and non-normative senses of harm: the latter involves some sort of setback to a person's interests,⁷⁸ whereas the former, normative sense involves a wrong which is a violation of a person's rights. He sees the harm principle as applicable only to setbacks to interests that are also wrongs, and only to wrongs which also involve a setback to interests. He explains:

Interests can be blocked or defeated by events in impersonal nature or by plain bad luck. But they can only be 'invaded' by human beings... It is only when an interest is thwarted through an invasion by self or others, that its possessor is harmed in the legal sense... One person harms another... by invading, and thereby thwarting or

⁷⁶ John Stuart Mill, *On Liberty* (Batoche Books, 1859), 68

⁷⁷ See Joel Feinberg's series on harm: Vol I *Harm to Others* (1984); Vol II *Harm to Self* (1984); Vol III *Offense to Others* (1985); and Vol IV *Harmless Wrongdoing* (1990) (all Oxford University Press)

⁷⁸ Feinberg states that "one's interests, then, taken as a miscellaneous collection, consist of all those things in which one has a stake, whereas one's interest in the singular, one's personal interest or self-interest, consists in the harmonious advancement of all one's interests in the plural. These interests... are distinguishable components of a person's well-being." Vol I, 1984: 34

setting back, his interest. The test... of whether such an invasion has in fact set back an interest is whether that interest is in a worse condition than it would otherwise have been in had the invasion not occurred at all.⁷⁹

In terms of what does and does not count as ‘harm’, Feinberg rules out ‘mere transitory disappointments, minor physical and mental “hurts” and a miscellany of disliked states of mind... as harms’ in the sense of wrongful setbacks to interest.⁸⁰ Further, moral indignation does not count as harm. Feinberg also distinguishes between general and normative senses of ‘offence’: general offence comprises myriad discomfiting mental states, whereas normative offence refers only to those states caused by the wrongful – right-violating – conduct of others.⁸¹ Nehushtan’s broader definition of harm recognises that it ‘can be emotional, mental, and physical... caused by condemning the other... avoiding his presence [and] discriminating against him’.⁸² This thesis contends that the definitions proposed by Feinberg and Nehushtan both lead to the conclusion that anti-gay discrimination does involve harm to lesbians and gay men, when understood within the societal framework of heteronormativity and homophobia.

At the same time, this thesis contends that these definitions preclude religious conservatives from using the harm principle as the basis of a purported right to discriminate on grounds of sexual orientation. The classic liberal position holds that the harm and offence principles between them exhaust the class of good reasons for criminal prohibitions and together delineate the moral limits of the criminal law.⁸³ It does not

⁷⁹ [n 78]

⁸⁰ Feinberg [n 77] Vol I, 215-6

⁸¹ Feinberg [n 77] Vol II: 14-22

⁸² Yossi Nehushtan, ‘The Limits of Tolerance: A Substantive-Liberal Perspective’ (2007) *Ratio Juris* 20(2), 230-257, 232

⁸³ Note that the extreme liberal position incorporates the harm principle only.

countenance legal paternalism⁸⁴ or legal moralism.⁸⁵ Thus classic liberalism offers no comfort to people suffering profound offence on religious grounds: people like the Bulls, who were fundamentally opposed to letting double-bedded rooms to guests other than heterosexual married couples.⁸⁶ If they view homosexuality as a sin, such people can be deeply offended by the idea of same-sex intimacy happening even in private, but Feinberg points out that ‘if his impersonal moral outrage is to be the ground of legal coercion and punishment of the offending party, it must be by virtue of legal moralism – to which the liberal is profoundly opposed’.⁸⁷ There is a distinction to be made here between the construction of harm for the purposes of allowing criminal intervention (religious offence being insufficient) and a religious right to ‘free speech’ (and the harms which might result and therefore lead to a qualification of the right).

Liberal Neutrality and the Harm Principle

Classic liberalism, then, defines the limits of state interference with individual liberty in accordance with the harm principle. Determination of the moral worth of an act, on this definition, is not a relevant consideration. Closely linked with this is the liberal idea that the state should be neutral between competing conceptions of the moral good.⁸⁸ Raz challenges both tenets of classic liberalism and instead advances a kind of ‘perfectionist’ liberalism, which is based on two propositions: (i) the state cannot be neutral – indeed, the very idea of liberal state neutrality is ‘chimerical’;⁸⁹ and (ii) the harm principle itself

⁸⁴ ‘It is always a good reason in support of a prohibition that it is necessary to prevent harm (physical, psychological or economic) to the actor himself’ – Feinberg Vol. IV: xix

⁸⁵ ‘It can be morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offence to the actor or to others’ – Vol. IV: xix-xx See also the debate between Devlin and Hart: Devlin’s *The Enforcement of Morals* (1965) and Hart’s *Law, Liberty and Morality* (1963).

⁸⁶ [2013] UKSC 73

⁸⁷ Feinberg [n 77] Vol. II, xiv

⁸⁸ See Chapter 2

⁸⁹ Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986), 110

assumes a moral position.⁹⁰ Liberal neutrality cannot be neutral between values which are consistent with fundamental liberal ideals and those which contradict them. As Sadurski points out, individuals are free to adopt their own conception of the good, such as a religion. However, ‘they cannot expect that any such conception will be equally supported by the legal system’.⁹¹ Sadurski goes on to acknowledge that some individuals will thus find this challenging, and specifically mentions religion in this context: ‘What is the point of persisting in a religious belief which requires the imposition of your beliefs upon ‘non-believers’ and calls for the use of the state apparatus for this goal, if your state is totally non-responsive to this aim?’⁹²

Judith Jarvis Thomson’s distinction between different types of distress⁹³ is worth considering here (as well as her interesting observation that ‘we all quite enjoy’ feelings of moral indignation at times!).⁹⁴ For Thomson, there is simple distress (in the sense of a feeling that one dislikes having) and then there is distress that is caused because we have a certain belief. Belief-mediated feelings can be held rationally or irrationally, and people bear some personal responsibility for how long they have these feelings and how intense they are.⁹⁵ Even if the feeling is not irrational, Thomson does not view belief-mediated distress as a harm. The very word ‘harm’ has a tendency to ‘slither’,⁹⁶ enabling people to say they have suffered a harm whenever something happens that they would prefer not to have happened. Indeed, harm is loaded with moral significance, so it can be a useful strategy or tactic if one wants another to stop doing a particular thing to say that thing is causing them harm. Where should the line be drawn? One of Thomson’s examples of the

⁹⁰ [n 89], 112-115

⁹¹ W Sadurski, ‘Joseph Raz on Liberal Neutrality and the Harm Principle’ (1990) *Oxford Journal of Legal Studies* 10, 122, 124

⁹² [n 91]

⁹³ Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, 1990), 249-266

⁹⁴ [n 93], 251

⁹⁵ [n 93], 253-4

⁹⁶ [n 93], 260

‘slithering of harm’ is particularly relevant to the conflict under discussion in this thesis: the extension of harm to include the worsening of a person’s condition via a worsening of status. Lilian Ladele and Gary McFarlane lost their jobs because of their refusal to provide services to gay people (civil partnership and counselling respectively), and the Bulls had to sell their hotel as a result of their refusal to let double rooms to same-sex couples.⁹⁷ According to Thomson, it is not an infringement per se to cause someone to lose their job (unless the loss were caused by an infringing act such as spreading lies about them);, because ‘the gravamen of the charge against one who causes a status worsening lies in the means used. If those means are no infringement of a claim, then causing the status worsening is not either. Thus status worsenings are not themselves harms.’⁹⁸ This is why, on a Thomsonian view, Ms Ladele, Mr McFarlane and the Bulls were not harmed.

Perhaps religious conservatives are right to be concerned. Reliance on liberal rights discourse has so far proved a less than effective tool for religious conservatives. It has failed to erode those rights and protections only recently granted to lesbians and gay men in the Equality Act. This explains the move towards conscience clauses, by relying on something purportedly ‘higher’ than human law. The Enlightenment, at least in this sense, has come full circle. There may not be a medieval theocracy, but there remains a pervasive theonormativity, which is the reason why appeals to discriminate based on conscience can even be voiced. It is submitted that theonormativity and heteronormativity operate in a discursive alliance, together providing a basis for unequal power relations that harm queer people by limiting their citizenship and thus their agency.⁹⁹ Our understanding of harm can

⁹⁷ ‘Christian B&B owners Hazelmary and Peter Bull “forced to sell up”’ *The Telegraph* (London, 19 September 2013). As a result of their refusal to let double rooms to same-sex couples, their hotel was no longer listed on the Visit England website, leading to a reduction in trade.

⁹⁸ [n 93], 266

⁹⁹ See Chapter 3 for further discussion of the feminist idea of ‘agency’ and how it differs from the liberal idea of autonomy.

be further improved through a Foucaultian perspective that recognises the importance of relations of power and their sedimentation through time.

A Foucaultian analysis of harm and power

If power is examined through a Foucaultian lens, it is revealed as that which characterises relations between parts of any given society – and between individuals in that society – as relations of struggle.¹⁰⁰ This approach conceptualises power not as a top-down mode of domination, but as ‘a dynamic situation, whether personal, social or institutional... a strategic, unstable relation’.¹⁰¹ It better describes the changing relations of power that have operated between law, religion and sexual orientation since the latter half of the twentieth century. It accounts, with greater analytical precision, for the discursive shifts that have taken place in religious conservatives’ opposition to increasing equality for lesbians and gay men. Furthermore, the Foucaultian approach offers a means of critiquing this opposition and suggests a different way forward for sexual orientation equality.

In applying a Foucaultian understanding of power to equality law, this thesis takes inspiration from Thomas’s argument that US anti-sodomy laws¹⁰² legitimised the homophobic violence perpetrated by citizens and individual state officers, through the ‘constructive delegation of state power’.¹⁰³ Taking a Foucaultian perspective, Thomas contends that we need a broader appreciation of the interests at stake than arguments based on privacy permit. This chapter suggests that religious exemptions to equality legislation can be understood in a similar vein. Further, Article 8 of the ECHR is no longer a satisfactory mechanism for the protection of non-heterosexuals. Pitting two qualified

¹⁰⁰ See Chapter 3 for a fuller discussion of Foucault’s understanding of power relations and the knowledges that are produced through them.

¹⁰¹ David Halperin, *Saint Foucault: Towards a Gay Hagiography* (Oxford University Press, 1995), 17

¹⁰² As exemplified by the case he discusses at length, *Bowers v Hardwick* (1986) 478 US 186

¹⁰³ Kendall Thomas, ‘Beyond the Privacy Principle’ (1992) 92 Colum L Rev 1431-1516

Convention rights - Article 8 (privacy) against Article 9 (freedom of religion) - contributes to the zero-sum game that has hitherto dogged scholarly approaches to this conflict.

Using Thomas's approach, this chapter contends that homophobia continues to be legitimised by the state through religious exemptions in equality law, and through the theonormative and heteronormative frameworks that these exemptions support. Religious exemptions provide a space where homophobia is permissible. For the state to allow 'reasonable accommodation' for religious conservatives means the amounts to state facilitation of sexual prejudice in the public sphere. It enables old anti-gay myths and tropes to be reactivated at both institutional and individual levels. Any consideration of a 'conscience clause' for individuals would exacerbate this problem. It would enable state-legitimised homophobia to be constructively delegated to individuals. At this point, a discussion on the relationship between privacy and power is necessary.

Privacy and Power

The liberal understanding of privacy sees it as a haven from the external world, including the state. This is indeed the image one sees if one looks through a heteronormative lens. In the liberal state, heterosexuals have always been able to enjoy privacy as an unqualified good; as a zone in which they can express their intimate needs and desires without interference. This has not been the case for non-heterosexuals, who have had to hide or 'closet' their sexual orientation in order to survive within society. As Halperin observes, the closet offers a zone of protection 'from the many and virulent sorts of social disqualification that one would suffer were the discreditable fact of one's sexual orientation more widely known'.¹⁰⁴ At the same time, this need for individual self-protection enables society to maintain its heteronormative structure. As Sedgwick

¹⁰⁴ [n 101], 29

recognises, privacy for lesbians and gay men has enabled society to enjoy ‘the epistemological privilege of unknowing’,¹⁰⁵ whereby the veneer of heterosexuality is not tarnished by a forced recognition of the homosexual ‘other’. Thus the closet serves as a reminder of the relations of power that exist with regard to sexuality.¹⁰⁶ As Thomas argues, privacy for non-heterosexuals ‘has always been both a tool and a trap, insofar as privacy has functionally served as a cornerstone for the very structure of domination that the principle has been used to attack’,¹⁰⁷ and it is this structure of domination that is criticised here.

This is precisely why the extension of sexual minority rights beyond the private sphere, into employment, education, and into the marketplace of goods and services, has provided such a flashpoint for conflict with religion. Religious conservatives have bemoaned their legal losses, and it is tempting to view sexual orientation as the winner. However, focusing on court decisions in case law can cloud our understanding of the forces that do (or should) motivate the law.¹⁰⁸ This is why an analysis of the power relations involved is important, and why Thomas advocates a focus on political power when considering the implications of homosexual sodomy statutes – or, in this case, of religious exemptions to anti-discrimination law. Thomas reminds the reader us that lesbian and gay history ‘is a story of homophobic aggression and ideology. Its central theme is the fear, hatred, stigmatization and persecution of homosexuals and homosexuality’.¹⁰⁹ He likens the constant, underlying threat of homophobic violence to living under the threat of terrorism:

As in the case of terrorism, much of the force of violence against gay men and lesbians lies in its randomness: individuals may know that the assertion or

¹⁰⁵ Eve K Sedgwick, *The Epistemology of the Closet* (University of California Press, 2008), 5

¹⁰⁶ [n 105]

¹⁰⁷ [n 101], 1456

¹⁰⁸ For further discussion, see Michael Moore’s ‘Sandelian Antiliberalism’ (1989), 77 Cal Law Rev 539

¹⁰⁹ [n 101], 1462

ascription of gay or lesbian identity marks them as potential targets of homophobic violence, but they cannot know until too late whether or when they will actually be hit. Like the terrorist, the perpetrator of homophobic violence strikes without giving warning. A second characteristic common to terrorism and homophobic violence is its utter impersonality. Like perpetrators of terrorist acts, those who attack gays and lesbians do not know, and are most often unknown to, their victims.¹¹⁰

Chapter 5 discussed how religious conservatives have used the discourse of war to describe their experience. Thomas uses the discourse of terrorism to provide a useful insight into the lived experience of lesbians and gay men around the world – including the UK. This is a bold comparison, which may seem overly dramatic or exaggerated at first glance¹¹¹ and may explain why the jurisprudence of the ECtHR has been loath to use Article 3 in the context of gay rights. The following section considers Article 3 in more detail.

Inhuman and degrading treatment: Article 3 ECHR

There has not, as yet, been a successful complaint under Article 3 relating to sexual orientation. Complaints continue to be made under Article 8, often in conjunction with the general anti-discrimination provisions in Article 14. The ECtHR has stated that Article 3, (unlike Articles 8-11) is an absolute and unqualified right.¹¹² However, the Court's case law has found guidance in principles such as the 'margin of appreciation'¹¹³ which have allowed an element of relativity and subjectivity to seep into its jurisprudence. As Addo and Grief point out, the Court's practice under Article 3 'is based not on objective criteria but on the effects of various subjective factors on the particular facts of each case, leading

¹¹⁰ [n 101], 1465-66

¹¹¹ See the discussion in Chapter 1 on the denial of the Orlando massacre as an example of anti-gay terrorism.

¹¹² *Ireland v UK*, no. 5310/71, 18 January 1978, Series A no. 25: 163

¹¹³ See Chapter 4 for further discussion on the 'margin of appreciation' doctrine.

to decisions which can be hard to reconcile'.¹¹⁴ Nevertheless the European Commission has provided assistance as to the meaning and extent of Article 3:

The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable... Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.¹¹⁵

This wording could be construed as offering hope to religious conservatives who seek to rely on a 'conscience clause', because they could argue that a legal obligation to provide gay people with goods and services constitutes 'treatment' that causes a person of faith to act against their will or conscience. Again, a parallel can be drawn with race discrimination, which no is longer justified (at least in the UK) with a biblical imprimatur. We do not describe racists who seek to act out their prejudices as being punished or treated wrongly, and we do not countenance a racist who tries to justify such acting out by reference to a 'holy' book. As previously stated, 'holy' books are not static or stable; they can be interpreted and reinterpreted, and have been historically. This organic feature of religion might be something that the courts can take advantage of. In a sense it is much like the common law, despite claims to the contrary. As Johnson argues, the historical treatment of homosexuality makes it surprising that Article 3 has not been a successful vehicle for rights claims on sexual orientation grounds. He suggests that the Court has sought to maintain a minimum level of severity before Article 3 can be engaged, so as 'not

¹¹⁴ MK Addo and N Grief, 'Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?' (1998) *European Journal of International Law* 9, 510-524, 514

¹¹⁵ *The Greek Case*, nos. 321/67, 3322/67 and 3344/67, Commission report, 5 November 1969, 12 YEHCR:186

to trivialize the substance of the provision or encourage rights inflation under it'.¹¹⁶ The possibility of religious conservatives attempting to deploy Article 3 in order to justify appeals to conscience would be an unfortunate by-product of any possible rights inflation. This would have to be resisted strongly if the zero-sum game that has resulted from current treatment of the conflict (Article 8 v Article 9) is not to be replicated under Article 3.

The Court has defined inhuman treatment as treatment which may 'cause either actual bodily harm or intense physical or mental suffering',¹¹⁷ and degrading treatment as that which can 'arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them'.¹¹⁸ The Commission has stated that the minimum level of severity for 'inhuman treatment' is treatment that inflicts 'severe mental or physical suffering'.¹¹⁹ It is unfortunate that the threshold for severity might prevent relief being granted in situations other than where homosexuality is criminalized and gay people are subject to torture. A better way forward would be to focus on 'degrading' rather than 'inhuman' treatment. As Johnson argues, 'this focus on actions that create feelings of fear, anguish and inferiority that humiliate and debase individuals provides scope to evolve the Court's interpretation of the Convention in respect of sexual orientation'.¹²⁰ Furthermore, the Court views the Convention as a 'living instrument' which recognises the 'increasingly high standard being required in the area of... human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies'.¹²¹ Once again, a parallel can be drawn with race discrimination. In *Moldovan and Others v Romania (No 2)*, the Court reiterated that

¹¹⁶ Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013), 196

¹¹⁷ *Kudla v Poland* [GC], no. 30210/96, 26 October 2000, ECHR 2000-XI [92]

¹¹⁸ [n 117]

¹¹⁹ *X v Federal Republic of Germany*, no. 9191/90 (unpublished)

¹²⁰ [n 116], 197

¹²¹ *Selmouni v France* [GC] no. 25803/94, 28 July 1999, ECHR 1999-V: 101 Note also that the Court requires 'intensive scrutiny' of matters where discrimination on grounds of sexual orientation is alleged.

‘discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 of the Convention’.¹²²

Using Article 3 as a basis for sexual orientation discrimination claims represents a synthesis of both the harm principle and the idea of the constructive delegation of state power into an approach that better captures the harm suffered by sexual minorities in the public sphere. It would mean that sexual orientation rights claims are no longer closeted as ‘private’ matters pertaining solely to Article 8, thereby recognising the citizenship rights of gay people. There are signs of some, if insufficient, movement in this regard. For example, in *Smith and Grady v UK*,¹²³ the applicants claimed that they had been subjected to discriminatory treatment during investigations into their sexual orientation by the armed forces. They argued that the investigations were ‘based on crude stereotyping and prejudice [that] denied and caused affront to their individuality and dignity’;¹²⁴ and that the questioning during the investigation was ‘hurtful and degrading... prurient and offensive’.¹²⁵ The applicants did not succeed in meeting the ‘minimum severity’ threshold, but nonetheless the judgment did recognise that, because degrading treatment causes the recipients ‘feelings of fear, anguish and inferiority capable of humiliating and debasing them,’¹²⁶ the Court would ‘not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority... could, in principle, fall within the scope of Article 3’.¹²⁷

¹²² Nos. 41138/98 and 64320/01, 12 July 2005 ECHR 2005-VII (extracts), 110

¹²³ Nos. 33985/96 and 33986/96, 26 September 1999, ECHR 1999-VI

¹²⁴ [n 123] 119

¹²⁵ [n 123]

¹²⁶ [n 117] 120

¹²⁷ [n 117] 121

More recently, the case of *Identoba*¹²⁸ was the first time that the ECtHR has recognised that 'hate crime' committed against individuals based on sexual orientation amounts to a violation of Article 3 taken in conjunction with Article 14 ECHR. Article 3 (taken in conjunction with Article 14) imposes a positive obligation on member states to ensure that all individuals within their jurisdiction are protected against all of prohibited forms of ill-treatment, including ill-treatment administered by private individuals. States must adequately protect LGBT people from 'hate speech and serious threats' and 'physical abuse' that cause them to feel 'fear, anxiety and insecurity'.¹²⁹ The judgment means that Article 3 requires states to put in place both preventative and investigative measures to protect LGBT people who peacefully assemble in public. As Johnson observes, 'the Court's message is that states must have a robust framework of law enforcement that protects LGBT individuals from ill-treatment motivated by homophobia.'¹³⁰ It will be interesting to see to what extent the application of Article 3 to peaceful assembly in public can be built upon in order to protect generally gay people in public space. In any event, *Identoba* can be seen as the start of a process whereby gay people have the right not to experience degrading public treatment because of their sexual orientation.

On a more global level, the United Nations has recently accepted that:

... members of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation or

¹²⁸ *Identoba and Others v Georgia* [2015] ECHR 537. The case concerned a peaceful demonstration to mark the International Day against Homophobia, which was violently disrupted by counter-demonstrators. The applicants who had participated in the march complained that the Georgian authorities had failed (i) to protect them from the counter-demonstrators and (ii) to effectively investigate the attack by establishing the discriminatory motive behind it.

¹²⁹ [n 128] [79]

¹³⁰ Paul Johnson, 'The judgment in *Identoba and Others v Georgia* is a triumph for LGBT rights in Europe' (*ECHR Sexual Orientation Blog*, 13 May 2015) <<http://echrso.blogspot.co.uk/2015/05/the-judgment-in-identoba-and-others-v.html>> accessed 15 May 2015

gender identity may often contribute to the process of the dehumanisation of the victim, which is often a necessary condition for torture and ill-treatment to take place.¹³¹

The UN's analysis should not only apply to states which have the most draconian anti-gay legislation. As stated in Chapter 1, it is not helpful to say to gay people in the UK, 'aren't you lucky you don't live in Uganda?' Socially constructed gender expectations permeate Western democracies just as they do elsewhere; the difference is only a matter of degree. Religious exemptions implicate the state in the perpetration and perpetuation of homophobia, through constructive delegation of state power to religious organisations and individuals. Conscientious objection, viewed in terms of power relations, is one example of the state's constructive delegation of (responsibility for enforcing) homophobia.

Concluding remarks

The concept of harm is typically discussed with reference to the moral limits of the criminal law. This chapter has sought to argue that, while equality law does not intervene only when harm (or offence) is found, consideration of harm is taken into account in matters of discrimination. The arguments presented in this thesis regarding equality law do not necessarily hinge on establishing the existence of harm, but nevertheless harm is still important when thinking about inequality. These concluding remarks aim to draw these arguments together and explain why the thesis engages with a discussion of harm in the context of equality law.

¹³¹ United Nations Human Rights Council, Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity: Report of the UN High Commissioner for Human Rights, 34

Harm is not necessary

In the context of goods and services provision, equality law has two purposes. First, the law aims to prevent service providers from discriminating against customers on the grounds of their protected characteristics. The second, broader purpose is to prevent service providers from acting upon their discriminatory views when they provide services to the general public. Service providers are thus prevented from refusing to provide a service, if their refusal is based on an adverse judgment about others because of their protected characteristics.

With regard to both purposes, the consequences of the discriminatory act – including whether harm is caused – are not necessary for a finding of discrimination. Equality law holds (direct) discrimination to be inherently wrong regardless of its actual consequences, because service providers are not allowed to put their discriminatory views into practice – whether or not harm (or offence) is caused. The purpose of equality law is broader than preventing harm or offence; its purpose is to prevent service providers (for example) from discriminating in the provision of services. This is clear when we consider that a refusal to provide a service because the service provider holds homophobic views is illegal, regardless of whether the customer is actually gay.

Harm is still important

Nevertheless, it remains important to recognise the harm that is caused by homophobia, and not just within the scope of the criminal law. As this thesis contends, homophobia finds expression in laws that have restricted gay people's access to full and equal citizenship. Notwithstanding the extension of equality law to include gay people in its embrace, religious exemptions remain. Allowing religious exemptions is itself an expression of homophobia at an institutional level; an expression that is based on the

hetero- and theo- norms that continue to pervade society. Therefore, while the overarching argument of this thesis does not hinge on establishing harm, harm is still relevant in both a real and a symbolic sense. Refusal of service on sexual orientation grounds is not simply an affront to the victim's dignity – it produces and perpetuates discursive effects on a societal level.

This chapter has characterised 'homophobia' as encompassing a range of negative attitudes and behaviours towards gay people, expressed through critical or hostile words or actions from distaste or disapproval, through discrimination, to verbal and physical violence. It has argued that all these expressions of homophobia constitute harm. Homophobia can be both individual and institutional; indeed, as the chapter has demonstrated, in many countries there is a strong correlation between the two. The chapter acknowledges that much of this institutional homophobia is expressed through the mechanism of the criminal law, with private consensual acts being illegal in over 75 countries, some of which impose the death penalty on those caught. However, this chapter also highlights how some institutional homophobia operates outside the criminal law, but nonetheless contributes to an environment which compromises or limits the sexual citizenship of gay people. This restriction on citizenship also represents harm. The Human Rights Watch and ILGA reports cited earlier suggest a link between homophobic laws – including those outside the criminal framework – and individual acts or expressions of homophobia. Moreover, the review of mental health issues suffered by LGB people in England (also cited earlier in this chapter) found that discrimination is likely to be at least partly responsible for the higher rates of mental ill-health observed in LGB people.

These are real harms which do need to be recognised in the context of equality law, not least to counter the arguments put forward by religious conservatives that gay people now have 'enough' equality – and that, indeed, the pendulum has swung too far the other way,

so that the religious conscience is now ‘closeted’ instead of the gay person. There is also the issue of symbolic harm to consider. A legal regime concerned with equality needs to recognise where the law compromises equal citizenship by legitimising homophobia through religious exemptions. Symbolic harm is no more necessary for a finding of discrimination than real harm, but it remains important to recognise its role with reference to individual and institutional homophobia. If, as is argued, the state has a responsibility to treat its citizens equally, and to ensure their dignity, safety and security, it must pay attention to both the ‘symbolic meanings attaching to social practices and the symbolism of its own pronouncements and silences’.¹³² This point relates back to Goodrich’s concern with “who speaks?” and with Foucault’s “five questions”, which underpin the research framework for this thesis.¹³³

¹³² [n 132] Elisabeth Boetzkes, ‘Symbolic Harm and Reproductive Practices’ in *Law and Medicine: Current Legal Issues Vol 3* (Oxford University Press, 2000) 327-340, 327. Here the author applies the concept of symbolic harm to ethical issues in medicine. This thesis argues in favour of a similar recognition in equality law that symbolic harm is important, even in the absence of actual, physical harm.

¹³³ See Chapter 3

CHAPTER 7: ‘CAKE OR DEATH?’¹³⁴ CONSCIENCE, CLASS AND CITIZENSHIP

*People imagine that if you say ‘Oh, he’s a homophobe’ that he’s a horrible monster who goes around beating up gays. You know that’s not the way it is. Homophobia can be very subtle... What it boils down to is, if you’re going to argue that gay people need to be treated in any way differently than everybody else or should be in anyway less, or their relationships should be in anyway less, then I’m sorry – yes, you are a homophobe.*¹³⁵

This chapter undertakes a critique of the most recent legal conflict between religious expression and sexual orientation: the Ashers Bakery case.¹³⁶ It aims to go beyond the rights-based arguments around religious conscientious objection and freedom of expression that have hitherto characterised the debate around this case. The case itself concerns gay people as citizens in a consumer, capitalist society, and the extent to which they are able to participate – as gay people – in the quotidian activities of everyday life without encountering faith-based homophobic resistance. The chapter contends that class and socio-economic status have a direct effect on access to full citizenship in a consumer-oriented society.

This critique examines the concepts of both class and citizenship through a Foucaultian-informed, Queer lens, and aims to show why liberal rights discourse blurs the issues that still prevent lesbians and gay men participating fully in public space. Using the case as a springboard for discussion, the chapter restates and refines the argument that conscientious

¹³⁴ ‘Cake or death?’ is a line from a satirical sketch by the comedian Eddie Izzard, in which he explains how Church of England fundamentalism would be unlikely, as it would involve little more than the dictum, ‘You must have tea and cake with the vicar or you die!’ <<https://www.youtube.com/watch?v=rMMHUzm22oE>> accessed 3 March 2016

¹³⁵ <http://www.broadsheet.ie/2014/01/16/wisdom-is-bliss/> Transcript of interview with drag artist and LGBT+ campaigner Panti Bliss (Rory O’Neil) (accessed 28 January 2015)

¹³⁶ *Lee v Ashers Baking Co Ltd & McArthur & McArthur* [2015] NICty2

objection operates, in terms of power relations, as a homophobic weapon cloaked in the garb of religious equality rights. It adds a further layer of analysis by arguing that social class operates as an additional limitation on lesbian and gay citizenship. The refusal to provide goods or services on the grounds of religious conscience harms particularly those lesbians and gay men who are less economically privileged and, as a consequence, have fewer consumer choices. Not only are working-class¹³⁷ non-heterosexuals particularly vulnerable as they walk down the high street,¹³⁸ they can be vulnerable even as the bell chimes on the shop door.

This chapter is comprised of three parts. Part One analyses the judgment in the *Ashers* case, in the context of the increasing call for conscientious objection to be accommodated in equality law – and in particular the call by Northern Ireland’s Democratic Unionist Party (DUP) for a ‘conscience clause’. Part Two suggests how Foucault’s concept of pastoral power can inform a Queer critique of the case. Finally, Part Three highlights the commercial and consumerist terrain in which this latest conflict between religion and sexual orientation is being played out. It argues for a better integration of social class into Queer theory, because social class has a bearing on access to participation in society.

Why does class matter to sexual orientation equality? How does an understanding of class relate to Queer theory?

Equality legislation in general glosses over structural inequality in favour of individuals who possess certain protected characteristics. The European Convention on Human Rights makes no mention of socio-economic disadvantage. The Equality Act 2010 does not recognise economic marginalisation as a protected characteristic. Section 1 of the Act

¹³⁷ See the discussion on class definitions later in this chapter.

¹³⁸ Corcoran et al (2015) ‘Hate Crime, England and Wales, 2014/15’ Home Office Statistical Bulletin 05/15, 8. For further discussion on homophobia as harm, see Chapter 6.

simply requires public bodies, when making strategic decisions, to ‘*have due regard to the desirability*’ of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage’. This duty was aimed at reducing the gap between rich and poor, and ensuring ‘that public bodies systematically and strategically take account of people who are poor and disadvantaged’.¹³⁹ As the Solicitor General observed, ‘poverty and powerlessness make it much harder to battle with discrimination and discrimination itself can undoubtedly generate poverty and powerlessness’.¹⁴⁰ The Declaration of Principles on Equality, drawn up by the Equal Rights Trust, contains the principle that ‘as poverty may be both a cause and a consequence of discrimination, measures to alleviate poverty should be co-ordinated with measures to combat discrimination, in pursuit of *full and effective equality*’.¹⁴¹ The provision in Section 1 of the Act was opposed by the Conservative Party (then in opposition), because ‘the remedies and powers to prevent discrimination are quite different from solutions to socio-economic disadvantage’.¹⁴²

Section 1 was never brought into force by the Coalition government of 2010-2015, and it is highly unlikely to be given effect by the current Conservative government, which is pursuing a programme of ideologically-driven decimation of state-funded public services, in favour of privatisation and voluntarisation. It can thus be argued that we should be somewhat suspicious of the government’s supportive stance on sexual orientation equality. It represents a distraction from the government’s war on public spending, because ‘the primary goal of the political elite is to starve the public sector to death’.¹⁴³ Gay rights do

¹³⁹ House of Lords debates, 15 December 2009 col 1407

¹⁴⁰ Public Bill Committee (Equality Bill) 6th sitting, 11 June 2009, col 156

¹⁴¹ *Declaration of Principles of Equality* (Equal Rights Trust, 2008), Principle 14

¹⁴² Public Bill Committee (Equality Bill) 5th sitting, 11 June 2009, col 129

¹⁴³ John D’Emilio, ‘Creating Change’. *The Scholar and Feminist Online*, issue 10.1-10.2 ‘A New Queer Agenda’ Fall 2011/Spring 2012 <<http://sfonline.barnard.edu/a-new-queer-agenda/creating-change/>> accessed 29 July 2015

not cost ‘the taxpayer’ money, so they are acceptable to a government whose main concern is to extinguish demands made on the state through public provision. The government’s LGBT-friendly image can be contrasted with its ideological commitment to austerity and a small state. The government’s unwillingness to allocate state resources to ‘welfare’ (in its broad sense) has heralded an increase in voluntary and charity provision. This has, in turn, provided opportunities for faith groups to be directly involved in service provision, providing more scope for religious influence over working-class, poor and disabled people. The discourse of ‘gentrified gays’ can be contrasted with the experience of average gay people who want to be able to participate in average activities such as booking hotel rooms and buying cakes. However, ‘conscience’ discourse threatens to bring about a re-emergence of the closet for gay people. Eddie Izzard’s comedy ‘cake or death’ sketch takes on a new significance if we appreciate that the closet renders gay people as less than citizens – as ‘socially dead’.¹⁴⁴

Part One: the Ashers Bakery case

Ashers is a Christian-owned bakery chain in Northern Ireland, employing approximately 80 staff. It does not operate as a religious organisation but as a business for profit.¹⁴⁵ In 2014, one of its branches accepted (but then refused to fulfil) an order placed by a returning customer, Gareth Lee, for a cake bearing a slogan in favour of same-sex marriage alongside an image of the Sesame Street characters Bert and Ernie. Lee is a member of a voluntary organization called QueerSpace, which supports LGBT people in Northern Ireland. QueerSpace ‘seeks to increase visibility of the LGBT community in a positive manner and to counteract the disregard and negative images presented to the general public

¹⁴⁴ M Blasius, *Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic* (Temple University Press 1994), 172

¹⁴⁵ [n 3] [12] The company’s Memorandum and Articles of Association contain no religious objectives.

over the past centuries.’¹⁴⁶ The Northern Ireland Assembly had recently rejected (for the third time) the introduction of same-sex marriage, this time by a narrow margin, which was felt to be encouraging. Mr Lee wanted the cake made for an event marking anti-homophobia week and noting the slow but sure momentum towards same-sex marriage. Having bought goods from Ashers previously, and seen a leaflet advertising the service, he knew that he could have a cake there incorporating his own graphic image.

The bakery’s ultimate refusal to bake the cake Lee had ordered was, they said, grounded in a religious conscientious objection to any change in the traditional view of marriage as being between one man and one woman. The Equality Commission subsequently began proceedings against Ashers for contravening anti-discrimination legislation.¹⁴⁷ The bakery itself was supported by the Christian Institute,¹⁴⁸ which had placed advertisements in the Belfast press seeking donations in order to contest the proceedings. Their choice of words is revealing: readers are told that the ‘taxpayer-funded Equality Commission’ is taking the bakery to court ‘for upholding marriage’, and the bakery’s owners are, like other Christians, ‘facing difficulties for holding to their religious beliefs in an increasingly secular society’.¹⁴⁹ A small business is thereby elevated to the position of ‘upholding marriage’ (on whose behalf it is not clear) and, echoing the discourses deployed in the *Clearing the Ground* report,¹⁵⁰ religious conscientious objectors are painted as lonely stalwarts, bravely standing up to increasing challenges from a secular state. Furthermore,

¹⁴⁶ [n 3] [3]

¹⁴⁷ The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 and/or the Fair Employment and Treatment (Northern Ireland) Order 1998

¹⁴⁸ The Christian Institute has a long history of campaigning against the extension of rights for lesbians and gay men, including the repeal of Section 28, the equal age of consent, same-sex adoption, civil partnerships, the Equality Act, and the Same-Sex Marriage Act.

¹⁴⁹ Lindsay Fergus, ‘Gay marriage cake: Christian Institute seeks donations for Ashers Bakery legal battle’ *Belfast Telegraph* <<http://www.belfasttelegraph.co.uk/news/northern-ireland/gay-marriage-cake-christian-institute-seeks-donations-for-ashers-bakery-legal-battle-30952360.html>> (Belfast, 31 January 2015) accessed 7 September 2015

¹⁵⁰ Christians in Parliament, ‘Clearing the Ground inquiry: Preliminary Report into the freedom of Christians in the UK’ (February 2012) <<http://www.eauk.org/current-affairs/publications/upload/Clearing-the-ground.pdf>> See Chapter 5 for a full analysis of the report.

the Christian Institute's reminder to readers that the Equality Commission is publicly funded feeds into the contemporary austerity-driven discourse concerning the need to curb public spending.

Daniel McArthur of Ashers was reported in the *Belfast Telegraph* as saying 'We just can't believe that they're serious about this, that they're going to spend money taking us to court because we didn't make a cake. People are surprised that despite us being a small family business and making our principles clear that they are still commencing court proceedings.'¹⁵¹ As these words suggest, the case can be said to have a 'superficial appeal'¹⁵² because people generally do not like to feel forced by law to deal with people that they would prefer to avoid. However, equality law has chosen to protect certain characteristics so that historically oppressed groups can conduct their lives without facing barriers that others do not have to face. Gay people and other social groups have historically suffered prejudice, stigmatisation and discriminatory treatment from people who would prefer not to deal with them. This is why Lady Hale said, in the course of her judgment in *Bull*,

Homosexuals... were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognised... But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world.¹⁵³

¹⁵¹ Claire Williamson, 'Gay cake: DUP MPs launch petition in support of Ashers bakery in Newtownabbey' (*Belfast Telegraph*, 13 November 2014) <<http://www.belfasttelegraph.co.uk/news/northern-ireland/gay-cake-dup-mps-launch-petition-in-support-of-ashers-bakery-in-newtownabbey-30742585.html>> accessed 16 February 2016

¹⁵² Colin Murray, 'Ashers Bakery loses "gay cake" discrimination case' (Human Rights in Ireland blog, 19 May 2015) <<http://humanrights.ie/civil-liberties/ashers-bakery-loses-gay-cake-discrimination-case/>> accessed 15 February 2016. This will be discussed further later in the Chapter.

¹⁵³ *Bull and another v Hall and another* [2013] UKSC 73 [52-3]

In the present case, Gareth Lee wanted to buy a cake for an event, paying the advertised price that the bakery charged for printing an image on it. The leaflet advertising the cake-printing service contained no limitation to the graphics that could be applied.¹⁵⁴ Although same-sex marriage is not (yet) legal in Northern Ireland, campaigning for it is not unlawful, and it appears that the requested graphic did not contravene any of Ashers' terms and conditions. Yet it seems that the bakery's management preferred to disregard "earthly" law in favour of what they understood to be a higher law: 'We consider that it is necessary as Christians to have a clear conscience before God... we must live out our faith in our words and deeds and... it would be sinful to act or speak contrary to God's law.'¹⁵⁵ Further, as Christians, they believed that the business 'must be run by God's wishes'.¹⁵⁶ On the particular matter of same-sex marriage, the defendants stated:

... the only divinely ordained sexual relationship is that between a man and a woman within the bonds of matrimony... No other form of marriage is permissible according to God's law... according to God's law, homosexual relations are sinful....¹⁵⁷

However, it appears that their god's legal wishes are not completely clear. Mrs McArthur, who originally accepted the order from Mr Lee, had discussed the issue with her husband that evening. Mr McArthur 'felt differently than his wife at the time and might have made the cake but, over the weekend, he spent one or two days wrestling with the issue in his heart and mind and came to the same view as his wife that the cake could not be made.'¹⁵⁸ It can be said that such mental and emotional struggle is an inherent part of religious faith and the search for spiritual truth and meaning. Indeed, this argument is a key aspect of the

154 [n 3] [20]

155 [n 3] [14]

156 [n 3] [22]

157 [n 3] [15]

158 [n 3] [26]

view that the religious conscience is a unique burden that must be respected in (earthly) law, because religious believers may not experience themselves as having any choice over what their conscience compels them to do. On the other hand, it can be argued that religious believers should themselves bear the cost of their religious commitments; the faithful should take responsibility for situations they might find themselves in, outside of their place of worship. The argument from choice has been discussed in Chapter 5, but it is worth restating here that – as the McArthurs have shown – there is room for ‘epistemic discretion’ in religious questions, and indeed this is the very idea behind the notion of freedom of religious belief.¹⁵⁹

Mr Lee said in evidence that, as a middle-aged gay man he was no stranger to homophobia, but Ashers’ ‘blatant refusal of a service’ made him feel like ‘a second-class citizen’:

It is not at all nice to think that a business will discriminate in the way that they provide services to me because I am gay or because I have political views about the need for legislation to support gay marriage or because I did not share their religious views... I was not asking the Defendants to share or support my perceived political views on gay marriage... I was simply asking them to provide me with the service they advertise in their shops.¹⁶⁰

This is the crux of the issue. Ashers’ refusal of service to the plaintiff not only made him feel like a second-class citizen, it actually *rendered* him a second-class citizen. This is an example of how ‘performatives’ actually do perform what they say; the heteronormative attitude displayed by the bakery proprietor had the effect of making the customer an

¹⁵⁹ “Freedom of religion” makes more sense to the ear than “freedom of race”, for example. For a detailed discussion, see Peter Jones, ‘Paying for another’s belief: the law on indirect religious discrimination’ in *Religion and Law* (Theos, 2012), 43-50. See also the judgment of Laws LJ in *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 771 [23]. Laws LJ’s judgment was also cited in *Ashers* (n xx) [79]

¹⁶⁰ [n 3] [11]

‘other’, someone whose request could be denied.¹⁶¹ It is important to recognise that, for a gay person, feeling able to campaign for equal marriage (and celebrate progress in the move towards equality) is part of what it means to be a citizen in a democratic society.¹⁶²

As Laws LJ stated in *McFarlane*:

The precepts of any one religion... cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be *less than citizens*; and our constitution would be on the way to a theocracy... The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.¹⁶³

In *McFarlane*, Laws LJ provided clear justification for the primacy of secular law over theocratic law, grounded in the importance of equal citizenship. This is a clear statement of values and of the law’s role in a liberal, secular democracy. However, Laws LJ retreated from categorising religious distaste for homosexuality as homophobia:

The judges have never, so far as I know, sought to equate the condemnation by some Christians of homosexuality on religious grounds with homophobia, or to regard that position as "disreputable". Nor have they likened Christians to bigots. They administer the law in accordance with the judicial oath: without fear or favour, affection or ill-will.¹⁶⁴

The judge’s words here may be understood as placatory, intended to reassure the appellants that all parties are subject to the neutral gaze of the rule of law. The liberal legal theorist,

¹⁶¹ For further discussion on the performance of gender, for example, see Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990)

¹⁶² This is the case even though not all LGBT people are in favour of same-sex marriage. For further discussion, see for example Ryan Conrad (ed), *Against Equality: Queer Critiques of Gay Marriage* (Against Equality Publishing Collective, 2010).

¹⁶³ *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 771 [24] (emphasis added)

¹⁶⁴ [n 29] [18] This statement is made in response to the submissions made by Lord Carey, former Archbishop of Canterbury, at [17]

Ronald Dworkin, argued similarly that the preferences and beliefs of legal actors were neutralised by such principles. Dworkin did, however, acknowledge that legal interpretation is essentially political: ‘There can be no useful interpretation... that is independent of some theory about what political equality is and how far equality is required by justice... reliance on political theory is not a corruption of interpretation but part of what interpretation means.’¹⁶⁵ It is regrettable that Laws LJ missed the opportunity to challenge the religious disavowal of homophobia. It is submitted that it would be more helpful – and more intellectually honest – if judges were generally clearer about their political values in the field of equality law. Lady Hale has alluded elsewhere to the difficulties judges face in discrimination cases, where they must tailor their reasoning to meet the requirements of anti-discrimination legislation:

Courts and tribunals have a natural eye for what they see as the merits of the case. If they think that there is a good reason for a difference in treatment they will try and find a reason why it is not unlawful. How much more satisfactory it would be... if there were to be a general defence of justification in discrimination law, so that courts and tribunals could get down to addressing the real issues – legitimate aim, rational connection, proportionality – rather than looking for technical distinctions which would mean that there was no discrimination at all.¹⁶⁶

Whenever a judgment is handed down in a discrimination case, any initial excitement usually peters away as it is read. The judgments are invariably technical and – save for the few pearls from the likes of Laws and Hale LJJ – lacking in any real analysis of what it is that equality law should be aiming to achieve.

¹⁶⁵ Ronald Dworkin, ‘Law as Interpretation’ (1982) *Critical Inquiry* 9(1) 179, 199

¹⁶⁶ Lady Hale, ‘The Conflict of Equalities’ Alison Weatherfield Memorial Lecture at the Employment Lawyers Association, 10 July 2013 <<https://www.supremecourt.uk/docs/speech-130710.pdf>> accessed 5 April 2016. Under the Equality Act 2010 direct discrimination can never be justified (s 13), whereas indirect discrimination can be, if it is a proportionate means of achieving a legitimate aim (s 19).

The Ashers Judgment

There are two limbs to Brownlie J's judgment: (i) the law on discrimination on grounds of sexual orientation¹⁶⁷ and (ii) the law on discrimination on grounds of political opinion.¹⁶⁸ These two limbs will be considered in turn in this Chapter, beginning with discrimination on grounds of sexual orientation.

a) Discrimination on grounds of sexual orientation

Ashers had maintained in their defence that making a cake with a "Support Gay Marriage" message upon it could be construed as their supporting gay marriage. However, as Brownlie J noted:

They were contracted on a commercial basis to bake and ice a cake with entirely lawful graphics and to be paid for it. The Plaintiff was not seeking support or endorsement. Whilst the graphics were contrary to their genuinely held religious beliefs, the provisions of the 1998 Order allow for no exceptions in these circumstances.¹⁶⁹

Moreover, such an occurrence was specifically mentioned by the Office of the First Minister and Deputy First Minister (OFMDFM) in a consultation response, following the enactment of the 2006 Regulations:

Where businesses are open to the public on a commercial basis, then they have to accept the public as it is constituted... In respect of "Christian businesses"... the Government is firmly of the view that any person or organization which opens a business to the public ... has to be prepared to accept the public as a whole no

¹⁶⁷ Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, Regulations 2, 3, 5, 16, 23 and 24

¹⁶⁸ Fair Employment and Treatment (Northern Ireland) Order 1998, Articles 2, 3, 28 and 31

¹⁶⁹ [n 3] [62]

matter how that public is constituted... These Regulations do not prohibit people from turning down business from any source, but they do protect people from having their sexual orientation used as the reason for turning the business down.”

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The judgment was heralded on the one side as ‘a good result for equality’¹⁷¹ and on the other as ‘a dark day for justice and religious freedom in Northern Ireland’.¹⁷²

Here it is worth noting what this brings up for me as a researcher who is, to paraphrase the comedian Dara O’Briain, an atheist, but an ethnically Catholic atheist.¹⁷³ As discussed later in this Chapter, the willingness of the researcher to understand her own situatedness within the topic is an important component of Queer theory. It is also worth noting that the framing of the case on the basis of religion versus sexual orientation¹⁷⁴ has been called into question by some. For example, it could be argued that the fact that a belief against same-sex marriage is grounded in religion is irrelevant to the decision not to provide goods and services, because an atheist might oppose same-sex marriage and refuse to bake such a cake on *political* grounds. Yet an ‘alarming trend’ has been detected ‘with the Christian Institute and Christian Concern to get this conflicting rights paradigm in the public imagination, even at the cost of justice for their clients’.¹⁷⁵ The activism of these organisations has already been highlighted,¹⁷⁶ and it does appear that political Christianity

170 Cited by Brownlie J in *Ashers* (n 7) [32]. See later in this Chapter for a discussion on people turning down business in other circumstances (xx-xx).

171 As tweeted by Sinn Féin MLA and Deputy First Minister Martin McGuinness, cited in Henry McDonald, ‘Northern Ireland bakers guilty of discrimination over gay marriage cake’ (*The Guardian*, 19 May 2015) <<http://www.theguardian.com/society/2015/may/19/northern-ireland-ashers-baking-company-guilty-discrimination-gay-marriage-cake>> accessed 16 February 2016

172 Traditional Unionist Voice leader, Jim Allister, cited in Henry McDonald (n 43)

173 Dara O’Briain interview - Laughter lines (*The Scotsman*, 21 November 2008) <<http://www.scotsman.com/lifestyle/dara-o-briain-interview-laughter-lines-1-1301444>> accessed 7 April 2016

174 [n 3] [14-15] set out the religious grounds for Ashers’ refusal to provide the cake that was requested.

175 Ian Paul, ‘The “Gay cake” ruling’ (Psephizo, 20 May 2015) <<http://www.psephizo.com/sexuality-2/the-gay-cake-ruling/>> accessed 15 February 2016

176 See Chapter 5

can be opportunistic in its support of various causes. However, as has been noted elsewhere, ‘the case, at its root, is about the ability to do the banal and ordinary things in life without these activities becoming the subject of public opprobrium’.¹⁷⁷

In this context, the words ‘Queer Space’ (the name of the organisation whose event the cake was for) take on a particular significance. This case is very much to do with religious objection to gay people visibly occupying space in society. Daniel McArthur, Ashers’ general manager, had argued that there had been no discrimination on sexual orientation grounds:

We’ve said from the start that our issue was with the message on the cake, not the customer and we didn’t know what the sexual orientation of Mr Lee was, and it wasn’t relevant either. We’ve always been happy to serve any customers that come into our shops.¹⁷⁸

Ashers’ management may indeed be happy to serve gay people in their outlets, but only, it seems, if they are not campaigning to take up more space than is deemed appropriate. This touches on the concept of citizenship – and sexual citizenship in particular – which was discussed in Chapter 2 and is also discussed in more detail later in this Chapter. For now, it is worth stating that a basic component of citizenship is ‘the right to access and use specific kinds of space within a given territory’.¹⁷⁹ People may be excluded as citizens ‘by virtue of the boundaries between particular types of spaces, which are sites for the exercise of power

177 Colin Murray, ‘Ashers Bakery loses “gay cake” discrimination case’ (Human Rights in Ireland blog, 19 May 2015) <<http://humanrights.ie/civil-liberties/ashers-bakery-loses-gay-cake-discrimination-case/>> accessed 15 February 2016

178 Henry McDonald, ‘Northern Ireland bakers guilty of discrimination over gay marriage cake’ (*The Guardian*, 19 May 2015) <<http://www.theguardian.com/society/2015/may/19/northern-ireland-ashers-baking-company-guilty-discrimination-gay-marriage-cake>> accessed 16 February 2016

179 Phil Hubbard, ‘Sex Zones: Intimacy, Citizenship and Public Space’ (2001) *Sexualities* 4(1), 51-71, 54

and the construction of difference'.¹⁸⁰ The "inappropriate" space, in the current context, is in the wedding ceremony. Married heterosexuals in Northern Ireland may (rightly or wrongly) view their wedding day as the 'best day of their lives', but it is nevertheless the case that heterosexual marriage is a banal and ordinary occurrence. Equal marriage campaigners would like same-sex marriage to be just as ordinary an event. Citizenship is not only about rights (and any correlative duties); it also involves an 'ideal of the citizen', ie the 'good citizen'.¹⁸¹ The view that marriage should remain as the union of one man and one woman is based on one particular interpretation of religious scripture and teaching linked to religious conservatism and its own determination of what constitutes a "good citizen".

Ashers' management belong to the Trinity Reformed Presbyterian Church, whose website illustrates how its views are aligned at the conservative end of the Christian spectrum. The Church calls homophobia 'the silver bullet of debate', designed to shut down anyone 'who just disagrees on principle with the practice of homosexuality'. It also re-enacts old tropes, arguing that accepting same-sex desire 'would seem to leave the door wide open to incest, polygamy, paedophilia, bestiality or whatever in an even more "enlightened" future'. Quoting Leviticus 20:13, we are told that 'If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them'. It is unclear from the article whether the Church itself calls for the death penalty for gay men; what is clear is that this Old Testament quote is reproduced without

180 Julianne Corboz, 'Sexuality, Citizenship and Sexual Rights' (2009) Australian Research Centre in Sex, Health and Society, 17. See also David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Polity Press, 2000); Hubbard, 2001 [n 46].

181 Steven Seidman, *Beyond the Closet: The Transformation of Gay and Lesbian Life* (Routledge, 2004), 188

comment, save for castigating the ‘homosexual lobby’ for taking umbrage at such statements.¹⁸²

The Church also engages in the ‘love the sinner; hate the sin’ trope: ‘It is not enough to simply condemn the practice of homosexuality. We must show love and compassion and seek to minister the grace of Christ to those enslaved by this particular sin.’ We are told that ‘homosexual practice is disgusting’, a ‘perversion’ and ‘an abomination’, but then again ‘so are many other sins that we commit every single day’ because, as human beings, ‘our whole self is rotten and needs to be redeemed.’¹⁸³ These are strong words. One might recall the view of humanity in the ‘state of nature’ (in the absence of government) summarised by Hobbes as ‘solitary, poor, nasty, brutish, and short.’¹⁸⁴ Whereas Hobbes’ solution lay in a civil society governed by a sovereign power, to whom individuals ceded authority in return for protection, and whose realm of control included the ecclesiastical, the Presbyterian Church’s solution is to cede all authority to its god. This is a key point. Political Christianity is not just concerned about protecting and/or extending religious rights and exemptions. Political Christianity is inherently and fundamentally opposed to positive law, as underlined by its adherence to what it believes is the order created by its god:

The customs and norms of culture may change and do change all the time, but the Creator’s pattern for humanity stays fixed. There is no way to get around a straightforward reading of the Bible on homosexuality (though many try to do so in

182 Sermon outline: ‘Is Christianity Homophobic?’ Trinity Reformed Presbyterian Church <<http://www.trinityrpc.com>> accessed 1 March 2016 To be fair to the Church, the article also castigates Christians for being ‘soft on heterosexual sin while making a huge fuss over homosexual sin’. Quoting Leviticus 20:10, we are reminded that ‘If a man commits adultery with the wife of his neighbor, both the adulterer and the adulteress shall surely be put to death.’

183 [n 48]

184 Thomas Hobbes, *Leviathan* (R Tuck ed) Cambridge University Press, 1996 [1651]), 72

all kinds of ingenious ways). We can't rewrite the Bible to suit ourselves. Only God has the right to tell us what we may and may not do with our bodies.¹⁸⁵

The anti-positive law theme is presented most clearly in the Church's statement of its doctrinal position:

... Reformed Presbyterians give prominence to the kingship of Christ. This has implications for human life in all its spheres. Areas which have received special attention... are worship and politics... The nation is under obligation, once admitted but now repudiated, to recognise Christ as her king and to govern all her affairs in accordance with his will.¹⁸⁶

The theme continues in a statement issued to the press on behalf of the church elders, which characterises 'bigamous and homosexual unions as breaches of God's purpose', meaning that Christians who countenance same-sex desire are necessarily 'opposing the teaching of their Master, Jesus Christ.' The language of freedom is also deployed as a counterpoint to what is perceived as increasing liberalization of sexual mores: 'the only true liberty is liberty based on the gospel of Jesus Christ the King. In so far as we lose the gospel, we lose liberty, and it will not quickly or easily be regained.'¹⁸⁷

However, political Christianity treats different "breaches" of "God's law" differently, in terms of what it asks earthly law to do. For example, in the course of the *Ashers* hearing, the court was presented with one of Ashers' promotional leaflets which advertised Hallowe'en cakes. Robin Allen QC, for the plaintiff, put it to the defendants that 'the

185 [n 48]

186 'What we Believe: Doctrinal Position' <<http://www.trinityrpc.com/beliefs/beliefs.php>> accessed 1 March 2016

187 'Church speaks out on same-sex marriage issue' (*Newtonabbey Times*, 11 November 2015) <<http://www.newtownabbeytoday.co.uk/news/your-community/church-news/church-speaks-out-on-same-sex-marriage-issue-1-7055866>> accessed 1 March 2016

Reformed Presbyterian Church does not approve of Halloween being celebrated at all and certainly doesn't approve of witches.' The defendant (Mr McArthur) responded that he had never thought about it and had never spoken to anyone in the Church about it.¹⁸⁸ While the Trinity Reformed Presbyterian Church has not stated its position on Hallowe'en on its website, another branch of the Reformed Presbyterian Church in Northern Ireland has described its own position, which we may take as analogous to Trinity's:

Halloween is not harmless fun, nor should it be treated as such. The Bible condemns all witchcraft... Halloween was pagan from the start and remains so today, despite any pseudo-christian gloss put on it. Christians should have no part in it and should ensure that their children do not either.¹⁸⁹

This thesis is less interested in Christianity's theology per se than in how it operates in the public sphere and in the 'strategies and tactics' it deploys.¹⁹⁰ Nevertheless, it is instructive to recognise how the theology is cherry-picked in order to achieve political aims. Christianity holds that we are all "broken" by virtue of being human and labouring under the stain of "original sin". Yet it appears that Ashers is happy to make Hallowe'en cakes and, presumably, cakes for unmarried heterosexual couples or even birthday cakes for the unrelentingly promiscuous.

188 'Ashers: McArthurs pressed on Halloween cakes' (*The Newsletter*, 27 March 2015) <<http://www.newsletter.co.uk/news/northern-ireland-news/ashers-mcarthurs-pressed-on-halloween-cakes-1-6660370>> accessed 3 March 2016

189 'Halloween - Harmless Fun or Dangerous Deception?' (*Loughbrickland Reformed Presbyterian Church*, 11 October 2014) <<http://www.loughbrickland.org/cms/index.php/articles/15-current-issues/27-halloween-harmless-fun-or-dangerous-deception>> accessed 1 March 2016

190 Michel Foucault, *Security, Territory, Population: Lectures at the College de France 1977-1978* (Palgrave MacMillan, 2009)

The Church of England was historically described as ‘the Tory party at prayer’.¹⁹¹ Today, the Presbyterian Church in Northern Ireland can be described as the Democratic Unionist Party at prayer. The DUP’s latest manifesto contains a pledge to continue opposing same-sex marriage. In a section lauding its record on ‘safer streets and smarter justice’, the manifesto states that the DUP has ‘stood by its commitment to family values and marriage and will continue to do so.’¹⁹² The DUP has a long history of homophobia. In 1977, the then leader, the Reverend Ian Paisley, launched the ‘Save Ulster from Sodomy’ campaign. Paisley was also the leader of the Free Presbyterian Church at the time. The campaign deployed both religious and political discourses focused on protecting ‘the people of Ulster’ from increasing freedoms being granted to homosexuals in England and Wales,¹⁹³ and from the influences of liberalism and secularism which he saw as undermining the Ulster people’s Christian beliefs and values. In a reflection of the anti-law nature of the church today, the campaign placed advertisements in newspapers to persuade readers that decriminalisation ‘can only bring God’s curse down upon our people’. As an example of the mechanics of political Christianity, the campaign engaged in outreach work with church attendees and thereby recruited 70,000 people.¹⁹⁴

Appeal

191 See for example John Anderson, ‘The Tory Party at Prayer? The Church of England and British Politics in the 1950s’ (2015) *Journal of Church and State* advance access <<http://dx.doi.org/10.1093/jcs/csu148>> accessed 7 April 2016

192 ‘Our Plan for Northern Ireland The DUP Manifesto for the 2016 Northern Ireland Assembly Election’, 20 <http://dev.mydup.com/images/uploads/publications/DUP_Manifesto_2016_v8_LR.pdf> accessed 7 April 2016

193 The Sexual Offences Act 1967 had partially decriminalised homosexuality in England and Wales, but the Act did not apply to Northern Ireland or Scotland. The Northern Ireland Gay Rights Association was established in 1975 to campaign for a similar law for Northern Ireland. “Save Ulster from Sodomy” was launched in response to the government’s proposal to consider law reform; the campaign was grounded in Paisley’s belief that homosexuality should not be legally acceptable in a state founded on Christian principles. Decriminalisation was eventually extended to Scotland in 1980 by virtue of the Criminal Justice (Scotland) Act 1980 and to Northern Ireland by the Homosexual Offences (Northern Ireland) Order 1982, following the ECtHR’s ruling in *Dudgeon v UK* 45 Eur. Ct. H.R. (ser. A) at 14 (1981) – see Chapter 4 for further discussion, xx-xx. Interestingly, Northern Ireland was the venue for the first registration of a civil partnership following the Civil Partnership Act 2004.

194 Marian Duggan, *Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland* (Ashgate Publishing, 2013), 53-54

The judgment in favour of Gareth Lee has been appealed by the bakery. Following a last-minute intervention by Northern Ireland's Attorney General, the appeal was been adjourned to May 2016. The Attorney General had sought permission to make representations concerning any potential conflict between Northern Ireland's equality legislation and the ECHR. The Court of Appeal also sat in March to hear legal argument on the compatibility of the regulations with European human rights law and to decide whether it raised a devolution point that would enable the Attorney to intervene in the case.¹⁹⁵ The McArthurs' appeal engages Article 10 ECHR (freedom of expression) in addition to Article 9 (freedom of religion); the appellants argued that the business should not be compelled to express a view contrary to its managements' beliefs.¹⁹⁶ The deployment of Article 10 is a means of circumventing the position that a business cannot have religious beliefs.¹⁹⁷ Judgment has not been handed down at the time of writing, but if the appeal is allowed, the implications should be assessed in view of the proposed 'Conscience Clause' Bill in Northern Ireland, which is examined in the following section.

The Conscience Clause – 'making space' for homophobia

Unionist politicians in Northern Ireland have used the decision in *Ashers* as justification for seeking amendments to equality law to facilitate anti-gay discrimination on grounds of religious conscience. Paul Givan of the Democratic Unionist Party has consulted¹⁹⁸ on a Private Member's Bill to allow people with 'strongly held' religious beliefs to refuse to

¹⁹⁵ Frank Cranmer, 'Ashers Bakery appeal (aka 'the gay cake case') adjourned to 9 May' (Law & Religion UK, 3 February 2016) <<http://www.lawandreligionuk.com/2016/02/03/ashers-bakery-appeal-aka-the-gay-cake-case-adjourned-to-9-may/>> accessed 15 February 2016

¹⁹⁶ Joseph Patrick McCormick, 'Anti-gay bakery prepares to argue freedom of expression at appeal hearing' (*Pink News*, 18 January 2016) <<http://www.pinknews.co.uk/2016/01/18/anti-gay-bakery-prepares-to-argue-freedom-of-expression-at-appeal-hearing/>> accessed 18 February 2016

¹⁹⁷ See for example *Core Issues Trust v Transport for London and Another* [2014] EWCA Civ 34

¹⁹⁸ Paul Givan, 'Consultation on the Northern Ireland Freedom of Conscience Amendment Bill' (December 2014)

<http://dev.mydup.com/images/uploads/publications/Freedom_of_Conscience_Consultation_Document_Final.pdf> accessed 26 February 2016

provide services to lesbians and gay men. The Nationalist party, Sinn Féin, has stated its intention to block the Bill through a Petition of Concern if it were to reach the stage of a vote in the Northern Ireland parliament.¹⁹⁹ Nevertheless, it is worth examining the discursive strategies revealed in the consultation document, as they reveal the extent to which the mooted conscience clause has less to do with religious freedom and more to do with ensuring that homophobia is ever more firmly entrenched in legislation. Political Christianity may be anti-positive law, but this does not preclude it from deploying strategies and tactics that enable its followers to “have their cake and eat it”. According to Givan:

This clause will enhance equality legislation. Equality is about ensuring that everybody in society is allowed to live out their lives. We now are heading towards a community where it's not just about live and let live – people are now saying, ‘you need to affirm my particular lifestyle and if that goes against your conscience, you have to do that’. That's not equality; that's intolerance.

The characterisation of homosexuality as a ‘particular lifestyle’ is the latest in an attempt to downgrade sexual orientation to redress what is seen as a hierarchy of rights at operating at the expense of the religious conscience. Givan is supported by Northern Ireland's First Minister, Peter Robinson, whose address to delegates at the DUP conference included the following:

I have become increasingly alarmed at the uneven pitch upon which rights and equality issues are played out. More and more the balance is tipped against people of faith. This has been recently demonstrated by the treatment meted out to the Ashers Baking Company... The publicly-funded Equality Commission has

¹⁹⁹ Northern Ireland Act 1998, s 42: Any 30 MLAs can trigger a petition of concern; once signed, the legislation must receive a majority vote in both the Unionist and Nationalist designations.

launched an unjustified attack on a small Christian family business. This is simply bullying. I contend that the Equality Commission is seeking to use the Ashers case to add a further layer of restrictions on Christian behaviour and practice.²⁰⁰

The words ‘bullying’ and ‘attack’ are highly emotive and enable the bakery to be posited as a small and vulnerable victim of a monolithic state institution. However, the conscience clause proposal would allow religious believers to deny goods and services to people, where delivery of goods and services would promote or facilitate same-sex relations. LGBT activists such as The Rainbow Project²⁰¹ are campaigning against the proposed Bill, arguing that:

Restaurants could deny same sex couples a table as this could be facilitating same sex relations. A mortgage provider could deny a mortgage to a same sex couple as it would be facilitating same-sex relations. Hoteliers could deny a room to a same sex couple as it would be facilitating same-sex relations. The examples are countless.²⁰²

Amnesty International has also criticised the proposal.²⁰³ Its Northern Ireland Programme Director, Patrick Corrigan, has stated:

What is proposed is not a conscience clause, it is a discrimination clause. This is not about freedom of religion; this is about treating a section of our population as second-class citizens. This change to the law is not welcome and it is not needed.

²⁰⁰ <http://www.pinknews.co.uk/2014/11/23/northern-ireland-dup-to-introduce-bill-to-exempt-religious-people-from-equality-laws/> (accessed 1 February 2015)

²⁰¹ <http://www.rainbow-project.org/> (accessed 1 February 2015)

²⁰² John O’Doherty, Director of the Rainbow Project, quoted in <http://www.gaystarnews.com/article/northern-ireland-gay-activists-fight-bill-which-could-allow-gay-discrimination310115> (retrieved 1 February 2015)

²⁰³ <http://www.amnesty.org.uk/press-releases/northern-ireland-new-%E2%80%98conscience-clause%E2%80%99-would-allow-anti-gay-discrimination> (retrieved 1 February 2015)

The law already strikes a fair balance between the human right to freedom of religion and the human right not to suffer discrimination.²⁰⁴

The consultation document describes the Ashers litigation as its inspiration, because it had highlighted the ‘adverse effect’ of equality law on religious people in the realm of goods and services provision, and the need to ‘balance and protect rights’ through measures that would ‘enhance’ the 2006 Regulations in order to ‘protect religious service providers and those who want to access services in the context of a religious ethos’. The document (without a hint of irony) appeals to the ‘liberal democratic tradition’ of ensuring that laws do not have ‘adverse unintended consequences for minorities’. Thinking back to the idea of Queer Space, it is interesting how much talk of ‘space’ can be found the consultation document. The current law is charged with ‘eroding space for difference’; as a consequence, there is a need to make ‘space for rights that clash’ – and to make ‘space for providers’ and ‘space for the service user’ where rights do clash. The following section will highlight the arguments they have produced in this regard.

i. Space for difference

The consultation argues that, just as laws aimed at the majority can have ‘adverse unintended consequences’ on minorities, laws aimed at ‘one minority strand’ can have adverse effects on ‘other minority strands’.²⁰⁵ It states that the law is guilty of a ‘marked double-standard’ in failing to observe the ‘basic liberal democratic discipline’ of checking for this possibility. It is therefore necessary to ‘consider the impact of laws designed for one minority group on other minorities’, and make ‘reasonable accommodation’ where negative effects are discovered. According to the consultation document, the current law

²⁰⁴ <http://www.gaystarnews.com/article/northern-ireland-gay-activists-fight-bill-which-could-allow-gay-discrimination310115> (retrieved 1 February 2015)

²⁰⁵ [n 65], 3

fails to ‘provide proper differential treatment under the law’ and thus ‘completely undermines the integrity of equality law’. The law also ‘fails to recognise that the cause of equality is not best served by arming different equality strands with different pieces of legislation they can use to press against and damage each other.’ The document states that equality law should respect and make space for difference. The appeal to liberal standards is used to criticise equality law for failing to give due weight to people’s difference. However, in this case, the difference is not religious belief per se, but distaste for homosexuality that has been based on one interpretation of a creed.

ii. Space for rights that clash

The consultation calls for an urgent amendment to the ‘sexual orientation equality strand’ in goods and services provision, ‘so that it does not undermine another equality strand, religion’. This will be achieved by ‘enhancing’ the legislation – specifically with regard to sexual orientation – to ‘protect religious service providers and those who want to access services in the context of a religious ethos’.²⁰⁶ This represents the latest example of how religious conservatives are using the discourse of a ‘hierarchy of rights’ in order to preserve and extend their ability to discriminate on sexual orientation grounds.

iii. Space for providers

The current legislation is criticised in the consultation document for being ‘profoundly illiberal, effectively giving one strand the ability to make life exceptionally difficult for the other’. It states that is ‘patently absurd’ for ‘those opposed to creating appropriate space for people of faith’ to pretend that differential treatment ‘is not an important liberal democratic principle’ and to suggest that it effectively allows ‘some people to operate outside the law’.

²⁰⁶ [n 65], 4

The consultation argues that ‘different treatment under the law does not allow anyone to operate outside the law’, but in ‘certain tightly defined circumstances’ different treatment would ‘prevent unintended negative consequences’. These ‘circumstances’ are envisaged as those which involve ‘endorsing, promoting or facilitating a same-sex sexual relationship in violation of... faith identity’.²⁰⁷

This means that, for example, a Catholic adoption agency, a Muslim printer or an Evangelical photographer ‘would not be required by law to choose between’ placing a child with a same-sex couple, printing a book promoting same-sex relationships, or photographing a civil partnership ceremony respectively, or ‘losing his or her livelihood’. The document reassures such people that Bill would protect them from having to act ‘in violation of their faith identity’ by either ‘endorsing’, ‘promoting’ or ‘becoming complicit in celebrating’, same-sex relationships. However, in another example of disclaiming homophobia, the consultation is keen to emphasise that these ‘circumstances’ would *not* mean that an Evangelical grocer could refuse to sell apples to a gay man; that a Muslim printer could refuse to print a brochure for a lesbian cabinet maker; or that a Catholic photographer could refuse to photograph recipes made by a bisexual chef. It appears that something more is needed in order to endorse, promote or become complicit in celebrating same-sex relationships, but it is not entirely clear where the line is drawn. In any event, the effect of this is still to compromise homosexual access to participation in civil life, by positing same-sex relationships as something which should not be endorsed, promoted or celebrated.

²⁰⁷ [n 65], 4-5

iv. Space for the service user

The consultation argues that, if a religious provider of goods and services were required by law to provide a service that ‘endorsed or promoted a same-sex union, or in some sense facilitated a same-sex sexual relationship’, that provider would ‘be made complicit in affirming same-sex sexual relationships’.²⁰⁸ Furthermore, it states that because religious faith deals with ‘higher loyalties to God’, it is likely that religious people ‘confronted’ with such a choice ‘would rather lose their livelihood than be pressured by the state into violating their faith identity’. The document argues that this would have the effect of ‘eroding the availability of some goods and services in the context of the faith ethos in question’,²⁰⁹ which would disadvantage both service providers and service users.

In their response to the consultation, Amnesty International considered the proposals ‘to be in fundamental conflict with the purpose of hard-won anti-discrimination provisions in Northern Ireland.’²¹⁰ This argument echoes Lady Hale’s words in *Bull*²¹¹ regarding the role of law in redressing the historical legacy of discrimination against homosexuality, and which is the normative concern of this thesis. Amnesty also raises the issue of the rule of law, which is linked with the role of law and with the values that underpin the law. The rule of law requires, inter alia, clarity, certainty and compliance with international and human rights obligations.²¹² As Amnesty point out, the DUP’s vague proposals are unlikely to

²⁰⁸ [n 65], 6

²⁰⁹ The consultation gives the examples of an Evangelical guest house or a Catholic adoption agency.

²¹⁰ Amnesty International UK, ‘DUP Consultation on the Northern Ireland Freedom of Conscience Bill: Submission to the Democratic Unionist Party’ (February 2015), Introduction

²¹¹ *Bull v Hall* [2013] UKSC 73

²¹² Lord Bingham, ‘The Rule of Law’ (2007) Cambridge Law Journal 66(1), 67-85. Lord Bingham’s 8 sub-rules of the Rule of Law are: the law must be accessible and, so far as possible, be intelligible, clear and predictable; questions of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion; the law should apply equally to all, except to the extent that objective differences justify differentiation; the law must afford adequate protection of human rights; means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred, and

pass the ‘in accordance with the law’ test for a lawful interference with Article 8 ECHR. Should they happen to pass this test, it is doubtful that the proposals would be considered a proportionate means of achieving a legitimate aim.²¹³ Notwithstanding our ECHR obligations, the proposals fail to meet the rule of law’s criterion of certainty. As Amnesty asks, ‘What kind of “belief” can the service denier rely on? How far does it go? How strong must the religious conviction be?’²¹⁴

The following section deals with the second limb of Brownlie J’s judgment; that of discrimination on grounds of political opinion. The law relating to political opinion is particular to Northern Ireland and was designed to address the centuries of sectarianism and Nationalist oppression in the region, by preventing opposition to a political standpoint being a lawful basis for a business refusing to deal with an individual.

b) Discrimination on grounds of political opinion

This limb of the judgment has been subject to particular criticism. For example, LGBT and human rights campaigner Peter Tatchell originally supported the judgment, on grounds already mentioned: as a business (not a religious organisation), Ashers is required to provide its services without discrimination on religious or other grounds. A victory for Ashers ‘would have driven a coach and horses through the equality laws’, leading to a state of affairs ‘where anyone could claim the right to discriminate on the basis that they disagreed with another person’s beliefs’.²¹⁵ However, Tatchell subsequently changed his mind, stating that ‘the law suit against the bakery was well-intended. It sought to challenge

without exceeding the limits of such powers; judicial and other adjudicative procedures must be fair and independent; and there must be compliance by the state with its international law obligations.

213 Any interference with Article 8 must be necessary and be at the minimum possible level in order to achieve a legitimate aim.

214 [n 77], para 28. See also the Equality Commission for Northern Ireland, ‘Response to Private Member’s Consultation on NI Freedom of Conscience Amendment Bill (February 2015), para 1.9, 1.11 and 3.8

215 Cited in Henry McDonald, ‘Northern Ireland bakers guilty of discrimination over gay marriage cake’ (*The Guardian*, 19 May 2015) <<http://www.theguardian.com/society/2015/may/19/northern-ireland-ashers-baking-company-guilty-discrimination-gay-marriage-cake>> accessed 16 February 2016

homophobia. But it was a step too far.’²¹⁶ Unfortunately – and, I am certain, unintentionally – the words ‘a step too far’ echo the concerns of the Archbishop of York, John Sentamu, who argued that the protection of lesbians and gay men from discrimination in goods and services provision created a new hierarchy of rights: ‘Rather than levelling the playing field for those who suffer discrimination... this legislation effects a rearrangement of discriminatory attitudes and bias to overcompensate and skew the field the other way.’²¹⁷

The judge in *Ashers* held that service providers cannot rely on conscientious objection to refuse any ‘lawful’ message.²¹⁸ Tatchell is concerned that a refusal to acknowledge a politically-based conscientious objection would lead to, for example, Muslim printers being obliged to publish cartoons of Mohammed, or Jewish printers having to publish the words of a Holocaust denier, or gay bakers being compelled to make cakes adorned with homophobic slurs. Tatchell also raises the spectre of far-right extremists demanding that businesses enable the promotion of ‘bigoted messages’. He concludes that ‘it is an infringement of freedom to require businesses to aid the promotion of ideas to which they conscientiously object. Discrimination against people should be unlawful, but not against ideas.’²¹⁹ Some human rights lawyers have agreed with this view, suggesting that the courts should pose the following question in similar cases in the future:

216 Peter Tatchell, ‘I’ve changed my mind on the gay cake row. Here’s why.’ (*The Guardian*, 1 February 2016) <<http://www.theguardian.com/commentisfree/2016/feb/01/gay-cake-row-i-changed-my-mind-ashers-bakery-freedom-of-conscience-religion>> accessed 15 February 2016

217 John Sentamu, HL Debate, 21 March 2007, c 1309

218 [n 3], [62]

219 [n 84] Similar arguments have been raised by, for example: Ian Paul, ‘The “Gay cake” ruling’ (Psephizo, 20 May 2015) <<http://www.psephizo.com/sexuality-2/the-gay-cake-ruling/>> accessed 15 February 2016; Alasdair Henderson, ‘Conscience and cake’ (UK Human Rights Blog, 21 May 2015) <<http://ukhumanrightsblog.com/2015/05/21/conscience-and-cake/>> accessed 15 February 2016; and Neil Addison, ‘Ashers Bakery and the "Gay Cake"’ (Religion Law Blog, 19 May 2015) <<http://religionlaw.blogspot.co.uk/2015/05/ashhers-bakery-and-gay-cake.html>> accessed 15 February 2016

Would the service or product which you are being asked to provide involve promoting, supporting or participating in a cause you do not agree with? If yes, you should be able to refuse on grounds of conscience. If no, you should provide the product or service, regardless of who the customer is.²²⁰

It is submitted that this is the wrong question. Demanding goods or services from businesses (or individuals) in furtherance of hate speech would go beyond the legal protection of political opinion. Brownlie J made clear that there is no obligation to print a message that would be in breach of the criminal law.²²¹ The debate on same-sex marriage was a live one at the time the cake was ordered. It was not a matter of a gay man purposefully wanting to make a religious business owner feel uncomfortable. The debate over freedom of speech and where speech becomes hate speech is far too complex to be reduced to a matter of conscientious objection. Asking a printer to print a banner proclaiming “Bring Back Slavery!” would be hate speech, whether or not the printer’s forebears were dehumanised through slavery.

The debate has been suffocated by “whataboutery” – the practice of responding to a difficult problem by raising another difficult problem, in order to deflect attention from the

220 Alasdair Henderson, ‘Conscience and cake’ (UK Human Rights Blog, 21 May 2015)

<<http://ukhumanrightsblog.com/2015/05/21/conscience-and-cake/>> accessed 15 February 2016

221 See Public Order Act 1986, s 18; Criminal Justice and Public Order Act 1994, which inserted s 4A into the Public Order Act 1986, prohibiting anyone from causing alarm or distress; Racial and Religious Hatred Act 2006, which further amended the 1986 Act by adding Part 3A: ‘A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.’ Freedom of expression is protected by virtue of s 29J: ‘Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system’; Criminal Justice and Immigration Act 2008, which amended Part 3A of the 1986 Act, adding (for England and Wales) the offence of inciting hatred on the ground of sexual orientation. All Part 3 offences cover the use of words or behaviour or display of written material, publishing or distributing written material, the public performance of a play, distributing, showing or playing a recording, broadcasting or including a programme in a programme service, and possession of inflammatory material. In the circumstances of hatred based on religious belief or on sexual orientation, the relevant act must be threatening and not just abusive or insulting.

original issue.²²² It is necessary to consider how likely these “false flags” are to occur in practice. For example, would Islamophobes actually choose to give their money to Muslim-run businesses, with the sole aim of making the proprietors feel uncomfortable? Would Christian conservatives really want a gay bakery to produce anti-gay cupcakes? If Ashers’ management was concerned that their logo would be seen on the box, had they made the QueerSpace cake,²²³ would this not also apply to the Christian conservatives? The existing law already makes sufficient provision for the regulation of hatred; there is no justification for using conscience as a shield, not least because it becomes a weapon with which to exclude gay people.

There are other examples where political – not religious – opinion might influence the type of customers who are refused goods or services. A member of an autonomous workers’ printing collective has given permission to cite his comments²²⁴ on the condition that both he and the collective remain anonymous. The collective has, in the past, refused to undertake printing for the police, News International and the Liberal Democrats, and has declined an invitation to quote for a fracking company’s publicity materials. They have undertaken other politically or culturally sensitive projects, such as sadomasochistic erotica, but with some collective members refusing to participate. He argues that there may be a valid difference between an autonomous workers’ collective and a business that has the ‘huge privilege of limited liability’ such as Ashers, where the latter ‘should fulfil customer orders without discrimination’.²²⁵

However, Cooper acknowledges that demanding that employees comply with their employers’ instructions ‘seems hard to recognise as the rallying cry of a progressive

²²² <http://www.macmillandictionary.com/dictionary/british/whataboutery> accessed 8 April 2016

²²³ [n 3]

²²⁴ Discussion on 18 February 2016

²²⁵ [n 91]

state'.²²⁶ On the other hand, Ashers is a company with around 80 staff, only some of whom are Christian, and yet they made no attempt to have a non-objecting staff member print the "offending" image. This suggests that the objection is more to the business being seen to endorse the image on the cake, rather than to any individual objection suggestive of alienation. Furthermore, what of those individual choices and consciences of employees who might (including for religious or secular reasons) feel strongly against being made complicit in homophobia? In any event, as Cooper explains:

Equality's terrain, in terms of the right to discriminate, should not be the place where problems of alienation are legally and politically accommodated... Equality should not be the exception to alienation – the one context where you don't have to do something you'd rather not... Otherwise, the debate risks reinforcing the exceptional status of religious beliefs.²²⁷

The complexities of the relationship between conscience and choice and the constraints on choice and agency were touched upon in Chapters 5 and 6. We might also add the observations on freedom offered by the feminist existentialist Simone de Beauvoir.²²⁸ The existentialist emphasis on freedom is theoretically at odds with Foucault's approach, in that the former holds that humanity is 'condemned to be free',²²⁹ while the latter is more concerned with the contingencies of and constraints on human agency. Nevertheless, de Beauvoir offers an interesting analysis of why people might find it hard to relinquish values and ideas with which they are inculcated as children. She argues that people try to

226 Davina Cooper, 'Religious anti-gay refusal – valuing dissent without making it lawful' (*Oxford Human Rights Hub*, 22 July 2014) <<http://ohrh.law.ox.ac.uk/religious-anti-gay-refusal-valuing-dissent-without-making-it-lawful/>> accessed 6 March 2016

227 Davina Cooper, 'More than "the icing on the cake": Can conservative Christians legitimately refuse to create pro-gay messages?' (*social politics and stuff*, 26 May 2015) <<https://davinascooper.wordpress.com/2015/05/26/more-than-the-icing-on-the-cake-navigating-between-gay-equality-and-the-alienation-of-labour/>> accessed 6 March 2016

228 Simone de Beauvoir, *The Ethics of Ambiguity* (Citadel Press, 1948, 1976)

229 Jean-Paul Sartre, *Existentialism and Humanism* (tr Philip Mairet) (Methuen, 1948, 1973), 29

deny their freedom, because freedom can be uncomfortable. We begin this process of denial as children, by adopting the values of the adults around us (which can often be grounded in a religious creed or ethos). De Beauvoir terms this the attitude of ‘seriousness’, whereby we circumvent the anguish of freedom by believing that these ready-made values exist objectively. As we move beyond childhood, we continue to assume that we are not free, until we grow up and become the ‘serious man’, subordinating our freedom to these unconditioned values, thereby reverting to a kind of childhood. We act in bad faith when we refuse to recognise that we are able to choose our own values, and continue to abide by those ready-made values handed to us during childhood.

Drawing parallels between the ‘serious man’ and the religious conscientious objector does not mean that the religious believer is little more than a child. It *does* mean that the religious believer can be understood as someone who has chosen scripture as a refuge from the more challenging and disquieting task of engaging with the complexities and uncertainties of human existence – of which human sexuality is a core aspect.²³⁰ Freedom is terrifying, so this urge to seek refuge is understandable. However, it is not a basis upon which law should be founded. It is disingenuous to argue that a refusal to allow a ‘conscience clause’ forces religious objectors to compromise their authenticity. On the contrary, it can be argued that is bad faith – and thus inauthentic – to cling to values based on a particular interpretation of a particular ancient religious text, rather than to attempt to grapple with questions of life, love and death in the present day. A better solution might be to look at the values behind the objection, as discussed earlier in this thesis.²³¹

²³⁰ I must declare an interest here. I was raised as a Catholic, having grown up in an Irish immigrant working-class family. I began to question the values with which I had thus been inculcated at around the age of 11, when I found Catholic teaching at odds with female body sovereignty and with non-heterosexual sexuality. I progressed from these questions to a position which found the notion of an omnipotent, omnipresent creator nonsensical – a position I retain some 40 years later.

²³¹ See the discussion on conscience and values in Chapter 5.

Part Two: a Queer critique of conscience

Like Plummer (and plenty of others), I am ‘a bit of a humanist, a bit post-gay, a sort of a feminist, a little queer, a kind of a liberal, and seeing that much that is queer has the potential for an important radical change.’²³² Engaging in Queer critique involves navigating these tensions and questioning whether Queer is enough to achieve the desired change. It might be useful to begin this section with a summary of those aspects of Queer used in this chapter. In general, Queer undertakes a radical questioning of norms, particularly notions norms concerned with of gender and sexuality.²³³ Queer, insofar as it can be defined, includes ‘whatever is at odds with the normal, the legitimate, the dominant.’²³⁴ For the purposes of this thesis, Queer recognises the fluidity of all sexual categories, challenges the heterosexual/ homosexual binary and de-centres identity as a category. It also problematises mainstream or ‘corporate’ homosexuality. It asks me, as a researcher, to be critically self-aware. My take on Queer also seeks to align itself with particular political and ethical principles, ones which and to even welcome the tensions, recognising that ‘the contradictory messiness of social life [is] such that no category system can ever do it justice.’²³⁵ In the words of songwriter Leonard Cohen, ‘there is a crack in everything; that’s how the light gets in.’²³⁶ The tensions and gaps between liberal, humanist, Queer and Foucaultian approaches provide space for insight as to what is happening and what needs to change.

²³² Ken Plummer, ‘Critical humanism and queer theory: living with the tensions’ in Y Lincoln and N Denzin (eds) *The Sage Handbook of Qualitative Research* (3rd ed, Sage 2005)
<<http://kenplummer.com/publications/selected-writings-2/critical-humanism-and-queer-theory/>> accessed 5 March 2016

²³³ Cherry Smith, ‘What is this thing called queer?’ in Morton (ed) *The Material Queer: A LesBiGay Cultural Studies Reader* (Westview Press, 1996), 280

²³⁴ David Halperin, *Saint Foucault: A Hagiography* (1995), 62

²³⁵ [n 101]

²³⁶ Leonard Cohen, ‘Anthem’ from *The Future* (Columbia, 1992)

Foucault's analysis of 'pastoral power' provides useful insight when considering the discourses and power relations surrounding conscientious objection claims. Foucault's concept of pastoral power was introduced in Chapter 3. Foucault was interested in 'the technologies of individual domination, in the mode of action that an individual exercises upon himself by means of the technologies of the self',²³⁷ and pastoral power is one of these technologies of individual domination. The following section analyses how this individual domination – this experience of being a prisoner of conscience – is grounded in pastoral power. Recall that, according to Foucault, 'religious power... is pastoral power',²³⁸ and that religious power has four characteristics: detail; an 'infinite' or 'mystical calculus' which serves as a justification beyond time and history; a focus on the body; and a focus on confession.²³⁹ The 'infinite' provides a religious rationale distinct from the 'technical rationality' of earthly institutions, enabling the relations of power to be set up 'for the conquest of salvation'.²⁴⁰

The influence and operation of pastoral power is seen in the *Ashers* case and the surrounding legal and political context. For example, the idea of being bound by one's conscience to a higher law is rooted in religious/pastoral power. Furthermore, the metaphor of the shepherd and his flock²⁴¹ is inherent to pastoral power, and shows that it is fundamentally a power focused on salvation, much as the shepherd gathers together his flock and saves it from danger. This is reflected in the DUP's discourse, informed by the Free Presbyterian Church, during the "Save Ulster from Sodomy" campaign. For Foucault,

²³⁷ Luther H Martin, Huck Gutman and Patrick H Hutton (eds) *Technologies of the Self: A Seminar with Michel Foucault* (University of Massachusetts Press, 1988) cited in B Golder and P Fitzpatrick, *Foucault's Law* (Routledge, 2009), 111

²³⁸ Michel Foucault, *Security, Territory, Population. Lectures at the College de France 1977-8* (G Burchell trans) (Palgrave Macmillan, 2007), 205

²³⁹ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage, 1995 [1977]), 162

²⁴⁰ [n 106], 140, 162

²⁴¹ This metaphor, as part of pastoral power, was described in Chapter 3 as the precursor of 'governmentality'. See also [n 105], 124

‘salvation’ provides a technology of power based on a scale of ‘faults and merits’.²⁴² For the individual, the scale of ‘faults and merits becomes a process of ‘analytical identification’ grounded in the examination of the self.’²⁴³ The pastor and his flock are bound in a relationship whereby ‘the pastor must really take charge of and observe daily life in order to form a never-ending knowledge of the behaviour and conduct of the members of the flock he supervises’.²⁴⁴ The pastor’s concern with his flock necessarily includes guiding the thoughts of his flock – a procedure which involves the production and extraction of ‘a truth which binds one to the person who directs one’s conscience’.²⁴⁵ Foucault’s analysis helps to explain why the religious do not experience themselves as having a personal choice over the content of their conscience. It also reveals the earthly, discursive power relations at play, in contrast to instead of the “divine law” posited by the church.

The operation of pastoral power has implications for the provision of goods and services to gay people, as is demonstrated by the *Ashers* case. It also has implications for the welfare of gay people. Recent research has highlighted how public spending cuts have negatively affected LGBT people.²⁴⁶ LGBT research participants reported difficulty finding safe, LGBT-friendly accommodation, with local access to support and advice services.²⁴⁷ They experienced greater feelings of marginalisation and invisibility as specialist LGBT services and support disappeared. There was also a sense of de-prioritisation of LGBT-focused

²⁴² [n 105], 172

²⁴³ [n 105], 184

²⁴⁴ [n 105], 181

²⁴⁵ [n 105], 183

²⁴⁶ M Mitchell, K Beninger, N Rahim and S Arthur (2013) ‘Implications of austerity of LGBT people and services’, 5. <<http://www.natcen.ac.uk/media/205545/unison-lgbt-austerity-final-report.pdf>> accessed 29 July 2015

²⁴⁷ [n 113], 27. According to the Albert Kennedy Trust, LGBT youth are at a ‘significantly higher risk of exposure to a range of experiences that are associated with becoming homeless’: Wayne Bateman ‘LGBT Youth Homelessness: A National Scoping Exercise.’ January 2015: v. <https://dl.dropboxusercontent.com/u/9386852/AKT%20National%20Scoping%20Review.pdf> accessed 29 July 2015

services (due to the common misconception that there are no financially or socially disadvantaged LGBT people), exacerbated by a reluctance to access mainstream services for fear of homophobic prejudice.²⁴⁸

Participants expressed concern that the cuts would begin to have an effect on increased discrimination such as feeling unsafe on the streets, hate crime and homophobia. Fewer ‘non-scene’ LGBT-friendly spaces and support groups meant that some LGBT people worried that there was less opportunity for safe socialising. Overall, there was fear that LGBT needs were beginning to be seen as a luxury.²⁴⁹ The trade union Unison has also highlighted the impact of austerity cuts on LGBT people. They have reported problems finding accommodation where they could feel safe and that was LGBT-friendly. They experienced greater feelings of marginalisation and invisibility as specialist LGBT services and support disappeared. There was fear that progress made in challenging heterosexism and discrimination was being reversed, and that homophobia and transphobia were on the rise again.

Meanwhile, faith groups are now filling the gap in provision that had been occupied by the state until the financial crisis and subsequent onset of austerity. Churches, mosques, temples and synagogues provide £3bn pa of free social action work.²⁵⁰ Austerity is a central plank of the current government’s ideology and is grounded on a philosophical belief in the rolling back of state provision of services. This void is being filled by increasing levels of provision by religious groups, fuelling a rise in theonormativity and a potential resurgence of pastoral power. A study of over 7000 young people in England

²⁴⁸ [n 113], 9. This fear is not unsubstantiated: see for example the Stonewall report [n 115].

²⁴⁹ Natcen report, 2013: 28

²⁵⁰ Faith Action Audit, Cinnamon Network <<http://www.cinnamonnetwork.co.uk/wp-content/uploads/2015/05/Final-National-Report.pdf>> accessed 29 July 2015

found that LGBT youth were significantly more likely to report that they did not feel accepted within their community – particularly within religious organisations.²⁵¹

Tellingly, the Department for Communities and Local Government (DCLG) has announced a £400,000 programme to ‘strengthen faith institutions’. Funds will be granted to bid-winning charities to support the growth of ‘places of worship’ in Britain. Justifying its decision, the DCLG stated that ‘faith communities make a vital contribution to national life: they guide the moral outlook of many, inspire great numbers of people to public service and provide help to those in need.’²⁵² This funding decision appears grounded in the belief that religious organisations and people do more good for local communities than non-religious ones, and so are more deserving of public funds. Such a belief is, in turn, grounded in the theonormativity that permits the continuance of pastoral power.

Furthermore, a Christian organisation that aims to encourage gay people not to have sex has recently been granted charity status. Living Out says it encourages discussion of homosexuality ‘from a Biblical perspective’, requiring gay Christians to abstain from (gay) sex for life to avoid being seen as ‘sinful’. Living Out preaches that same-sex desire came about through Original Sin in the Garden of Eden, and that gay sex is ‘inconsistent’ with Christian teachings. Notwithstanding this, the Charity Commission reviewed its previous decision and concluded that the group was for the ‘public benefit’, because it was ‘concerned with promoting the wider Christian principles of unconditional love, compassion, acceptance and understanding, and a welcoming place in the Christian Church for same-sex attracted individuals who wish to stay true to their Christian faith.’²⁵³ Yet 10% of health and social care workers have observed colleagues expressing the belief that

²⁵¹ Albert Kennedy Trust [n 114]

²⁵² ‘Government promises £400,000 to help grow faith institutions’ (*British Humanist Association*, 18 February 2015) <<https://humanism.org.uk/2015/02/18/government-promises-40000-help-grow-faith-institutions/>> accessed 18 February 2016

²⁵³ [n 113]

LGBT patients can be cured of their sexualities; this figure rises to 22% in London.²⁵⁴

Homophobia is reportedly rife in the health and social care sector, with homophobic abuse almost a daily occurrence: ‘I was told I should be hanging from a tree by a nurse from Nigeria with strong religious beliefs’.

Those who are persuaded that conscience should be accommodated ought to consider the costs of such conscience that are borne by LGBT people in society.²⁵⁵ A recent study by Columbia University, of data from 1988 to 2008, examined whether mortality risk differed for LGB people who lived in communities with high or low levels of prejudice. The information on sexual orientation and community-level prejudice was linked longitudinally to mortality data via the National Death Index. The study found that gay people living in communities with high levels of anti-gay prejudice are expected to die 12 years earlier than their peers who live in more accepting environments. By the end of the study, 92% of LGB respondents living in low-prejudice communities were still alive, whereas only 78% of LGB respondents living in high-prejudice communities were still alive:

... these effects are independent of established risk factors for mortality, including household income, education, gender, ethnicity, and age, as well as the average income and education level of residents in the communities where the respondents lived... In fact, our results for prejudice were comparable to life expectancy

²⁵⁴ Catherine Somerville, *Unhealthy Attitudes: the treatment of LGBT people within health and social care services*, Stonewall and YouGov report <http://www.stonewall.org.uk/our-work/campaigns/unhealthy-attitudes> accessed 16 November 2015.

²⁵⁵ The issue of costs to LGBT citizens was raised in the Equality Commission for Northern Ireland’s ‘Response to Private Member’s Consultation on NI Freedom of Conscience Amendment Bill (February 2015), para 6 (financial costs, injury to feelings or distress, unnecessary legal action)

differences that have been observed between individuals with and without a high school education.²⁵⁶

In the UK, a recent report by the Equalities and Human Rights Commission revealed that 35,000 homophobic hate crimes go unreported each year. The report stated that 88% of LGBT people had experienced some form of hate crime leaving them emotionally or physically scarred. Just 14% had reported the latest hate crime to police.²⁵⁷ Other research illustrates the effect of social class on sexual self-expression. Being lower in social class is related to a decreased likelihood of describing oneself as gay or to being able to live in a 'safe' gay community.²⁵⁸ There is an unequal distribution of the gains of the LGBT movement, according to educational privilege, skin colour, where you live, and how gender-normative you are.²⁵⁹ This is why a discussion of class is important in the context of the increasing religious influence in service provision. The next section goes on to consider the relationship between social class and sexual citizenship.

Part three: social class and sexual citizenship

Sexuality, Class and Foucault

In his genealogy of sexuality, Foucault suggests that the working class had historically managed to escape the 'Christian technology of the flesh',²⁶⁰ which had hitherto been focused on the bourgeois classes. It was not until the nineteenth century, with the

²⁵⁶ David Baldash, 'Top University Study: Anti-Gay Prejudice Is Killing Gay People' (*The New Civil Rights Movement*, 17 February 2014) <<http://www.thenewcivilrightsmovement.com/top-university-study-anti-gay-prejudice-is-killing-gay-people/discrimination/2014/02/17/83300>> accessed 18 February 2016

²⁵⁷ University of Leicester Centre for Hate Studies 2015

²⁵⁸ Donald C Barrett and Lance M Pollack, 'Whose gay community? Social class, sexual self-expression, and gay community involvement' (2005) *The Sociological Quarterly* 46(3), 437-456, 451

²⁵⁹ John D'Emilio, 'Creating Change' (2012) *The Scholar and Feminist Online*, issue 10.1-10.2 'A New Queer Agenda' Fall 2011/Spring 2012 <<http://sfonline.barnard.edu/a-new-queer-agenda/creating-change/>> accessed 29 July 2015

²⁶⁰ Michel Foucault, *The History of Sexuality Vol 1: The Will to Knowledge* (Penguin, 1978), 121

‘development of the juridical and medical control of perversions’,²⁶¹ that the deployment of sexuality permeated through to the working class – not as a means of repression per se, but rather as a ‘new distribution of pleasures, discourses, truths and powers’, the aim of which was the strengthening of the ruling class and the forming of a ‘political ordering of life, not through an enslavement of others, but through an affirmation of self’.²⁶² Here, Foucault differentiates his approach from what might be called a “pure” class analysis of repression. However, he concludes ‘that there is a bourgeois sexuality, and that there are class sexualities. Or rather, that sexuality is originally, historically bourgeois, and that, in its successive shifts and transpositions, it induces specific class effects.’²⁶³

How we understand and experience this ‘new distribution of pleasures, discourses, truths and powers’ is shaped by the sociophysical environment in which we live.²⁶⁴ Relations of power, on a Foucaultian analysis, do not just involve the domination of others but also the extent to which some can take actions that others are denied on the grounds of race, class, age, disability and gender.²⁶⁵ Four modes of power are key to the Foucaultian analysis:²⁶⁶ ideology (hetero- and theo- normativities); force (how political Christianity justifies its claims for conscientious objection); discipline (how social interactions and institutions are ordered) and resources (wealth, rights and time – which help to determine class). The ‘mutually constitutive politics of class and sexuality’ have been forgotten in the current conflict between religion and sexual orientation rights claims. Any discussion of sexual

²⁶¹ [n 127], 122

²⁶² [n 127], 123

²⁶³ [n 127], 127. On the other hand, it can be argued that linking sexuality to the working class only from the nineteenth century onwards misses Foucault’s treatment of the ‘incorrigible individual’, or ‘individual who needed to be corrected’ – whom Foucault places at an earlier historical moment. These figures were connected to sexuality through the vice of masturbation, which helped account for the criminality of the “lower orders”. See Michel Foucault, *Abnormal: Lectures at the College de France 1974-1975* (Verso, 2016) and A Sharpe, *Foucault's Monsters and the Challenge of Law* (Routledge, 2010) Chapter 3.

²⁶⁴ Davina Cooper, *Power in Struggle: Feminism, Sexuality and the State* (Open University Press 1995), 17-18

²⁶⁵ [n 131] 20

²⁶⁶ [n 131], 21

citizenship, therefore, should be better ‘attuned to the impact that class has on the potential to benefit from rights claims’.²⁶⁷

It is clear that sexuality matters to rights claims and to citizenship. Yet class also matters to rights claims and to citizenship. LGB people in C2DE (lower socio-economic) groups are 50% more likely to experience sexuality-related bullying than those in ABC1 groups.²⁶⁸ A survey by the Office for National Statistics revealed a ‘dramatic variation across class and geography in the proportion of people identifying as gay’: 1.6% described themselves as gay overall (but 3.9% did not know or would not say). In London, this figure was 3.2%; in the North-East, it was a mere 1.1%. Among managerial and professional groups, the figure was 2.2%; in intermediate, routine, and /manual occupational groups, it dropped to 1.4%.²⁶⁹ Put simply, it is harder to be openly gay in areas and occupations that have a higher proportion of economically deprived people.

The myth of the gentrified gay

There is an assumption that the “gay (male) community” (such as it is) is middle-class. There is an associated hypothesis that the middle-class nature of the gay community requires economic and psychosocial resources that are not available to the working-class, which may limit the opportunities for working-class expressions of sexual orientation. As Valocchi and others argue, the preponderance of middle-class gays is partly due to the historic, economic, and social forces that facilitated the development of a middle-class (and white) gay movement, and partly due to the contemporary ‘gay lifestyle’ choices that

²⁶⁷ David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Polity Press, 2000), 144

²⁶⁸ Ruth Hunt and Sam Dick, *Serves You Right: Lesbian and gay people’s expectations of discrimination* (Stonewall, 2008).

²⁶⁹ Emily Dugan, ‘Young, middle-class Londoners most likely to be gay’ (*The Independent*, 7 October 2014)

require the residency, employment and consumption patterns of the middle class.²⁷⁰ The myth of the gentrified gay persists even within some sections of the Queer community.²⁷¹ However, those urban “bubbles” that did exist, such as Soho in London, are beginning to disappear as the process of gentrification forces them to burst.

For example, The Black Cap in Soho was one of London’s best-known LGBT pubs and drag venues, operating as a gay venue since the 1960s. It was recently closed by its corporate owners just a week after the local authority granted it the status of ‘asset of community value’, in recognition of it ‘furthering the social well-being or cultural, recreational or sporting interests of the local community’.²⁷² The venue had an important role as a community hub and meeting point for various support groups, particularly for older LGBT people and those from ethnic minorities; for hate crime outreach work; and as a venue for events, consultations and forums. The ‘community value’ status is supposed to give venues an added layer of protection from being sold and redeveloped. The owners had unsuccessfully sought local authority permission to redevelop the space above the venue three times since 2011, and subsequently put the freehold up for sale. The twin processes of gentrification and austerity have had an impact on where and how people live and work. It would be helpful to pause at this point and consider how these processes relate to social class. First, it is necessary to consider how class is defined for the purposes of this discussion.

270 Steve Valocchi, ‘The Class-Inflected Nature of Gay Identity,’ (1999) *Social Problems* 46(2), 207 See also Bell & Binnie [n 125], 437

271 See for example Aleardo Zanghellini, ‘Are Gay Rights Islamophobic? A Critique of Some Uses of the Concept of Homonationalism in Activism and Academia’ (2012) *Social & Legal Studies* 21(3) 357–374

²⁷² Loulla-Mae Eleftheriou-Smith, ‘London’s historic gay pub The Black Cap in Camden closed by owners a week after being awarded “asset of community value” status’ (*The Independent*, 14 April 2015) <<http://www.independent.co.uk/news/uk/home-news/londons-historic-gay-pub-the-black-cap-in-camden-closed-by-owners-a-week-after-being-awarded-asset-10176344.html>> accessed 8 April 2016

Modern capitalism and class structure

It can be argued that the traditional Marxist understanding of class is insufficient to address the more complex manner in which modern society is stratified. More than a century after Marx, Bourdieu²⁷³ identified three kinds of capital: economic capital (wealth and income); cultural capital (educational achievement and the capacity to participate in cultural goods), and social capital (contacts and connections). While there was some overlap between these kinds of capital, there were also differences. These differences enabled subtle distinctions to be drawn between people who possessed varying levels of each, revealing a more complex picture than the Marxist landscape of ownership of the means of production versus alienated labour.

The most recent research²⁷⁴ now posits the existence of seven social classes, ranging from an elite – rich in all types of capital – through to a ‘precariat’ with very low levels of capital, comprising some 15% of the population. The research concludes that only two of these seven classes conform to traditional understandings of ‘middle’ and ‘working’ classes. Further, some of the new classes have economic capital without cultural or social capital, while the ‘new affluent workers’ and the ‘emergent service workers’ (often the children of the traditional working class) enjoy economic and social capital without necessarily accessing ‘highbrow’ culture. Together, these findings ‘challenge the perception that the problem of social and cultural engagement is more marked at the lower levels of the class structure’, while maintaining the ‘ongoing salience of social class divisions in the stratification of British society.’²⁷⁵

273 Pierre Bourdieu, *Distinction* (Routledge, 1984)

274 Mike Savage et al, ‘A New Model of Social Class? Findings from the BBC’s Great British Class Survey Experiment’ (2013) *Sociology* 1-32

275 Savage [n 141], 28

However social class is understood, it is true that not all gay people have ever had the necessary disposable income to enjoy a work, social and economic life in any kind of protective gay bubble. This chapter has highlighted how gentrification and austerity have combined to threaten this protective zone, but in any event gay people should not have to rely solely on gay-run businesses for the provision of goods and services. Whether or not they can afford to have their same-sex wedding cake made by Choccywoccydoodah²⁷⁶ should not render gay people vulnerable to discrimination by high street cake shops. Yet those who occupy a less advantaged socio-economic position have much fewer choices in the goods and services they access, and are thus particularly vulnerable to high street homophobia.

Capitalism, Consumerism and Citizenship

In the course of this thesis, I have argued that the use of rights discourse has resulted in a zero-sum game when applied to the conflict between conservative religious expression and sexual orientation. Does this mean that the strategic deployment of rights discourse by the movement for gay equality should be replaced with “citizenship discourse”? The argument is not without its attractions. Indeed, part of the rationale for equality legislation is to remedy the historical oppression faced by particular sections of society; to bring them within the realm of citizenship by protecting them against discrimination on grounds of certain characteristics. If gay people are still subject to restrictions based on their sexual orientation, does reframing the discussion in terms of citizenship remedy this problem? Is it possible that consumer capitalism may contain within it the potential for resistance through increased gay cultural visibility, just as ‘reform capitalism’ provided an opportunity for earlier generations of gay people to challenge discrimination on an ‘equal

²⁷⁶ A gay-friendly bespoke cake maker based in Brighton <https://www.choccywoccydoodah.com/> accessed 8 April 2016

rights' basis?²⁷⁷ The gay rights movement of the 1970s was chiefly concerned with breaking out of the heteronormative closet and proclaiming a public, gay identity. Decades later, the visibility of gay people in the public, commercialised sphere offered businesses new marketing opportunities and led to the conflation of income with a 'valorized gay identity'.²⁷⁸

There are also wider questions. Recall that one aspect of this Queer critique is marked by antipathy towards the construction and marketisation of a purported "gay identity". With this in mind, one can ask to what extent has the movement for sexual orientation equality been appropriated by individualist consumerism? Has capitalism's fascination with 'the pink pound' become a tool for 'pinkwashing' genuine equality for lesbians and gay men?²⁷⁹ In 2014, Barclays Bank became the headline sponsor for London's annual Gay Pride event. Their website describes Pride as 'one of the largest annual events held in London along with the London Marathon and New Year Fireworks, and regularly attracts nearly a quarter of a million people.'²⁸⁰ The website includes glowing endorsements from the Chair of Pride in London, who speaks of Pride's 'levels of *consumer satisfaction* equal only to the Olympic and Paralympic Games'. He adds,

Research has shown that LGBT people are more inclined (52%) to spend with companies that they know to be supportive of their community... Pride in London offers companies a truly unique opportunity to secure incredibly strong brand

277 Steve Valocchi, 'The Class-Inflected Nature of Gay Identity,' (1999) *Social Problems* 46(2), 207, 220
278 [n 144], 220

279 'Pinkwashing' is a political or marketing strategy designed to present an image of gay-friendliness. See for example Sarah Schulman, 'Israel and "Pinkwashing"' *New York Times*
<http://www.nytimes.com/2011/11/23/opinion/pinkwashing-and-israels-use-of-gays-as-a-messaging-tool.html?_r=0> (22 November 2011) accessed 29 September 2015

280 'Barclays becomes headline sponsor of this year's Pride in London'(16 May 2014)
<<http://www.home.barclaycard/news/2014-9.html>> accessed 7 April 2016

presence and shows backing for diversity and equality to an audience of potentially millions of consumers.²⁸¹

Thus Pride – which originated as a response to police anti-gay and anti-trans brutality as part of the Stonewall riots – morphs from a means of protest into a tourist attraction and a means for business to secure their ‘brand presence’. What does this mean for social and sexual citizenship? Social citizenship, as Marshall highlighted, originated partly in capitalism’s move towards mass production and consumerism. In modern capitalism, citizens are characterised as ‘consumers with identities and lifestyles which are expressed through purchasing goods, communities and services’.²⁸² Consumer power is perceived by many as a basis for citizenship: ‘we pay our taxes, we should get our rights’.²⁸³ Richardson may be largely correct to suggest that lesbians and gay men are broadly accepted as consumer citizens – however, this acceptance stops when it meets conservative religious expression. Indeed, as discussed earlier, the (Christian) wedding ceremony is a vivid example of what Richardson calls the ‘hegemonic heterosexuality of citizenship’.²⁸⁴ This is where the challenge and the resistance discussed in Chapter 5 might prove particularly useful.

This chapter has sought to develop a class-informed, Foucaultian queer critique of the *Ashers* case and the subsequent call for a conscience clause to be added to equality law provision. It has argued that the current debate surrounding this latest conflict between religion and sexual orientation has been conducted in terms of sexuality-rights-based freedoms, to the detriment of an appreciation of class-based freedoms. Socio-economic

281 Michael Salter, quoted in ‘Barclays returns for headline sponsorship of Pride in London’ <<http://prideinlondon.org/about-us/news/2016/03/11/barclays-returns-for-headline-sponsorship-of-pride-in-london>> accessed 11 March 2016

282 Diane Richardson, ‘Constructing sexual citizenship: theorizing sexual rights’ (2000) *Critical Social Policy* 62, 83-84

283 Nicola Field, ‘Identity and the Lifestyle Market’ in Rosemary Hennessy and Chrys Ingraham (eds) *Materialist Feminism: A Reader in Class, Difference, and Women's Lives* (Routledge 1997), 259

284 [n 149]

disadvantage limits the choices that people have to access goods and services in a society undergoing both gentrification and austerity. If goods and service providers are permitted to use faith as grounds for refusing to deal with gay people on faith grounds, this renders gay people second-class citizens.

CHAPTER 8: DISCUSSION AND CONCLUSIONS

*Every time a public official refers to homosexuality as a disease, claims that homosexuals are not fit to be parents or draws parallels between homosexuality and child sexual abuse, they degrade gay men and lesbians... every time homosexuals are denied access to goods and services on the basis of their sexual orientation, prevented from assembling and associating in public or dismissed from their jobs, they experience degradation. Such degradation cultivates and sustains the social stigma of homosexuality and produces detrimental physical and mental effects upon individuals.*¹

Aim of the thesis

The task of this thesis was to identify and critically analyse the discourses and societal structures that compromise the belonging of non-heterosexuals. In doing so, it has highlighted the hetero- and theo- normativities that make it possible for religious conservatives to be able to make their claims for religious exemptions, and for law to grant them. The thesis has also argued that a society concerned with equality should challenge those parts of the law that compromise equal citizenship, dignity and security by legitimising heterosexism and homophobia. The effects of heteronormativity and homophobia on gay people were examined through concepts of harm: Mill's classic liberalism, Raz's value-based liberalism, Feinberg's analysis of harm to others, and Judith Jarvis Thomson's discussion on harm, distress and belief. Thereafter, Kendall Thomas's concept of constructive delegation of power in US anti-sodomy legislation was applied to UK equality law, in support of the argument that conscientious objection, viewed in terms of power relations, is an example of the state's constructive delegation of homophobia to individual religious conservatives. As well as hetero- and theo- normativities, the thesis

¹ Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013), 209

also cited the impact of class and socio-economic status on sexual citizenship, because it limits the inclusion of non-heterosexuals in the public sphere.

Research question

This thesis has considered the question, *how should law adjudicate conflicts between sexual orientation and the expression of religious belief*? It is a normative question, and the thesis has sought to address it as part of a much broader discussion about the sort of society we want and the role law should play in achieving it. The conflict between religion and sexual orientation raises many of the central questions of legal liberalism: freedom, equal rights, and harm. Therefore, it has been necessary to engage with the prevailing liberal philosophies, but also to move beyond them. Using Queer theory and a Foucaultian understanding of discourse, the constellation of liberal concerns regarding the conflict has been re-examined in the context of power relations. This has provided some useful insight into how the legal norms central to the conflict were created and sustained; how they have changed; and how they might further develop. The conflict is a microcosm of the wider relationship between law, religion and homosexuality, and the discursive techniques employed by legal actors – of which rights discourse plays a key role.

The role of rights discourse

The analysis of rights discourse in this thesis can be seen in some ways as a critique of rights itself. The conflict between religion and sexual orientation, as a result of their both being protected characteristics in the Equality Act, has seen rights discourse adopted by religious conservatives to support their claims for exemptions to the Act, so as to allow discrimination against others on grounds of sexuality. There is a temptation, then, to view rights discourse as fundamentally flawed and incapable of realising genuine equality for gay people. While there is some truth in this, it is not the whole picture. The thesis is not,

in the final analysis, a condemnation of rights discourse itself, but rather a critique of particular engagements with rights discourse. Nevertheless, the analysis of rights discourse also has implications for a broader critique of rights.

A significant limitation is the susceptibility of rights discourse to being used by religious conservatives to compromise non-heterosexual equality and citizenship. Moves towards secularism and gay equality over the past sixty years or so have encouraged religious conservatives to become strategic polyglots; they have largely discarded the language of morality and instead have appropriated the language of rights as a cloak to cover their continuing distaste for homosexuality. The charge of religious appropriation of rights discourse is not hyperbole; rather, it highlights the vulnerability of a rights discourse that is grounded in both universality and neutrality. This vulnerability can be revealed by interrogating first the idea of a universal rights-bearing individual, and second the law's neutral approach to determining what it means to bear these rights.

The myth of the "universal human"

Liberal theories see equality, freedom and autonomy as the basis of all other human rights. Humans have rights by virtue of being human – and all are considered equally human. They have rights to enable them to be the (partial) authors of their life. The nature and extent of all human rights in the liberal canon, including freedom of religion, are largely defined by equality and freedom, and by the concept of a "universal" human being. However, as the thesis has shown, the liberal rhetoric of universality largely ignores the situatedness of the human and the social construction of identity and difference. More specifically to the current issue, it does not account for the influence of heteronormativity and theonormativity as prisms through which the "universal subject" was historically

constructed, nor for the impact of class and socio-economic status on the ability of a rights-bearing individual to exercise these supposed universal rights.

Rights need to be grounded in something firmer than the idea of a “universal human”. The thesis has drawn on Queer theory to provide vital insights into the limitations of this traditional liberal idea. Recall Foucault’s observation in Chapter 3 that the exercise of power in Western societies ‘has always been formulated in terms of law.’² This power encompasses both judicial power (the enforcement of behavioural norms) and disciplinary power (the production of identity). Disciplinary power defines people through differences which become enshrined in law, so that ‘the law is brought in to manage otherness, but in doing so identities become reified’.³ Discipline as a mechanism of power regulates a society’s people through regulating their space, their time and their behaviour. Disciplinary power also operates to exclude and restrict those people who have been deemed to be “other than” the universal rights-bearing subject.

Chapter 2 described the construction of “the homosexual” as “other”, as a species that was excluded from the moral embrace of universal rights. Further, disciplinary power originated in the church – through the operation of pastoral power – before being adopted by other social institutions through the rise of the State and the development of ‘governmentality’.⁴ In Western society, therefore, it was the discipline of theonormativity – the acceptance of the role of religion in shaping behaviour – that begat the discipline of heteronormativity, dictating how men and women should be, physiologically, psychologically and sexually. These two norms have an historical connection that

² Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France* (G Burchell trans) (Palgrave Macmillan, 2007), 99

³ Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University press, 1995), 79-81

⁴ Foucault [n 2]. The term ‘governmentality’ now encompasses not only the administration of populations through the State, but also the techniques designed to govern people’s conduct at every level.

traditional liberal theory overlooks. This oversight is also manifested in liberalism's second limb: that of neutrality.

The myth of "liberal neutrality"

Liberalism strives to uphold human autonomy by adopting a neutral stance towards what constitutes a "good" life. However, this neutral approach has been a means by which religious conservatives have sought to argue that their religious conscience – which governs their conception of what is "good" – entitles them to claim exemptions from equality law. In most claims for exemption on grounds of religious conscience, both in the UK and in the European Court of Human Rights, the courts apply a mostly neutral rhetoric while almost completely ignoring the content of the relevant conscience. In these cases the courts avoid, almost completely, making any normative judgment about the content of the relevant conscience. It is true that such conservative judicial rhetoric can be deployed to justify progressive outcomes, as has been seen in the cases discussed in Chapter 4. Nevertheless, they do – even if unconsciously – make a (theo)normative judgment that religion is *prima facie* a valid basis for conscientious objection. Otherwise, they would not need to entertain the question at all. So the absence of a normative judgment does not mean that there are no norms being played out.

The content-neutral approach, then, is not truly neutral because it has been underpinned by a pervasive theonormativity. As discussed in Chapter 2, the public sphere is infused with religious values. Even in liberal states that profess to be secular, there remains a presumption that religion is a human good, as reflected in international and domestic Human Rights charters. This presumption can affect how the so-called "neutral" liberal state undertakes any supposedly neutral balancing exercise, and highlights how even content-neutral considerations are situated in a theonormative society. The courts'

emphasis on neutrality therefore sits uneasily amidst a prevalent theonormativity. Even the courts' recognition of the secular state⁵ is of limited value if their judgments then proceed on the illusory basis of neutrality.

Our society is not a theocracy, but it remains theonormative. A theonormative society can be persuaded to take religious arguments at face value because of the assumption that religion is special. The task then becomes to halt and then reverse the process. The state should recognise explicitly that the theo-norm should not dictate the terms of human equality. Further, the courts' interpretation of the Equality Act should recognise explicitly a hierarchy of rights, according to which principles of equality define the limits of religious freedom. However, the courts are reluctant to recognise this hierarchy because of its implications: it would puncture the theo-norm and require the liberal state to remove its mask of neutrality.

Perfectionist liberalism – a move away from “neutrality”

Raz's perfectionist liberal theory⁶ moves closer to the desired solution, by enabling a critique of the traditional content-neutral approach to the values underpinning conscientious objection claims to gay equality. A perfectionist moral stance would instead differentiate between two types of case: claims for exemption or accommodation that are directly based on intolerant, anti-liberal and ultimately illegitimate values; and claims that are based on values that may be irrational or misguided but are not necessarily unjustly intolerant or illegitimate. This latter type of case includes, for example, wearing religious dress or symbols in the workplace. Normative evaluation of the content of the conscientious objection offers a reason for not ever tolerating the first type of case – and for tolerating the second type only under certain conditions.

⁵ See for example *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 [24] (per Laws LJ)

⁶ Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986)

Advocates for gay equality and citizenship should point out that the state has already expressed a view that discrimination against gay people relies on illegitimate values.⁷ The Equality Act sets an underlying moral principle whereby direct discrimination because of a protected characteristic is indefensible, so freedom of religion ends when it expresses itself through unjust discrimination against others. Accordingly, in this case the state *has* set the limits of liberal tolerance by relying on content-based, rather than content-neutral, considerations. If the courts can be persuaded to make this clear in their judgments, it would be an important step towards enshrining genuine gay equality and citizenship.

Rights discourse has not, so far, proved fully amenable to religious appropriation; as discussed in Chapter 4, the courts have rejected religious conservatives' pleas for exemptions from equality law on repeated occasions. These are indeed important victories but, as the thesis has sought to demonstrate, the battle is not yet fully won. This is why it remains important to engage with rights discourse but to use that engagement to encourage a move away from neutrality, towards an explicit recognition that it is the content of the conscience that matters.

Rights and citizenship – Article 3 ECHR

A move away from neutrality in rights discourse would help confirm the status of gay people as equal, but something more is still needed in the canon of gay rights before full citizenship can be achieved. For example, as discussed in Chapter 6, the courts have not yet gone so far as to confirm that excluding gay people from equal treatment is a form of degrading treatment, contrary to ECHR Article 3. The Equality Act is one site of strategic engagement with rights; Article 3 ECHR provides another. Again, it demonstrates the

⁷ Indirect discrimination may be justified, however, if it is a proportionate means of achieving a legitimate aim: see Equality Act 2010 s 19

importance of engaging with rights discourse to protect and extend genuine gay citizenship.

Article 3 forbids the infliction of torture, or of inhuman or degrading treatment or punishment. The ECtHR has defined inhuman treatment as treatment which may ‘cause either actual bodily harm or intense physical or mental suffering’,⁸ and degrading treatment as that which can ‘arouse in the victim feelings of fear, anguish and inferiority capable of humiliating and debasing them’.⁹ An argument can be made that discrimination against, and exclusion of, gay people – ‘actions that create feelings of fear, anguish and inferiority that humiliate and debase individuals’¹⁰ – does constitute degrading treatment. It defines gay people as less deserving of equal treatment; it thereby renders them less than citizens.

This is not a far-fetched proposal. In fact, it provides an opportunity to develop and extend the Court’s interpretation of the Convention in respect of sexual orientation. For example, in *Smith and Grady v UK*,¹¹ the applicants claimed that investigations by the armed forces into their sexual orientation involved questioning that was ‘hurtful and degrading... prurient and offensive’.¹² Although the applicants failed to meet the threshold of severity currently required for Article 3, the judgment did confirm the reasoning in *Kudla* that ‘treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority... could, in principle, fall within the scope of Article 3’.¹³ Most recently, in *Identoba*,¹⁴ a case involving peaceful public assembly, the ECtHR recognised that anti-gay hate crime is a violation of Article 3, when taken in conjunction with Article 14 ECHR. *Identoba* heralds the start of a process whereby gay

⁸ *Kudla v Poland* [GC], no. 30210/96, 26 October 2000, ECHR 2000-XI [92]

⁹ [n 8]

¹⁰ Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013), 197

¹¹ Nos. 33985/96 and 33986/96, 26 September 1999, ECHR 1999-VI

¹² [n 11]

¹³ [n 8], 121

¹⁴ *Identoba and Others v Georgia* [2015] ECHR 537

people have the right not to experience degrading public treatment because of their sexual orientation. It also serves as a further example of the importance of continuing to engage with rights discourse.

However, the question arises whether recognition of gay citizenship under Article 3 would leave the door ajar for religious conservatives to use Article 3 to justify appeals to conscience. The European Commission has stated that ‘treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.’¹⁵ Thus there remains the possibility that it could be used by religious conservatives in the future, particularly if the scope of Article 3 evolves to protect gay people from degrading treatment through discrimination or exclusion. As illustrated in Chapter 4, ECtHR jurisprudence does not adopt a content-based approach to claims for conscientious objection. Therefore it is not sufficient for domestic courts to adopt a content-based approach; the European Court of Justice would have to develop its thinking along similar lines. Otherwise, the zero-sum game that is played on the field of rights discourse is in danger of being replicated under Article 3.

Rights and queer theory: a strategic engagement

The insights of Queer theory show that rights discourse has been slow to embrace those humans who had historically been classified as outside of the universal moral embrace. Yet Queer theory has its own limitations; it can fail to recognise the potential of rights discourse in furthering equality, and the necessity of engaging on the terrain of rights in legal conflicts such as this. If change is desired, then it is important to engage politically and ethically with rights. As Foucault observed, ‘it is not a matter of imposing law on

¹⁵ *The Greek Case*, nos. 321/67, 3322/67 and 3344/67, Commission report, 5 November 1969, 12 YEHCR:186

men... but of employing tactics rather than laws, or... employing laws as tactics.’¹⁶ Rights discourse has enabled LGBT people to win important legal victories: equal treatment in employment, education and goods and services provision, as well as freedom from criminal sanctions and recognition of non-heterosexual relationships. It remains an important weapon in the armoury of strategies and tactics in the pursuit of genuine equality and citizenship. It is possible, then, to recognise the utility – and the success – of rights discourse in the pursuit of gay equality. Indeed, the development of Queer theory, as well as feminist and critical race theories, has influenced rights discourse to become more inclusive; to begin to recognise the complexity and the intersectionality of the erstwhile “universal human”.

Queer theory has sometimes been reluctant to tackle normative jurisprudential questions. However, as this thesis has sought to argue, Queer’s pedigree in challenging established norms does not mean that it must necessarily resist any normative encounter. The discussion in this thesis has highlighted the continued existence of lesbian and gay inequality, and has suggested a need for both a rethinking of an essentialist approach to rights and a legal and political system willing to tackle the widening gap between rich and poor and the drastic shortfall in government social welfare spending. Accordingly, ‘Queer and liberal theory need to converse with each other’,¹⁷ particularly in the current debate where issues of rights, and the state’s role in determining these rights, are highlighted. This thesis is a contribution to the conversation by offering a ‘critical and strategic engagement’¹⁸ with rights discourse.

¹⁶ Foucault [n 2]

¹⁷ Aleardo Zanghellini, ‘Queer, Antinormativity, Counter-Normativity and Abjection’ (2009) 18 Griffith Law Review 1, 14

¹⁸ Ben Golder, ‘Foucault’s Critical (Yet Ambivalent) Affirmation: Three Figures of Rights’ (2011) Social and Legal Studies 20(3), 283, 286

The master's house: law and rights

This thesis opened with a quote from Audre Lorde which said that the master's tools will never fully dismantle the master's house. The master's house can be viewed as an allegory for the use of rights discourse within the legal system, with reference to equality law in particular. Lorde's words served to position this work as a critical analysis of the role of rights as a tool (or weapon) in conflicts between religion and sexual orientation, and contends that traditional rights discourse lacks the necessary recognition of how hetero- and theo- normativities have underpinned law's construction. The master's house can also be viewed as an allegory for law in a broader sense; more specifically, the master's house can be construed as the disciplinary society, with law operating as one of its tools.

This view enables an understanding of equality law as a product of power relations and the discourses that have constructed truth and knowledge claims – in this context, claims about sexual orientation and religion. Historically, the master's house has been constructed on foundations that are both hetero- and theo- normative. Trying to resolve the conflict between religion and sexual orientation using the traditional, liberal rights-based framework is akin to using the master's tools to effect repairs: plastering over cracks while failing to notice that the whole building is damaged. The damage consists of the hetero- and theo- normativities already mentioned, but also damage on a more structural, socio-economic level.

The relevance of class

As well as norms pertaining to religion and to sexuality, the master's house – as an allegory for the disciplinary society – is also underpinned by norms relating to socio-economic status. If the traditional, liberal rights-bearing subject is a white, male,

heterosexual Christian, he also belongs to a certain class. As explained in Chapter 1, class is one of the ‘organising principles’ – along with others such as race, age, disability and gender – that affect how power is exercised wherever it operates in society.¹⁹ However, class is not recognised as a protected characteristic because law views it as lacking the requisite categorical fixity. This view is itself informed by the ideology of meritocracy and social mobility.²⁰ Yet one’s class – particularly one’s socio-economic status – has an impact on one’s choices as to how public space, in its broadest sense, can be accessed. This has implications for lesbian and gay citizenship. As Vaid puts it,

... homophobia does not originate in our lack of full civil equality. Rather, homophobia arises from the nature and construction of the political, legal, economic, sexual, racial, and family systems within which we live. As long as the rights-oriented movement refuses to address these social institutions and cultural forces, we cannot eradicate homophobic prejudice.²¹

This illustrates the limits of civil rights, which are ‘principally mechanisms to gain access, not means to implement fundamental social change’.²² This aspect of rights has led to class (as a shorthand for socio-economic status) being overlooked in the mainstream debates. However, this thesis contends that an analysis of class in equality law is necessary, because ‘without an analysis and appreciation of systemic subordination and advantage, a progressive politics can become directionless’.²³ Moreover, the key flashpoint in the conflict between religion and sexual orientation has been in the area of goods and services provision. This may not be widely recognised as an area in which class has particular

¹⁹ Davina Cooper, *Power in Struggle: Feminism, Sexuality and the State* (Open University Press 1995), 24-25

²⁰ For further detail on the theory of meritocracy, see Michael Young, *The Rise of the Meritocracy* (Transaction Publishers, 2008 [1958])

²¹ Urvashi Vaid, *Virtual Equality: the mainstreaming of gay and lesbian liberation* (Anchor Books, 1995), 183

²² Vaid [n 21], 180

²³ Cooper [n 19], 13

relevance; class might be seen as being more obviously relevant to discrimination in employment, perhaps. However, it is important to place discrimination in goods and services provision in the context of a consumer-oriented, capitalist society, where the ability to consume – and the choices of what and where to consume – are affected by social class. The ‘mutually constitutive politics of class and sexuality’ have been forgotten in the current conflict between religion and sexual orientation rights claims. Any discussion of sexual citizenship, therefore, should be better ‘attuned to the impact that class has on the potential to benefit from rights claims’.²⁴

As discussed in Chapter 7, LGB people in C2DE (lower socio-economic) groups are 50% more likely to experience sexuality-related bullying than those in ABC1 groups.²⁵ There is in the UK a ‘dramatic variation across class and geography in the proportion of people identifying as gay’: 1.6% described themselves as gay overall; in London, this figure was much higher at 3.2%, whereas in the North-East it was a mere 1.1%. Among managerial and professional groups, the figure was 2.2%; in intermediate, routine, and /manual occupational groups, it dropped to 1.4%.²⁶ Put simply, it is harder to be openly gay in areas and occupations that have a higher proportion of economically deprived people.

This has implications for genuine equality and sexual citizenship; yet neither liberal nor Queer theories have placed adequate emphasis on the importance of class. This why the thesis highlights it in Chapter 7; as part of the ongoing conversation between liberal and Queer theory, the thesis foregrounds class to underline how much it matters to rights claims and to citizenship. In addition, Chapter 7 makes an important contribution to knowledge by bringing an understanding of class-based inequality up to date. Laclau and

²⁴ David Bell and Jon Binnie, *The Sexual Citizen: Queer Politics and Beyond* (Polity Press, 2000), 144

²⁵ Ruth Hunt and Sam Dick, *Serves You Right: Lesbian and gay people’s expectations of discrimination* (Stonewall, 2008).

²⁶ Emily Dugan, ‘Young, middle-class Londoners most likely to be gay’ (*The Independent*, 7 October 2014)

Mouffe's discourse theory (discussed in Chapter 3) offered a 'reformulation of the socialist project'²⁷ by challenging Marxism's view that class struggle was the *sole* dynamic in human society. They sought to develop a theory that incorporated the emerging struggles and rights claims based on gender, race and sexuality. Chapter 7 of this thesis is intended to serve as a reminder that class should not be forgotten amidst identity-based rights claims. It is true that the traditional, Marxist understanding of class is no longer sufficient to address the particular stratification and consumer orientation of modern society. Nevertheless, class remains relevant and needs to be (re)emphasised as a vital factor in a critical analysis of rights and citizenship for gay people.

Intersectionality

As stated earlier, Queer, feminist and critical race theories have influenced rights discourse to become more inclusive and recognise the complexity and the intersectionality of the erstwhile "universal human". The thesis did not specifically examine the interplay between sexuality and religion in the lives of working class gay people, or gay people of colour, which are important areas for further research. However, the focus of this thesis was a critical analysis of rights discourse in the conflict between religion and sexual orientation, rather than an exploration of religion and/or sexuality in general. Further, intersectionality is now more recognised than class in liberal and Queer discourse, which is why class is foregrounded in a specific chapter while intersectionality is referred to more implicitly throughout the arguments in the thesis.

For example, the discussion on discourse theory in Chapter 3 refers to discursive attempts to represent a hegemonical unity in society through concepts of 'nation' and 'people', which mask the conflicts and antagonisms that exist beneath the veneer of unity. When

²⁷ Chantal Mouffe, 'Introduction: for an agonistic pluralism' in C Mouffe (ed) *The Return of the Political* (Verso, 1993), 10

antagonism occurs, the so-called “unity” loses its pretence of universality. Chapter 3 also makes the point that people can be interpellated in a number of different subject positions at once, such as ‘mother’, ‘black woman’, ‘Christian’ and ‘lesbian’. The thesis focuses on the subject positions of ‘homosexual’ and ‘Christian’ within this discourse-theoretical framework, but it also recognises the events occurring at the intersection of religion and sexuality that may prove pivotal in our future understanding of both sexuality and religious expression. Chapter 6 highlights the resistances that are taking place within religious organisations and communities, with the voices of gay people of faith now beginning to be heard.

A significant aspect of this resistance is to do with clergy’s desire to have and to formalise their same-sex relationships. For example, the current Bishop of Grantham is the first Bishop to declare that he is in a same-sex (albeit celibate) relationship.²⁸ Notably, a senior bishop from the Church’s evangelical wing has called for far-reaching change in the church’s attitudes to homosexuality and a welcome to Christians in same-sex relationships.²⁹ Unfortunately, words have not translated into Church action so easily. Jeremy Pemberton, a gay clergyman, was prevented from taking up a post as a hospital chaplain after marrying his partner. He recently lost an employment tribunal against the Church, but has been given the right to appeal.³⁰

These examples of resistance are happening alongside with the Church of England’s ongoing conversations regarding human sexuality.³¹ There is an increasing recognition of

²⁸ Harriet Sherwood, ‘Bishop of Grantham first C of E bishop to declare he is in gay relationship’ *The Guardian* (London, 2 September 2016)

²⁹ Harriet Sherwood, ‘Senior bishop calls for change in C of E attitudes to gay people’ *The Guardian* (London, 16 June 2016)

³⁰ Press Association, ‘Gay clergyman to appeal after losing discrimination claim’ *The Guardian* 15 March 2016

³¹ See for example the Pilling Report and the Working Group on Human Sexuality <<https://www.churchofengland.org/media-centre/news/2013/11/pilling-report-published.aspx>> accessed 15 April 2016

intersectionality as more LGBT religious people come forward to make their voices heard within the Church. As Andrew Yip observes, there is great diversity among different Christian denominations; there is a considerable difference between orthodox Christian teachings and what actually occurs among Christians; and there is an increasing acceptance of people with gay identities within some parts of the Christian faith community.³² This observation is reflected in one of the points made in Chapter 4 that the assertion of a “religious right” to discriminate against gay people only makes sense if one accepts that there is a special relationship between religion and sexual orientation that renders it compulsory for religious people to be anti-gay.

Methodology

For now, laws purporting to offer same-sex equality – but with limitations and religious exceptions – offer little more than a ‘promise of a solution’.³³ Recognition of this problem led to the formation of the research questions guiding this project, and the focus on three particular areas within the broader discussion:

1. How are heteronormativity and theonormativity expressed in UK equality law?
2. How central is the concept of harm to resolving the conflict between religion and sexual orientation?
3. How might UK law finally realise sexual citizenship for lesbians and gay men?

No methodology is perfect, and discourse theory is no exception. Neither Foucault, nor Laclau and Mouffe, ever prescribed a method for undertaking discourse-theoretical analysis. It is certainly true that the meta-theoretical character of Foucault’s approach can

³² Andrew K Yip, ‘Same-sex marriage: Contrasting perspectives among lesbian, gay and bisexual Christians’ (2004) *Feminism and Psychology* 14(1), 173-180

³³ Wayne Morgan, ‘Queer Law: Identity, Culture, Diversity, Law’ (1995) *Australian Gay and Lesbian LJ* (1), 15

be difficult to apply methodologically. As Torfing acknowledges, ‘discourse theory... has no ambition of furnishing a detailed framework for the study of all kinds of social, cultural and political relations’.³⁴ Nevertheless, the thesis has sought to use a Foucaultian approach to highlight where and why traditional concepts and norms have floundered in this conflict. It has advocated a new perspective using Queer and class concerns to provide an additional dimension to the liberal debate over rights. The work has had regard to the guidance from Jorgensen and Phillips,³⁵ and to Foucault’s ‘five questions’,³⁶ and has asked a series of questions to identify the struggles that take place over meaning. In the context of the current conflict, the work has illustrated how both “Christian” and “homosexual” are filled with meaning as part of the discursive construction of (competing) identities. The thesis has charted the struggle between these competing identities to understand how the discursive structure is constituted and changed.

Reflections on methodology

Discourse theory is based on an epistemology that considers all knowledge to be socially constructed, so it is important for the researcher to be aware of her own part in the process – including the gathering, choice and presentation of data. I am a member of the LGBT community and I am also an atheist, having been brought up in a Catholic environment. As such, I have a keen interest in (and strong feelings about) the influence of religion on equality law, particularly where the expression of religious belief conflicts with the expression of sexuality. I have endeavoured to find a place of distance in my research, as far as is possible. This has not been an easy task, not least because of my own subject position and the complex questions of identity and experience of discrimination that such a

³⁴ Jacob Torfing, *New Theories of Discourse: Laclau, Mouffe and Žižek*. (Blackwell, 1999), 291

³⁵ Marianne Jorgensen and Louise Phillips, *Discourse Analysis as Theory and Method* (Sage, 2002), 30

³⁶ Michel Foucault, ‘Politics and the study of discourse’ in G Burchell, C Gordon and P Miller (eds) *The Foucault Effect: Studies in Governmentality: with Two Lectures by and an Interview with Michel Foucault* (Chicago University Press 1991), 59-61

position entails. This is another reason why a Foucaultian-informed Queer approach is an appropriate methodology for the work, because it recognises these very issues as part of its critique of liberal neutrality.

Contribution to knowledge

This thesis has sought to provide an original contribution to the conflict between sexual orientation and the expression of religious belief. Notwithstanding the gains that have been made in terms of same-sex equality, it has argued that non-heterosexuals continue to be stalked by what has been characterised as the “four horsemen of homophobia”: war, famine, pestilence and death.³⁷ War - because religious conservatives have often adopted such language to describe their experience vis-à-vis extensions to gay equality.³⁸ Famine - because cutbacks to public spending have impacted on LGBT support services, with faith-based organisations increasingly filling the gap in provision and having a disproportionately negative impact on working-class gay people.³⁹ Pestilence - because old tropes of homosexual infection and corruption of youth still persist.⁴⁰ Finally, death - because conservative religious attempts to curtail sexual citizenship has the effect of causing gay people – particularly working-class gay people with fewer consumer choices – to be ‘socially dead’.⁴¹ The thesis has argued that religious exemptions to equality law, coupled with a political environment that is avowedly pro-business while hostile to social

³⁷ The four horsemen of the apocalypse appear in ‘The revelation of St John the Divine’, 6:1-8, *The Holy Bible* (authorised King James version) (Collins 1957)

³⁸ See Chapters 4, 5 and 7

³⁹ See Chapters 6 and 7

⁴⁰ See Chapter 4, in particular the case of *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* Upper Tribunal, Appeal number FTC/52/2011; see also the discussion in Chapter 6 on the “gay cure” case of *R (Core Issues Trust) v Transport for London and the Mayor of London* [2014] EWHC 2628 (Admin) and *R (Core Issues Trust) v Transport for London and another* [2014] EWCA Civ 34

⁴¹ See Chapter 7. The idea of ‘social death’ is explored by M Blasius in *Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic* (Temple University Press 1994)

welfare spending, have a negative effect on the citizenship of non-heterosexuals. This has a number of policy implications.

Policy implications

First, section 1 of the Equality Act 2010 – the public sector duty regarding socio-economic inequalities should be brought into force. This would place socio-economic disadvantage more firmly on the legal and political agenda. Unfortunately, the problems that bedevil the Act would remain. For example, the duty involves having ‘due regard’, when making strategic decisions, to the desirability of exercising public functions so as to reduce socio-economic inequality. In practice, without any additional requirements, this duty could amount to little more than a box-ticking exercise.⁴² Moreover, the Act relies on people bringing claims, and with government cuts affecting access to the justice system⁴³ their ability to do so is further compromised. Christian conservative organisations, on the other hand, are well-organised and well-funded, and are well positioned to bring and defend cases.⁴⁴

Second, the scope of Article 3 of the European Convention on Human Rights should be extended. It should encompass the degrading treatment meted out to lesbians and gay men by denying them access to employment and to the provision of goods, services and facilities. Article 3 ECHR is an absolute, not a qualified, right and this would communicate the important message that religious belief is not valid grounds for restricting same-sex

⁴² See Bob Hepple, ‘The New Single Equality Act in Britain’ (2010) *The Equal Rights Review* Vol 5, 11

⁴³ Monidipa Fouzder, ‘Legal aid cuts creating new advice ‘deserts’’, *Law Society Gazette* (London, 18 April 2016)

⁴⁴ See Chapter 7

citizenship rights. However, current political trends make it by no means certain that the UK (or what remains of it) will stay a signatory to the ECHR.⁴⁵

Further research

The result of the *Ashers* appeal is awaited with interest; further research may be needed regarding the implications of the judgment. The appeal of Canon Jeremy Pemberton is also anticipated to bring up further issues around exemptions for religious organisations in employment, which may also require further research. This could be linked with the Church of England's ongoing conversations regarding human sexuality,⁴⁶ as part of an analysis of the shifts taking place in some religious discourse. Empirical studies into the lived experience of working-class religious gay people and working-class gay people of colour in the UK are also important areas of research to explore. Finally, the state's failure to legislate regarding the practice of gay 'cure' therapy suggests that useful research might be carried out into common law solutions which have been beyond the scope of this thesis. It is clear that the conflict between religion and sexual orientation is continuing; further research will help identify how power relations and discourses continue to shift.

⁴⁵ See for example Anushka Asthana and Rowena Mason, 'UK must leave European convention on human rights, says Theresa May' *The Guardian* (London, 25 April 2016). There is ongoing discussion regarding a British Bill of Rights, which is beyond the scope of this thesis.

⁴⁶ [n 31]

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