



# How should Biblically-based Homophobic/Hate Speech be treated in South Africa, legally and socially?

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### **Declaration of Originality**

The author hereby declares that the content of this dissertation, unless specifically indicated to the contrary, is his work, and that the dissertation has not been submitted simultaneously, or in any form, for any degree or diploma, to any other university. Where use has been made of the work of others it is duly acknowledged in the text.

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## Abstract

In a country like South Africa where 80% of the population is Christian, many of them quite conservative, and where homophobia is common, it seems likely (given the common biblically-based belief that homosexuality is a sin) that much homophobia stems from scripture, and translates into words, sometimes actions and ultimately harm to the LGBTQI+ community. In this dissertation I argue that Biblically-based homophobic hate speech should not be treated (either in terms of social disapproval or legal punishment) any less severely than any other form of hate speech.

The reasons I have focused on Christianity in this dissertation are i) that I hope to help affect jurisprudence in a manner that impacts my own society, ii) that I wanted to start by dealing with the main religious influencer in my own context before branching out more broadly to other religions or geographies and iii) since Christianity is overwhelmingly dominant in South Africa, it is the obvious candidate for my attention in this regard.

Given that evidence of the harm caused by homophobic hate speech is fairly unambiguous, and that openly homophobic statements are uttered publicly by both believers and leaders of Christian groups on a regular basis, one might expect a large number of cases to be reported to the South African Human Rights Commission (SAHRC). The SAHRC's mandate is, after all, precisely to deal with harm-causing hate speech. Yet very few cases (a few dozen per year) of homophobic hate speech (emanating from whatever source) are reported to the SAHRC. Of those it seems that some cases that arguably have merit are turned away. Simultaneously, annual cases of racist hate speech reported to the SAHRC number in the hundreds – far outstripping their homophobic counterparts.

It seems that the legal sanction applied to homophobic hate speech, religiously based or otherwise, is too low in gross terms, given the pervasive nature of discrimination reported by LGBTQI+ people. It also seems that, compared to racist hate speech in particular, homophobic hate speech is vastly under-represented in the reporting stakes. I hope to paint a picture that can help to inform both legislation and jurisprudence in this regard, to support the creation of laws that moderate homophobia, reduce harm, and influence culture to create a safer environment for LGBTQI+ South Africans.

# 1. Introduction

From within Christianity in South Africa – churches, Christian homes, prayer meetings and bible studies – biblically-based<sup>1</sup> value judgements of homosexuality are routinely preached, spoken about, and generally perpetuated<sup>2</sup> with respect to lesbian, gay, bisexual, transgender, questioning or intersex (LGBTQI+) people. Christians and their leaders are commonly known to argue that the bible specifically calls out homosexuality as a “sin”, as “unnatural”, “detestable” or an “abomination”<sup>3</sup>.

On that basis Christians claim to be constrained by their consciences as religious people to adhere to, profess and broadcast homophobic views and, sometimes, to act upon them. The (first) question arises whether potential harm caused by the exercise of such rights can be justified when weighed against the civil rights of the marginalised LGBTQI+ community or whether the dignity and safety of that community trumps religious rights to express such views.

To answer, I draw a clear line from the Christian demographic dominance of South African society, through biblical doctrine to its impact on profoundly held Christian belief, and the latter’s impact on speech/actions by believers.

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<sup>1</sup> All texts from *Bible, New International Version, 1978*, : Genesis 19:5; Leviticus 18:22; Leviticus 20:13; Romans 1:26-27; 1 Corinthians 6: 9-10; 1 Timothy 1:8-10

<sup>2</sup> - Methodist church of Southern Africa, Profession of the MCSA’s Unity and Diversity Within the Context of the Church’s Conversation on Same-Sex Relationships, pg. 2 -

<https://www.methodist.org.uk/media/2110/marriage-mcsa1-a-profession-of-unity-and-diversity-0415.pdf>;

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- The Presidency, Government Gazette, Republic of South Africa, 2006, No. 17 of 2006: Civil Union Act, 2006 - [http://www.saflii.org/za/legis/num\\_act/cua2006139.pdf](http://www.saflii.org/za/legis/num_act/cua2006139.pdf)

<sup>3</sup> All texts from *Bible, New International Version, 1978, Zondervan*: Genesis 19:5; Leviticus 18:22; Leviticus 20:13; Romans 1:26-27; 1 Corinthians 6: 9-10; 1 Timothy 1:8-10

The reasons I offer for thinking that actions are impacted by beliefs which, in turn, are informed by scriptures are: i) that the bible itself exhorts believers to act on its precepts, ii) that believers themselves tell us they do so, and iii) that research confirms a strong correlation between the everyday actions of believers and their strongly held beliefs<sup>4</sup>.

Given South Africa's 80%+ Christian population<sup>5</sup> sample group, the widespread incidence of biblically-based homophobic/hate speech (BBH/HS) can reasonably, at least partially, be attributed to biblical writ. The four largest denominations' membership adds up to 12 915 187 people, or 36.1% of the Christian population of South Africa. These four collectively form my qualitative (in terms of attitudes to homosexuality) sample group.

In terms of harm itself, I cite two major studies.

First, the 2015 Gauteng City-Region Observatory (GCRO) Quality of Life Survey according to which just 56% of respondents agreed that LGBTQI+ people deserve the same rights as other South Africans, 29% actively disagreed, and 14% think violence towards LGBTQI+ people is acceptable.

Second, the Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa (2016) study, which concluded that over half (55%) of LGBTQI+ people in SA fear Sexual Orientation, Gender Identity (SOGI) discrimination and that, in fact, 44% of respondents have actually experienced discrimination in their everyday lives during the last two years. I add to that, evidence of LGBTQI+ youth being up to four times more likely to attempt suicide than straight peers, with LGBTQI+ youth who are rejected by their families being more than eight times as likely to attempt suicide than LGBTQI+ youth who do not suffer such rejection.<sup>6 7</sup>

The second question relates to how BBH/HS is currently treated in terms of the law and society, and then, how should it be treated? Should people be allowed to broadcast harmful forms of homophobia with impunity, simply because they are "preaching the Word of God", and happen to be in a church building where most of those present agree with them? Should they be allowed to get away with causing harm, simply because they are ensconced in Christian hegemony? I hope to contribute to a broader corpus of work that could inform jurisprudence in this regard.

In order to establish the credibility of the claim that homophobia and/or homophobic hate speech are commonly preached and taught in the Sunday services and other gatherings of South African Christian churches on a biblical basis, I will first establish the extent of Christian dominance of religious demography in South Africa. I will identify the biblical

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<sup>4</sup> Pew Research Center, 2016, "Religion in Everyday Life", Pg. 9.

<http://www.pewforum.org/2016/04/12/religion-in-everyday-life/>

<sup>5</sup> Statistics South Africa, "Census 2001" (the last time denominational affiliation was polled in SA)

[http://www.statssa.gov.za/?page\\_id=3892](http://www.statssa.gov.za/?page_id=3892),

Media Club South Africa, unattributed, 2001, *Fast Facts*, <http://www.medioclubsouthafrica.com/landstatic/82-fast-facts>;

<sup>6</sup> Ryan, C.; Huebner, D. et al., 2009, *Family rejection as a predictor of negative health outcomes in white and Latino lesbian, gay, and bisexual young adults*, pp 346-352, <https://www.ncbi.nlm.nih.gov/pubmed/19117902>;

<sup>7</sup> John Shore, 2017, *Gay Teen Suicides, Bullying and Christianity: A Talk with the Trevor Project Director* (citing Massachusetts 2007 Youth Risk Survey), <http://www.huffingtonpost.com/john-shore/a-talk-about-gay-teen-sui b 745912.html>)

basis for church doctrine on the subject and clarify my position on the interpretation of these texts with respect to necessary requirements to support my overall claims. Then I will identify some major denominations within the Christian demographic and look at the stated policies and preachments of those groups. Finally, I will look at the societal harm caused by Christian dominance of South African religious demography with respect to BBH/HS.

It is nothing new for the Abrahamic religions to clash with the homosexual community. Christianity, Judaism and Islam all have homophobic denominations or sects, though it would not be fair to classify any of them as wholly homophobic in their practices or even in terms of their theologies. What often seems to happen, however, is that adherents feel constrained to express homophobic opinions by means or utterances or actions that impact the everyday lives of LGBTQI+ people.

Despite the SOGI provisions in the South African Constitution, Bill of Rights, and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA, 2000)<sup>8</sup>, South Africa's (80%+ Christian) population<sup>9</sup> routinely targets the LGBTQI+ minority for hate speech and discrimination. In short, the combination of census figures<sup>10</sup> which indicate an overwhelming 80% Christian population, and social research that points to broad-based and routine infliction of harmful prejudice upon LGBTQI+ members of society, seems to point towards a significant contribution by religion to LGBTQI discrimination. This includes general prejudice, as well as specific prejudice in the healthcare sector, at secondary school (or institutions offering secondary school level of education), and even by the police and the justice system<sup>11</sup>.

While these utterances, if they were racist in nature, would be likely to draw massive outrage and even legal sanction by means of reports to the SA Human Rights Commission, SOGI-related hate speech seems to draw a minute amount of attention in comparison. In the last three years of reporting by the South African Human Rights Commission (SAHRC - 2014/15; 2015/16 and 2016/17) race-related discrimination was reported to the SAHRC 292, 505 and 486 times, respectively. During the same period, SOGI-related discrimination was reported 17, 26 and 24 times<sup>12</sup>. Cases like those of Penny Sparrow<sup>13</sup> have become fairly common, but cases of homophobic hate speech reported to the SAHRC or Equality Court, not as much.

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<sup>8</sup> SA Bill of rights, 1997, Ch 2, Section 9 - <http://www.justice.gov.za/legislation/constitution/saconstitution-web-eng-02.pdf>;

Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) or the "Equality Act", Act No. 4 of 2000 - <http://www.justice.gov.za/legislation/acts/2000-004.pdf>, section 9

<sup>9</sup> Media Club South Africa, unattributed, 2001, *Fast Facts*, <http://www.medioclubsouthafrica.com/landstatic/82-fast-facts>;

Statistics South Africa, "Census 2001" [http://www.statssa.gov.za/?page\\_id=3892](http://www.statssa.gov.za/?page_id=3892)

<sup>10</sup> Statistics South Africa, "Census 2001", [http://www.statssa.gov.za/?page\\_id=3892](http://www.statssa.gov.za/?page_id=3892)

<sup>11</sup> OUT, Love Not Hate (LNH) Campaign, 2016, "Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa", pp7 & 9, <https://www.out.org.za/index.php/what-s-hot/news/501-majority-of-lgbt-south-africans-live-in-fear-of-discrimination>

<sup>12</sup> South African Human Rights Commission, 2016/17, *Annual Trend Analysis Report*, pg.24, <https://www.sahrc.org.za/index.php/sahrc-publications/trends-analysis>

<sup>13</sup> *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016), <http://www.saflii.org/za/cases/ZAEQC/2016/1.html>

Christian teaching with respect to homosexuality exacerbates already-elevated mental health and suicide rates among gay people. Suicide attempt rates, and suicide rates, are heightened among LGBTQI+ teens, particularly where they are rejected, and especially where the rejection comes from their close communities, families, persons regarded as moral/religious authorities<sup>14</sup>. Pew research<sup>15</sup> has established:

The survey shows a clear link between what people see as essential to their faith and their self-reported day-to-day behavior. Simply put, those who believe that behaving in a particular way or performing certain actions are key elements of their faith are much more likely to say they actually perform those actions on a regular basis.

It is vital to note that the need to address explicitly Christian homophobia has become apparent both within the broader South African Christian church, and from within the LGBTQI+ community, and has been publicly vocalised. In other words, the need to address Christian Biblically-based homophobic hate speech is not driven by an anti-religious agenda per se. There might be elements among those combatting such hate speech who do oppose religion more broadly, but it is not necessary to be anti-religion to have recognised the need for such social activism, and the movement to address biblically-based homophobic and/or hate speech from within Christianity itself lends a certain objectivity to the expression of the need to do so.

In “When faith does violence - Re-imagining engagement between churches and LGBTI groups on homophobia in Africa”<sup>16</sup>, Gerald O. West, Kapyra Kaoma and Charlene van der Walt note that: “African church theologies are not neutral, they are heteropatriarchal.” Their view is that, in fact, the biblically accurate/preferable biblical theme to emphasize is one that “privileges the experience of marginalized communities.” In other words, they focus on themes like those of Exodus, where god is claimed to hear the cry of slaves and ultimately sets them free, (Exodus 3:7), leads them to a promised land and allegedly protects them from oppression by means of prophets. West, Kaoma and Van der Walt would have their readers focus on the fact that, for example, the biblical Christ is “born on the margins of a colonized and marginalized people” (Luke 2:1). They conclude that:

It could and has been argued that within the shape of scripture God acts in specific social contexts, taking sides with the oppressed across historical time and geographical space, reminding us of the fact that marginalized communities are the springboard for Christian theology, ethics, and ministry (Croatto 1987). (p10)

It is not my intention to go into the theological accuracy of one claim over another – only to build the case for countering harmful practices that are informed by beliefs which, in turn, are defined or informed by the Christian bible. It is compelling that, even within the Christian church, harm to their LGBTQI+ sub-communities is noticed, and is being formally addressed, in both theological and academic circles.

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<sup>14</sup> John Shore, 2017, Gay Teen Suicides, Bullying and Christianity: A Talk with the Trevor Project Director (citing Massachusetts 2007 Youth Risk Survey), <http://www.huffingtonpost.com/john-shore/a-talk-about-gay-teen-sui b 745912.html>)

<sup>15</sup> Pew Research Center, 2016, “Religion in Everyday Life”, Pg. 9. <http://www.pewforum.org/2016/04/12/religion-in-everyday-life/>

<sup>16</sup> The Other Foundation, Gerald O. West, Kapyra Kaoma and Charlene van der Walt, 2017, “When Faith Does Violence” <http://theotherfoundation.org/wp-content/uploads/2017/01/When-Faith-Does-Violence.pdf>



From the LGBTQI+ community's side, the message was reinforced at an SAHRC-sponsored "In-country Meeting On Sexual Orientation, Gender Identity And Expression in November 2017"<sup>17</sup>, by Glenton Matthyse from transgender lobby group, Gender Dynamix<sup>18</sup>. Matthyse expressed the view that: "Religion plays a major role as to why LGBTI members are still discriminated against today." At its final panel, the Meeting handled the intersection of SOGI issues, religion and culture, and singled out SOGI-driven religious and cultural discrimination.

Reverend Nokuthula Dhladla explained that this is an issue which churches have resolved to discuss due to the excessive violence and discrimination suffered by persons in the LGBT community. Materials have been developed on the role of churches in the context of violence against LGBT groups, with the purpose of training church leaders. While the process is ongoing and there continue to be challenges, the space for dialogue on religion and LGBT rights has been opened up, which represents significant strides compared to the previous status quo. Keval Harie of the Gay and Lesbian Memory in Action (GALA) posed the question of how to create spaces for young, gay and black youth in African communities. These spaces need to be safe and allow for the voices of marginalised individuals to be preminent in the narrative. While religion is deeply private and protected by the Constitution, both the State and religious institutions tend to use religion to divert attention from important conversations around SOGIE-based discrimination. (Pg. 26)

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<sup>17</sup> South African Human Rights Commission, 2017, SAHRC and Network Of African National Human Rights Institutions' (NANHRI) In - Country Meeting On Sexual Orientation, Gender Identity And Expression - <https://www.sahrc.org.za/home/21/files/South%20Africa%20Incountry%20Meeting%20Report.pdf>

<sup>18</sup> Gender Dynamix - [www.genderdynamix.org.za](http://www.genderdynamix.org.za)

## 2. Definitions

Before proceeding any further, I need to clarify some terminology.

Biblically-based Homophobic Hate Speech (BBHHS) is hate speech (per legal definitions) aimed at the LGBTQI+ community, based on a particular interpretation of some key biblical texts.

Biblically-based Homophobic Speech (BBHS) is homophobic speech which, while it may be pejorative, does not necessarily fall into the legal definition of hate speech, but is also aimed at the LGBTQI+ community and based on a particular interpretation of some key biblical texts. When addressing both, I will use BBH/HS (biblically-based homophobic/hate speech as acronym).

In dealing with my main research question, I will ask:

- i. To what extent does biblical doctrine influence the beliefs of South African Christians, inform their actions and speech, and affect wellbeing of LGBTQI+ people?
- ii. How is BBH/HS<sup>19</sup> currently treated in law, and socially, in comparison with other homophobic speech or in comparison with other types of hate speech altogether?
- iii. How should BBH/HS be treated in law, and socially?

My contention is that BBH/HS causes the same harm inside the church as its non-biblically-based equivalents do outside the church, and is comparable to other forms of hate speech, such as racist hate speech. As a result, my view is that such utterances should be treated (in terms of both social moral opprobrium and South African law) like any other homophobic/hate speech, and any other form of hate speech. My further contention is that those who practice BBH/HS, and even those who do not, but tolerate it, abuse religious freedom (based on biblical writ) as pretext (by using it to justify special pleading and respect) to gain exemption from being sanctioned socially or legally.

While my contention is not that the biblical interpretation used by bigots is accurate – or inaccurate, for that matter – it is relevant to take note of the current intersection between South African Christianity and the LGBTQI+ community, as referenced above<sup>20</sup>. My aim is to draw a clear causal link between what the bible says, what people believe, and how that belief informs their actions. I am non-committal on the exegetical legitimacy of the homophobic interpretation of scripture. All I aim to show is that it is plausible that a significant portion of the church *believes* that this interpretation is the accurate, god-breathed truth, that they act on those beliefs, and that this causes harm – harm which seems to be unfairly favoured by society, in comparison to other, similar harms. This makes it not only relevant, but important, to deal with the harm, whether that harm is (legitimately) scripturally based or not. In essence, I am more concerned with how the homophobia is treated, than with whether its hermeneutical foundation is sound.

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<sup>19</sup> Combined acronym to refer to both Biblically-based homophobic hate speech, and Biblically-based homophobic speech.

<sup>20</sup> The Other Foundation, 2017, [When Faith Does Violence](http://theotherfoundation.org/wp-content/uploads/2017/01/When-Faith-Does-Violence.pdf) - <http://theotherfoundation.org/wp-content/uploads/2017/01/When-Faith-Does-Violence.pdf>

A foundational premise of this dissertation is that, per Karl Popper, absolute tolerance ultimately leads to an intolerant society. Tolerance is generally understood to be the ability or willingness to tolerate something, in particular the existence of opinions or behaviour that one does not necessarily agree with<sup>21</sup>, and intolerance is an inability or unwillingness in this regard.

On a point of clarification, it should be noted that respect is not a necessary condition for tolerance. In fact, tolerance, by definition, is the allowance of ideas or actions that one potentially does not respect, or agree with, to continue unmolested. Respect denotes more active approval towards ideas and actions than is required by simple tolerance. The ability to tolerate ideas and actions inconsistent with one's own thinking, but which do not require sanction, is necessary to maintain a functional society – so that disparate ideas can coexist in peace. Coexisting harmoniously does *not* require that all members of society agree on, and approve of, the same ideas. While some call tolerance “minimal respect,” a more intuitively accurate description might be “principled toleration” as described by Brian Leiter.<sup>22</sup>

For the purposes of this dissertation, I will further distinguish between primary and secondary intolerance<sup>23</sup>.

Primary Intolerance (PI) - bigotry, or narrow-mindedness, with respect to persons who differ from oneself with respect to categories including (but not limited to) race, religion, sexual orientation, gender and class. It occurs on a continuum ranging from mild intolerance to hate speech, incitement to violence, or even violence itself. All of these are known to happen with respect to LGBTQI+ people, in South Africa, on the basis of biblically-founded beliefs, as will be demonstrated later.

Secondary Intolerance (SI) - (intolerance of intolerance) intolerance in response to primary intolerance, aimed at curbing that primary intolerance, ranging from mild individual disapproval, through group or societal disapproval, public shaming, to legal restriction and, where necessary, legal sanction – including fines and/or incarceration, all of which have been used in the South African LGBTQI+ community, and among its allies.

If tolerance were applied absolutely, there would be no *philosophical* problem. All homophobic speech and behaviour would simply be tolerated – ultimately resulting in an intolerant society where homophobic speech and behaviours go unchecked. If society were governed by a highly autocratic government which brooked no argument, the philosophical problem would also largely disappear, since no diversion from state policy would be tolerated, on pain of legal prosecution. Neither of these is the case in South Africa, where LGBTQI+

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<sup>21</sup> Cambridge Dictionary, [Definition of 'tolerance'](https://dictionary.cambridge.org/dictionary/english/tolerance),  
<https://dictionary.cambridge.org/dictionary/english/tolerance>,  
Collins English Dictionary, [Definition of 'tolerance'](https://www.collinsdictionary.com/dictionary/english/tolerance),  
<https://www.collinsdictionary.com/dictionary/english/tolerance>,  
Oxford English Dictionary, [Definition of 'tolerance'](https://en.oxforddictionaries.com/definition/tolerance),  
<https://en.oxforddictionaries.com/definition/tolerance>

<sup>22</sup> Brian Leiter, 2013, *Why Tolerate Religion?* pp68-73, Princeton University Press.

<sup>23</sup> Karl Popper, 1945, *The Open Society and Its Enemies*, Vol. 1, Notes to the Chapters: Ch. 7, Note 4

rights, among many others, are being actively tested in the courts.

The practical and philosophical problem therefore remains, in terms of balancing the rights of marginalised LGBTQI+ South Africans with the free speech/religious freedom guaranteed to religious adherents. How do we maintain a society that retains civil liberties for all, while preventing the religiously intolerant from unfairly imposing prejudice on the LGBTQI+ community (which includes religious people)? In order to do so, a certain amount of intolerance must be tolerated but, simultaneously, where PI leads to an untenably harmful situation, it should be curbed – either socially or legally.

PI in the form of BBH/HS evokes or legally mandates (depending on whether the speech is hate speech or not) various levels of SI from society. PI sometimes evokes simple disapproval in social settings or on social media. This might be escalated to group disassociation like de-platforming of voices by venues or institutions. Sometimes the response is more vociferous - even violent, and harmful, from those countering PI. In the context of current societal battles in the areas of social justice for LGBTQI+ and religious intolerance, the question of how much intolerance to tolerate becomes a deeply practical, and deadly serious, one. To borrow from the field of employment equity and affirmative action, where *fair discrimination*<sup>24</sup> is a well-established concept, I will specify two forms of SI:

Fair Secondary Intolerance (FSI) - SI which is proportional to the severity of the PI being countered, or which appropriately applies relevant legislation and jurisprudence when *legal SI* is required.

Unfair Secondary Intolerance (USI) - SI which is disproportionately extreme when compared to the PI which is being countered, or when legal SI is excessively applied or inappropriately applied – when it is not legally warranted.

In terms of the distinction between BBHS and BBHHS, it is important to note that both of these could be subject to either FSI or USI. BBHS, because it does not fall into the definition of hate speech, should therefore not be subject to legal prosecution. The correct approach in circumstances where simple homophobia is brought before the court, would be to relegate it to the court of social opprobrium, where familial and / or societal disapproval can play their role in quelling it. In terms of BBHHS, it can also be subject to both USI and FSI. Furthermore, it can be under-addressed by virtue of being subject only to societal and / or familial disapproval when, in fact, it *should* be brought before the courts. It is my contention that this is, all too often, exactly the case.

The fact that a state, especially a secular state, includes a large majority of adherents of a particular faith does not necessarily translate into any obligation on the part of that state to make special accommodations for religion. There seems to be little reason to think that, just because a religious group happens to be in the majority, appropriate response in the form of SI should be limited to a greater extent than would be the case in a state without such a majority. Part of the discussion about when to afford protection to religious speech that might

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<sup>24</sup> South African Parliament, Employment Equity Act, No 55 of 1998, Ch. 2, section 6

contain harmful homophobia revolves around the question of special accommodation for religions, as argued by Brian Leiter and Martha Nussbaum. Their arguments are captured in Leiter's *Why Tolerate Religion*<sup>25</sup> and Nussbaum's *The New Religious Intolerance*<sup>26</sup>.

In order to treat my philosophical questions with appropriate nuance (and to clarify pre-emptively) I shall distinguish between "active" and "passive" accommodation by defining them, respectively, in terms of two important ways in which legal accommodation of religion can occur as an application of moral philosophy:

Active accommodation: legal exemption from rules normally applied to all citizens; special permission to express religious or conscience-based convictions in ways that contradict laws normally applicable to all citizens. This would include constitutional amendments to allow religious freedom beyond basic freedom of conscience, or other legislative changes and enforceable legal precedent that goes beyond the basic liberties and limitations on liberty applicable to all citizens. Active accommodation would involve "affirmative respect" or Stephen Darwall's "appraisal respect"<sup>27</sup> (special treatment) which would result in legal exemptions for certain practices by adherents of certain religions under certain conditions.

Passive accommodation: basic constitutional/legal accommodation expressed as a foundational freedom of religion or conscience, equally applied to both religious believers and non-believers. This includes the liberties and limitations on liberty applicable to all citizens, without any necessary further legislative or judicial state intervention. Though still "active" in terms of the definition of accommodation (in that freedom of religion and/or conscience are actively included in a constitution), passive accommodation would involve exception-based management of transgressions of basic constitutional or legislated principles – effectively the "minimal respect" or "principled toleration" espoused by Leiter<sup>28</sup>, or Darwall's "recognition respect"<sup>29</sup> without any requirement for special treatment for religion.

Practical state involvement in the accommodation of religion is, by definition, legal. The extent, then, to which provision should be made for religious accommodation in a liberal state, really turns on the definition of "accommodation." Relevant definitions include: i) "A convenient arrangement; a settlement or compromise; the process of adapting or adjusting to someone or something"<sup>30</sup> and "Adjustment, as of differences or to new circumstances; adaptation, settlement, or reconciliation."<sup>31</sup>

Ultimately, *very serious and harmful* homophobia would need to attract the harshest sanction. In the South African context, that could involve being reported to the Human Rights

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<sup>25</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press

<sup>26</sup> Martha C. Nussbaum, 2012, *The New Religious Intolerance*, The Belknap Press of Harvard University Press

<sup>27</sup> Ibid.

<sup>28</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press, pp68-73

<sup>29</sup> Ibid.

<sup>30</sup> Oxford English Dictionary, Definition of 'accommodation', <http://www.oxforddictionaries.com/definition/english/accommodation>

<sup>31</sup> Collins English Dictionary, Definition of 'accommodation', <http://www.collinsdictionary.com/dictionary/english/accommodation>

Commission and potentially referred to the Equality Court or being charged with the crime of Crimen Injuria resulting in community service, fines or even a prison term<sup>32</sup>.

Excessive SI, or inappropriate SI, would be unfair by definition. Ergo, the intolerant, even the extremely intolerant, can themselves also be victims of unreasonable intolerance. It remains practically important to distinguish between Fair Secondary Intolerance (FSI) and Unfair Secondary Intolerance (USI).

More relevant than the uncontroversial question of *whether* the homophobic can suffer USI themselves (it seems inevitable that responses might sometimes be disproportional in an arena as highly charged as LGBTQI+ rights and religious views on homosexuality), is the question of *when* it is justified to limit their freedom to express homophobic views (under what conditions the intolerant suffer USI). I refer, here, particularly to marginal cases that occur when intolerance (PI) is close to, or over, the line of what is considered either socially or legally tolerable. I am concerned with the extent to which social or legal intolerance (SI) towards BBH/HS (PI), can be justified. I am also interested in the questions of when PI should attract merely social SI (manifested in de-platforming, social disapproval and disassociation) and where cases should be subject to legislation and consequent legal SI (for example censorship or criminal sanction like fines or incarceration).

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<sup>32</sup> Ivan Pijoo, News24, 2018, [Vicki Momberg Sentenced to an Effective 2 Years in Prison](https://www.news24.com/SouthAfrica/News/vicki-momberg-sentenced-to-an-effective-2-years-in-prison-for-racist-rant-20180328) - <https://www.news24.com/SouthAfrica/News/vicki-momberg-sentenced-to-an-effective-2-years-in-prison-for-racist-rant-20180328>

### 3. Literature review

An understanding of religious freedom is important to the question of how BBH/HS is handled, since religious freedom requires that society pay special attention to ensure that the expression of religious belief is not unduly prejudiced in social terms, or unduly curbed in legislative terms. An unreasonable focus on BBH/HS could lead to undue curbing of religious freedom.

The early philosophical foundations of religious freedom were established by thinkers like Locke in his *Letter Concerning Toleration*<sup>33</sup>. Religious freedom, and the more contemporary concept of freedom of conscience proposed by Leiter<sup>34</sup>, will be weighed against Popper's Paradox of Tolerance as well as Rawls<sup>35</sup>, Hamilton<sup>36</sup> and Spencer's<sup>37</sup> expressions of the Law of Equal Liberty, to create a tension between the need to maximise civil liberties (including religious freedom) on the one hand, and the need to limit harm and ensure for equal liberty for LGBTQI+ people, on the other.

In this literature review I will attempt to establish why and when religious views should and should not be tolerated and / or respected in contemporary society in light of arguments by Leiter<sup>38</sup>, Nussbaum<sup>39</sup>, Jeremy Waldron<sup>40</sup>, and Ryan T. Anderson, John Corvino, and Sherif Girgis<sup>41</sup>.

Leiter specifically asks why religion is given special preference in law and in social interaction, why a Sikh boy is allowed to wear his Kirpan (ceremonial dagger) to school while any other boy could be expelled for carrying a knife<sup>42</sup>? I contend, as does Leiter, that religious doctrine that contradicts the law should not be accorded special toleration, especially while secular convictions of conscience, or other forms of hate speech (like racist hate speech) do not receive equal treatment. In the case of BBH/HS, the question would be whether homophobic/hate speech outside the church would be allowed as much latitude as inside the institution. Leiter demonstrates how the reasons for tolerating religion are not only applicable to religion but could equally be used to justify exemptions for secular convictions of conscience.

In *The New Religious Intolerance*, Nussbaum uses Locke and Williams to describe how Lockean and accommodationist notions have been used to protect religious freedom. While both traditions acknowledge that the public good supersedes religious freedom under certain

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<sup>33</sup> John Locke, 1689, *A Letter Concerning Toleration*

<sup>34</sup> Brian Leiter, 2013, *Why Tolerate Religion?* Princeton University Press.

<sup>35</sup> John Rawls, *A Theory of Justice*, 1971, Harvard University Press.

<sup>36</sup> Harold C. Syrett, 1961, *The Papers of Alexander Hamilton, vol. 1, 1768–1778*, New York: Columbia University Press, pp. 45–78.

<sup>37</sup> Herbert Spencer, 1851, *Social Statics*, c. 4, § 3.

<sup>38</sup> Brian Leiter, 2013, *Why Tolerate Religion?* Princeton University Press.

<sup>39</sup> Martha C. Nussbaum, 2012, *The New Religious Intolerance*, Harvard University Press.

<sup>40</sup> Jeremy Waldron, *The Harm in Hate Speech*, 2012, Harvard University Press.

<sup>41</sup> Ryan T. Anderson, John Corvino, and Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination*, Oxford University Press.

<sup>42</sup> Brian Leiter, 2013, *Why Tolerate Religion?* Princeton University Press, Pg. 3.

conditions, while granting equal rights to individuals, the implications of these principles are applied differently by the two schools of thought. Based on Locke's views, Nussbaum notes that Lockean tradition emphasises that "laws that do not penalize religious belief, and laws that are non-discriminatory about practices (that is, the same laws must apply to all in matters touching on religious activities)"<sup>43</sup>. Based on Roger Williams' views, accommodationists go further and assert that even the unintentional social or legal persecution of religious minorities is unfair discrimination. As Nussbaum asserts, punishing religious people for refusing to testify in court due to religious convictions is "a grave offense against equal respect for conscience". If we are to treat minorities equally, says Nussbaum, these cases require special exemption, "otherwise the majority [is] claiming for itself a liberty much more extensive than it is prepared to grant to others".

Anderson, Corvino, and Girgis' book: *Debating Religious Liberty and Discrimination* poses the question of how, while there is broad-based support for religious liberty and opposition to discrimination, issues should be dealt with when exercises of religious liberty seem to discriminate unjustly. The authors argue, from opposing views, about the dynamic tension between the common good and respect for conscience in a religiously diverse society. In particular, Anderson chose to team up with Corvino and Girgis to provide proposing and opposing viewpoints on various aspects of the multi-layered social justice fight between the rights and dignity of LGBTQI+ people, and the religious freedoms of Americans who believe that god has ordained marriage to be heterosexual.

The specific denial of requests to perform or endorse same-sex marriage is not totally synonymous with the broader topic of BBH/HS, but nonetheless asks many of the same questions, and almost by default implies the expression of views that LGBTQI+ people are likely to regard as oppressive.

Same-sex marriage is, de facto, one of the primary areas of disagreement where the expression of religious belief clashes with the civil liberties of LGBTQI+ people and will form an important test case for this dissertation.

In *The Harm in Hate Speech*, Waldron deals with the conflict between hate speech laws and free speech legislation. While Waldron tends to focus on the United States in terms of law, the principles he discusses are universal. Free speech absolutists argue that hate speech laws damage societal liberties, while Waldron contends that hate speech should be regulated to guard human dignity and foster inclusion and respect for members of vulnerable minorities. Oppression of such groups, he says, amounts to sufficient harm to, at the very least, not dismiss claims of harm to the common good, a priori<sup>44</sup>.

Free-speech advocates wear, as a badge of honour, the idea that while they might "...wholly disapprove of what you say", they "...will defend to the death your right to say it"<sup>45</sup>. Waldron says the emphasis on intellectual resilience is misguided and argues that we should move beyond what he calls "knee-jerk American exceptionalism" in our debates over the serious consequences of hateful speech, and instead ward off the threat that hate speech poses to the

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<sup>43</sup> Martha C. Nussbaum, 2012, *The New Religious Intolerance*, Harvard University Press, Pp. 71-75.

<sup>44</sup> Jeremy Waldron, *The Harm in Hate Speech*, 2014, Harvard University Press, Pg. 3

<sup>45</sup> S. G. Tallentyre (pseudonym for Evelyn Beatrice Hall), 1906, *The Friends of Voltaire* - <https://quoteinvestigator.com/category/evelyn-beatrice-hall/>.



lives, dignity, and reputations of minority members of society.

I will attempt to establish a position where greater balance for all convictions of conscience can be maintained between these two partially conflicting priorities. I will try to argue against some convictions being given extra privileges because of an appeal to (in this particular case) religious special pleading.

Civil liberties – especially freedom of speech and expression – are often invoked in defence of intolerance. While free speech is generally enshrined in the legislation of Western democracies (including South Africa), it is also legally limited, and socially discouraged, in certain instances. The ability to discuss the question of hate speech towards LGBTQI+ people remains vital, and should not be lost in the quest to limit real harm to this community. As opined by Timothy Zick<sup>46</sup>:

For many decades, gay men and lesbians fought for the right to come out publicly and express their sexual orientation. Further, the freedom of individuals and organizations to speak about, and of the public to debate, marriage equality was critical to the change in public and official attitudes that led to the marriage equality decision<sup>47</sup>.

### 3.1 Foundations – Locke, Popper, Rawls

A foundational premise of this dissertation is that absolute tolerance ultimately leads to an intolerant society and that, therefore, the question of balancing religious liberties and civil rights is not one of *whether* civil liberties must sometimes be curtailed to avoid harm, but rather *when*. Indeed, it is already common for certain forms of speech (such as incitement to violence or genocide<sup>48</sup>) to be banned. The principle behind this type of legislation was asserted by Popper:

Less well known is the paradox 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 will be destroyed, and tolerance with them. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant.<sup>49</sup>

Rawls built on Popper's thinking by concluding that a just society must tolerate the intolerant (within reason), for otherwise, the society would then itself be intolerant, and thus unjust. Rawls also insists, like Popper, that society has a reasonable right of self-preservation that supersedes the principle of absolute secondary 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.<sup>50</sup>

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<sup>46</sup> Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1 (2014) (discussing the importance of rights discourse)

<sup>47</sup> US Supreme Court, 2015, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599.

<sup>48</sup> HJ van der Merwe, 2013, *The Prosecution Of Incitement To Genocide In South Africa*, Available at <http://www.saflii.org/za/journals/PER/2013/74.html> (Accessed 4 November, 2018)

<sup>49</sup> Karl Popper, 1945, *The Open Society and Its Enemies* Vol. 1, Routledge, Notes to the Chapters: Ch. 7, Note 4

<sup>50</sup> John Rawls, 1971, *A Theory of Justice*, Belknap Harvard, pg. 193

But both of these philosophers were preceded and no doubt prompted to some degree by the thinking of Locke almost three hundred years earlier, in the Commonwealth of Pennsylvania. Dealing specifically with religious tolerance, Locke says:

The toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light.<sup>51</sup>

Locke specifically establishes the importance of toleration of those of different religions in order to maintain international even-handedness and bring a perspective that helps to make the case for religious tolerance in Pennsylvania itself:

And what if in another country, to a Mahometan or a Pagan prince, the Christian religion seems false and offensive to God; may not the Christians for the same reason, and after the same manner, be extirpated there?<sup>52</sup>

While he extends this charity to those within *some sort of religion*, he is not as charitable to those who have *none*:

Lastly, those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all; besides also, those that by their atheism undermine and destroy all religion, can have no pretence of religion whereupon to challenge the privilege of a toleration.<sup>53</sup>

Locke seems to assert an inability, by virtue of a lack of belief in a higher power, for atheists to be trusted to keep to a legal commitment, or even a promise. However, to give Locke his due, he does encapsulate his overall intent in a line that is a precursor to the Law of Equal Liberty later expounded by Hamilton and Spencer:

That we may draw towards a conclusion. The sum of all we drive at is that every man may enjoy the same rights that are granted to others.<sup>54</sup>

And herein lies the crux of the balance between religious freedom (inasmuch as it includes homophobia) and the civil liberties of LGBTQI+ people. On this basis, it seems clear that freedom of speech and expression cannot be absolute and would, in a society that includes intolerant individuals or groups, could lead to the breakdown of that society.

BBH/HS is an example of primary intolerance – when homosexual people are not allowed to simply exist alongside silent disapproval by adherents to anti-homosexual Christian doctrine, but that doctrine is preached and otherwise vocalised and potentially even acted upon. When that primary intolerance is fought socially or legally, the motivation is usually to protect society (and LGBTQI+ people in particular), to ensure equal freedoms for all, where the

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<sup>51</sup> John Locke, 1689, *A Letter Concerning Toleration*, pg. 25

<sup>52</sup> *Ibid.* pg. 27

<sup>53</sup> *Ibid.* pg. 28

<sup>54</sup> *Ibid.* pg. 29

liberties of one group do not infringe on the dignity and safety of another, especially a marginalised group.

Nevertheless, the intolerant (proponents of BBH/HS) themselves may complain of undue secondary intolerance on the part of the individuals or bodies restricting their freedom of speech. In particular, they might claim the right, in terms of religious freedom, to express their disfavour and feelings of repugnance towards gay people and (in both private and state capacities) to refuse to perform their wedding ceremonies, deny them the legal right to get married or just express various degrees of disapproval of the idea that LGBTQI+ people are entitled legally, or theologically, to the same basic passive accommodation as heterosexual people when it comes to marriage or anything else. Do the intolerant have the right to complain of unfair secondary intolerance if expected to perform such services?

To repeat Locke's key statement: "That we may draw towards a conclusion. The sum of all we drive at is that every man may enjoy the same rights that are granted to others." Locke's encapsulating statement is crucial in establishing a balanced context within which to evaluate responses to primary intolerance (PI) of homosexuality in the form of BBH/HS.

It is uncontroversial to assert that even the most bigoted and intolerant individuals, or groups, are *capable* of saying or doing things that are neutral, or benign. They are also capable of saying or doing homophobic things that cause such mild harm to society that it (society) should reasonably evince little to no negative response at all towards this form of PI. So just as mildly sexist statements like: "you throw like a girl" may not be calculated to cause harm and so should be subject to mild disapproval and reasoning rather than legal sanction or even serious social sanction, a similar lack of insight into the lives of LGBTQI+ people may combine with a mild (possibly unconscious) homophobia and lead to misguided homophobic statements like: "That's so gay," in situations where, say, a straight male professes to conform to the stereotype of liking musical theatre, or enjoying the art of interior design.

A step up from this relatively mild level of homophobia, the more deliberately pejorative intolerant sometimes enact *more serious and harmful* PI that could require social intervention in the form of strong, principled disapproval from family, friends or the public, but still without the need for legislation to take effect. This might entail temporary social shunning or even the loss of friendships or family bonds, which could occur in cases where the homophobic speech or action is calculated to be hurtful and deliberately denigrating towards LGBTQI+ people but is not broadcast, and so therefore does not actually cause widespread harm.

It may be that the homophobic speech (which could well fall within the definition of hate speech) is shared with a person/s of similarly bigoted disposition who is not, therefore, harmed. It may also be that it is shared with a person who decides not to disseminate it further due to a vested interest in maintaining the peace for the sake of family relationships or friendship. While it is likely that there are many such cases where personal conflicts of interest and a desire to avoid conflict lead to silence on the part of those who could blow the figurative whistle, this fact would seem to heighten the moral importance of effectively handling those cases where the whistle is indeed blown in the interests of establishing new

social norms with respect to homophobic speech, and potentially deterring homophobic individuals from assuming that others share their attitudes.

In practice, it is sometimes the case that the only reason a particular utterance does become formally and publicly classified as hate speech is because it is distributed to a person/s mistakenly assumed to share bigoted attitudes, who then decides to act as whistle-blower out of a sense of fairness<sup>55</sup>. The substantive nature of the speech does not change, because it is exactly the same speech that is then shared more broadly than originally intended by the speaker, but the harm caused is greatly exacerbated by the fact that the speech is broadcast. This deepens the need for a response due to the level of harm.

However, it is fair to say that a certain (if far more limited) amount of harm has occurred even before the hypothetical whistle-blower acts, in the sense that the person committing the primary intolerance has presumed upon those with whom she shares the hate speech. It remains difficult to prosecute such speech unless the whistle-blower acts, however.

For those who do not share such attitudes, there is already an inherent harm / insult in the presumption – both in terms of the assumption with respect to shared homophobia and with respect to the expectation that the recipients / audience would become complicit by keeping it a secret.

To re-state and expand on Popper, the balance that society needs to strike between FSI and USI at the watershed of social and legal secondary intolerance of BBH/HS, can be framed in terms of the dynamic tension between civil liberties (especially freedom of thought, of speech, of expression, and of association) and the Law of Equal Liberty / Freedom for All as expressed by Locke:

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the lord and master of them all should, by any manifest declaration of his will, set one above another, and confer on him, by an evident and clear appointment, an undoubted right to dominion and sovereignty.<sup>56</sup>

Hamilton developed Locke's thinking by assigning legitimacy to unusual power only in the case of such power being vested by other humans:

All men have one common original, they participate in one common nature, and consequently have one common right. No reason can be assigned why one man should exercise any power over his fellow creatures more than another, unless they voluntarily vest him with it.<sup>57</sup>

Spencer further established the idea that one person's liberties end where they begin to infringe on the possibility of equal liberty for others:

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<sup>55</sup> Zanele Zama, 702, 2018, [The Person who leaked the Adam Catzavelos Video Did a Good Thing](http://www.702.co.za/articles/316385/listen-the-person-who-leaked-the-adam-catzavelos-did-a-good-thing) -

<http://www.702.co.za/articles/316385/listen-the-person-who-leaked-the-adam-catzavelos-did-a-good-thing>

<sup>56</sup> John Locke, 1689, *A Letter Concerning Toleration*, pg. 3.

<sup>57</sup> Alexander Hamilton, 1774, *A Full Vindication of the Measures of the Congress*, pp. 45–78.

...that every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty to every other man and ...each has freedom to do all that he wills provided that he infringes not the equal freedom of any other.<sup>58</sup>

The logical implication of these statements is that, at the point where one person's liberty does infringe the equal freedom of any other, that this liberty should be restricted if moral ends are to be served. When should it be restricted? When it causes sufficient harm.

### 3.2 Harm principle

John Stuart Mill's Utilitarian principle of harm<sup>59</sup> is fundamental to answering these questions. The dialectic train would be as follows: Does the BBH/HS (PI) cause real harm? When is that harm sufficient to, fairly, subject the PI to social SI? When is that harm sufficient to, fairly, subject the PI to legal SI? When is the SI unfair (when does the SI not meet the requirements of fairness, as above)?

To start with the most personally localised potential form of "intolerance": extreme proponents of SI might argue that intolerant homophobic opinions should not be tolerated. While democratic societies generally shun the idea of thought policing, autocratic states are known to engage in the proactive monitoring of citizen opinions. North Korea sends political dissidents to "political internment camps". Speaking out against the regimes is unnecessary to elicit such punishment - and even immediate family, who are assumed to share their views, are incarcerated.<sup>60</sup>

Horrible interrogations and torture have been reported in these camps as well as in those for political prisoners, who have typically been convicted of demonstrating or speaking out against the regime. Political prisoners are sent for life, often with three generations of their families accompanying them.<sup>61</sup>

Does a homophobic idea, alone, cause harm/enough harm to warrant FSI – either in the social or legal sense? Locke even mooted this idea in the seventeenth century:

I say, first, no opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society, are to be tolerated by the magistrate.<sup>62</sup>

Lastly, those are not at all to be tolerated who deny the being of a God. Promises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist. The taking away of God, though but even in thought, dissolves all.<sup>63</sup>

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<sup>58</sup> Herbert Spencer, 1851, *Social Statics*, Ch. 4., pg. 78.

<sup>59</sup> John Stuart Mill, 1861, *On Liberty*, pp. 21-22.

<sup>60</sup> Andrei Lankov, Bloomberg, 2014, [The Surprising News From North Korea's Prisons - https://www.bloomberg.com/opinion/articles/2014-10-13/life-beyond-north-korea-s-gulag](https://www.bloomberg.com/opinion/articles/2014-10-13/life-beyond-north-korea-s-gulag)

<sup>61</sup> Anna Fifield, Washington Post, 2017, [New Images Show North Korea's Extensive Network of Re-education Camps - https://www.washingtonpost.com/world/asia\\_pacific/new-images-show-north-koreas-extensive-network-of-re-education-camps/2017/10/25/894afc1c-b9a7-11e7-9b93-b97043e57a22\\_story.html?noredirect=on&utm\\_term=.1b202f43b530](https://www.washingtonpost.com/world/asia_pacific/new-images-show-north-koreas-extensive-network-of-re-education-camps/2017/10/25/894afc1c-b9a7-11e7-9b93-b97043e57a22_story.html?noredirect=on&utm_term=.1b202f43b530)

<sup>62</sup> John Locke, 1689, *A Letter Concerning Toleration*, pg. 18

<sup>63</sup> *Ibid*, pg. 23.

Locke seems to suggest that thought itself would cause harm. However, this would seem morally untenable, not to mention impractical to police. Why?

First, homophobic thoughts that are silently held do not, in themselves, seem to cause any harm to others, unless they are *expressed* in a context or manner that causes (e.g. psychological) damage to targets of the intolerant opinion, or in a way that incites others to cause damage to the victims of PI – say, through incitement to violence.

Additionally, while one could argue that these thoughts could cause some sort of harm to the individual holding them, it seems unreasonable and impractical to sanction an individual for holding opinions that harm only themselves, and potentially known only to themselves. Therefore, it is doubtful whether such opinions, unexpressed, even qualify as intolerance. They might qualify as *solipsistically* intolerant opinions, but to translate into active intolerance they'd have to be expressed and/or acted upon. In fact, the ability to hold an intolerant homophobic opinion *without expressing or acting on it in a manner directed towards those it disfavours, falls very much within the definition of tolerance*. By not speaking out or acting upon their opinion, the holder of the opinion fulfils the definition of tolerance – allowing something you disagree with or dislike to continue unmolested.

Expressing homophobia, on the other hand, crosses the vital conceptual line between freedom of thought and freedom of speech. In expressing the opinion, the *idea itself is immediately no longer the sole subject of discussion* – it has been translated into speech, a form of action, and when expressed to others it has an impact on society by definition.

An important caveat is that even the tolerant are capable of entertaining intolerant ideas without necessarily accepting them. Indeed, it seems a necessary condition of deciding that an idea is intolerant to consider its merits in the first place, and this may involve the expression of that idea, without agreeing with it. Considering an idea and agreeing with it are distinct concepts, but considering it is a precursor to acceptance or rejection.

In this sense, it would seem that the sanctity of freedom of thought (and in some cases, even expression) with respect to violently harmful ideas must be preserved in order that intolerant ideas themselves can be evaluated. It is often opponents of those ideas that express them. Furthermore, this applies not only so that the person considering the idea can define what she is talking about, but also to allow a second person to express and substantiate the idea as strongly as she can to allow the idea to be fairly considered in its strongest form as part of a dialectic.

Society can remain largely unharmed, and even retain a tolerant character, despite some of its members either considering or agreeing with intolerant ideas, if those ideas remain unexpressed or even if they are, but are expressed for heuristic purposes, and inflict a negligible amount of harm.

Nevertheless, words and actions are in a more serious class, as far as harm goes, than thought. It is uncontroversial to assert that they are well-established as being able to cause harm at both personal and group levels. Physical harm, firstly, is a largely unambiguous concept. The

blameworthiness of the inflictor may require a separate discussion in certain circumstances. Physical harm can involve responsibility with diminished blameworthiness in cases of extreme trauma, for example the case of a French woman who killed her husband after years of violence and sexual abuse of her and their children<sup>64</sup>. Verbal harm can be more complex to pinpoint, since words sometimes amount to offense, which isn't necessarily objectively harmful, but can be. For example, a study on the damage caused to pubescent brains by means of verbal abuse by peers suggests that physical brain damage and negative behavioural results can occur as a consequence of verbal abuse:

... those individuals who reported experiencing verbal abuse from their peers during middle school years had underdeveloped connections between the left and right sides of their brain through the massive bundle of connecting fibers called the corpus callosum. Psychological tests given to all subjects in the study showed that this same group of individuals had higher levels of anxiety, depression, anger, hostility, dissociation, and drug abuse than others in the study.<sup>65</sup>

Since homophobic thoughts alone cannot cause harm to others and would therefore, by definition, not provoke a response, we will focus only on BBH/HS that is actually expressed verbally or physically. We will evaluate them as potentially harmful PI, and look at the legitimacy or otherwise of sanctions (or the absence thereof) in the form of SI.

In evaluating how to respond most appropriately to homophobic speech, an important question to ask is whether a particular offense is in fact harmful. As part of his description of the Harm Principle<sup>66</sup>, Mill would argue that in order to qualify as actual harm, offense must extend beyond hurt feelings. He describes three principles that contribute to an understanding of harm. First, the *Principle of Utility* – that actions must bring the greatest happiness to the greatest number of people. Unhappiness and feelings of inadequacy, unworthiness, shame and humiliation would qualify under this principle. Second, the *principle that offense does not necessarily lead to harm* – the concepts are distinct and, to qualify as harm, PI must actually prejudice others' wellbeing, rights or disadvantage social interests that benefit an individual or group. The right to personal dignity espoused in the South African Constitution's Bill of Rights could conceivably be included here. Third, the *principle that actions very seldom affect only the person taking them*, and most actions do affect other people in observable and significant ways.

In summary: offense given by means of BBH/HS may be wrong, and can be a subset of harm, but offense meets the requirements of the harm principle only if also causes actual prejudice to others. By actual prejudice I mean harm that causes some kind of palpable damage to the well-being of those subject to BBH/HS. Additionally, it would be preferable if the damage were quantifiable, or qualitatively comparable to some extant, recognised societal harms, though an important caveat is that non-measurability does not at all necessarily entail the

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<sup>64</sup> Agence France-Presse via Telegraph, 2016, Fury as French Court Refuses to Release Woman Pardoned for Killing Abusive Husband - <http://www.telegraph.co.uk/news/2016/08/13/fury-as-french-court-refuses-to-release-woman-pardoned-for-killi/>

<sup>65</sup> Fields, R. D. 2010., Psychology Today, Sticks and Stones—Hurtful Words Damage the Brain - <https://www.psychologytoday.com/blog/the-new-brain/201010/sticks-and-stones-hurtful-words-damage-the-brain>

<sup>66</sup> John Stuart Mill, 1859, *On Liberty*, Chapter 1, pg. 18

absence of damage, and that our ability to measure and identify such damage improves with time. It seems likely that some real harms and damage that are not yet identifiable or measurable will be missed and under-addressed until human tools to measure and prosecute them are improved.

Unfair secondary intolerance towards BBH/HS (unwarranted limiting of religious rights) would only occur when excessive SI is given effect (SI expressed when none is required, legal SI when only social SI is needed, or simply excessive legal SI). Sometimes SI may even be directed at perfectly normal words or actions of the intolerant homophobe, in response to speech unrelated to homosexuality itself. In such cases, the SI would most likely be a function of the general antipathy that intolerant individuals can evoke in society, rather than being a justifiable reaction to a specific, current harm. In other words, intolerant individuals (who can inspire more or less chronic societal or individual “grumpiness” that spills over into situations that would normally be ignored) can be too harshly dealt with, especially in societies where they may be in a minority.

### **3.3 Sacred, categorical divine command**

Having established the generic criteria on which to evaluate harm resulting from PI, and where SI is appropriate, it becomes important to ask whether the fact that religious beliefs are seen by believers as sacred, categorical and divinely originated entitle those believers to special exemptions in law to express their beliefs, when that expression clashes with the civil liberties of others.

Leiter’s answer is clearly “no.”<sup>67</sup> I agree, because although religious beliefs sometimes make categorical demands of a distinctly moral nature, their insulation from evidence (combined with their categoricity) opens religious beliefs to potentially unreasonable symptoms of prejudice and harm. Where they happen to be promote virtuous speech or actions, the religion (while it may be claimed to be a motivator) does not seem to be a necessary condition for any objective good.

In terms of attitudes to homosexuality, there are so many variations of doctrine even within Christianity, that it seems unlikely ever to be resolved into a single view. But even if one could establish what the “correct” biblical or Christian view of homosexuality is (which would require agreement on the relative weightings given to scriptural revelation of god’s will versus direct revelation, as well as the balance of literal versus figurative or thematic guidance<sup>68</sup> one takes from scripture), the objective harms caused to the homosexual community are likely to outweigh the importance of allowing Christians to live out their faith in all respects, without impediment.

By “thematic guidance” I refer to the idea that, where different scriptural references seem to contradict one another, some believers view themes like love (as putatively displayed by

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<sup>67</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press, pg. 67

<sup>68</sup> See generally: The Other Foundation, Gerald O. West, Kapyra Kaoma and Charlene van der Walt, 2017, [When Faith Does Violence](http://theotherfoundation.org/wp-content/uploads/2017/01/When-Faith-Does-Violence.pdf) - <http://theotherfoundation.org/wp-content/uploads/2017/01/When-Faith-Does-Violence.pdf>



Christ) as being the default one should use to decide on a given piece of doctrine. Leiter points out that there is no moral good that can be achieved without religion, hence it is the secular morality they contain that makes them in any way valuable, rather than their claim to be divinely inspired.

### **3.4 Religion's moral impact**

How is the moral impact of contemporary religion determined? I submit that its extent would, to greater and lesser degrees (depending on local geo-political factors) be determined by factors such as i) the proportion of religious belief in a population, ii) the socio-political and economic influence wielded by such religious groups, iii) religions' track records in terms of morality and basic human rights (which would, in part, define the level of trust they enjoy in a population – modified over time by cultural and political trends) and iv) religion's resulting practical impact on people's deeply held beliefs and the actions they inform.

The last major study of global religions by Pew Research<sup>69</sup> indicated that 84% (5.8 billion) of the world's population identifies with one religious group or another, including 2.2 billion Christians (32%), 1.6 billion Muslims (23%), 1.1 billion with no religious affiliation (16% - which includes those with idiosyncratic religious beliefs), 1 billion Hindus (15%) and nearly 500 million Buddhists (7%).

Religions have extensive de facto influence on ordinary daily behaviour and morality (as will be demonstrated later in this dissertation), as well as (partially or wholly) being used to justify extraordinary acts of violence or terrorism. The latter represents a particularly heavy burden on public consciousness. The high degree of religious belief in Africa where conflict between Christians and Muslims (e.g. Sudan, Nigeria) continue, the large, vocal and politically powerful American Evangelical Christian religious right, the rise of domineering Islamism (e.g. Taliban, ISIS) alongside existing and often oppressive Islamic theocracies in the Middle East – all indicate good reason for significant contemporary interest in religion and the moral impact of religious beliefs, and the actions they inform, on society.

### **3.5 Passive versus active religious accommodation**

Leiter argues for passive accommodation / tolerance of religious expression<sup>70</sup>, which emanates, firstly, from the Kantian principle that all humans have inherent value and, therefore, a right to dignity including the right to their own religious views. Leiter and Nussbaum both argue that ignoring this principle would cause unjustifiable harm to individuals. Since the governments of democracies receive their mandate from the collective will of the people they serve, and given that almost all populations are inherently heterogeneous, the state is obliged to respect, equally, the dignity of all people, part of which is embodied in state and individual respect for others' liberty of thought.<sup>71</sup> In terms of its mandate, Government must apply the Kantian principle (regardless of any arbitrary

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<sup>69</sup> Pew Research Center, 2012, "Forum on Religion & Public Life" -

<http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/>

<sup>70</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press, pp. 54-67

<sup>71</sup> Martha C. Nussbaum, 2012, *The New Religious Intolerance*, The Belknap Press of Harvard University Press, pg. 65

characteristic – including religion) of treating people as ends in themselves, not as mere means. Nussbaum, too, asserts that every natural person, assuming sentience and sapience, has inherent value and is entitled to certain basic rights, including dignity and freedom of conscience, which includes freedom of, or from, religion.<sup>72</sup>

These arguments for passive accommodation are supported by principles such as the objectivity of the veil of ignorance in Rawls' "Original Position" thought experiment.<sup>73</sup> The thought experiment imagines that people will define the structure of their societies from behind a veil of ignorance, which renders them ignorant of their own positions in that society with regard to key characteristics like gender, social stratum, ethnical background, religion and also their Conception of the Good (in other words, how they would define a good life and its characteristics). This enforced ignorance means the subjects have to structure their society without bias. The experiment gives practical effect to Spencer's Law of Equal Freedom (Social Statics, 1851): "that every man may claim the fullest liberty to exercise his faculties compatible with the possession of like liberty to every other man."

Religion falls within individual Conceptions of the Good (per Spencer). So a dynamic tension between i) regard for inherent individual human value/dignity, ii) the objectivity of the Rawlsian veil of ignorance and iii) the balance of Spencerian<sup>74</sup> equal liberty, would provide excellent grounds for passive accommodation of religion.

Such passive accommodation would not unduly undermine individual rights, nor would it pander unnecessarily to religious claims that are categorical, insulated from evidence and potentially harmful. It seems that Leiter feels secular laws taking these principles into account should provide sufficient liberty for anyone to practice their religion<sup>75</sup>. Leiter argues that the selective application of tolerance to religious claims of conscience, especially when similar consideration is not given to secular claims, is unjustifiable. They should provide enough liberty to qualify that society as religiously tolerant, while not conflicting with the liberties of others or the good of society.

Leiter argues against active accommodation of religion in liberal states, precisely because he does regard religious beliefs as arbitrary, categorical, insulated from evidence and often pernicious<sup>76</sup>. However, these arguments may not necessarily be enough on their own to preclude the possibility of active accommodation of religion.

### **3.6 Active accommodation of religion - challenges**

Rather, Leiter asserts, systemic problems associated with consistency and fairness would make attempts to implement active accommodation over-inclusive (e.g. accommodating religious believers whose practices would be harmful, along with those that are benign, for the sake of consistency), or under-inclusive in that secular claims of conscience are, as a matter of fact, not treated with the same gravity as religious ones.

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<sup>72</sup> Martha C. Nussbaum, 2012, *The New Religious Intolerance*, The Belknap Press of Harvard University Press, pg. 62

<sup>73</sup> John Rawls, 1971, *A Theory of Justice*, Belknap Press, pg. 15

<sup>74</sup> Herbert Spencer, 1851, *Social Statics*

<sup>75</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press, pg. 133

<sup>76</sup> *Ibid.* pg. 81

Coupled with these potentially negative characteristics, Leiter argues, there seems to be no benefit to be derived from religion that cannot be derived without it. In the long run, there is nothing societies necessarily have to lose, but there is significant harm they can avoid by not actively accommodating religion beyond the basic rights granted to all citizens by passive accommodation – which should provide enough liberties for all citizens, theist or atheist.

There are several problems, in principle, with granting any religious request for special treatment at all, as argued by Leiter and Nussbaum.

Arguably, the most important objection to active accommodation of religion by the state is the threat of *legal anarchy*. Historical demands for religious exemption from normally applicable laws have not been granted on the basis of the veracity of the religious claim, but rather based on the sincerity of the conviction. This was the case with the Sikh boy in the preamble to Leiter's book who wanted to carry his traditional Kirpan to school<sup>77</sup>. However, both reasonable and unreasonable (or benign and harmful), religious claims can be held with equal sincerity. It would clearly be harmful to society to grant believers exemption from laws against child abuse because, as members of a hypothetical religion, some people wanted to follow that religion's categorical dictate to use every second child as a blood sacrifice to their god.

Differing interpretation of scripture (inconsistent exegesis) is common. It seems dubious to claim the refusal of services to gay couples seeking marriage officiants or wedding cakes as a *necessary* aspect of the free expression faith when biblical prescriptions on the matter are inconsistently understood and applied across Christianity. These differences would seem to make such claims *optional* to the faith, rather than necessary – at least, until overwhelming clarity is established. In addition, granting such a right might imply that extremist Christians should have equal rights to apply other archaic exhortations to practice unreasonable or harmful punishments like stoning of young brides found to be non-virgins on their wedding nights.<sup>78</sup> In fact, some news reports suggest that the impulse to stone homosexuals, is alive and well among extremist Christians<sup>79</sup> - even in geographies usually dominated by liberal ideologies. If sincerity, and not epistemological validity or ethical value, is the only yardstick by which a claim is assessed, then there is no rational basis for turning down one religious request for exemption and granting another. This concern is particularly relevant to the sanctioning of BBH/HS, since it seems that other harmful beliefs, like racism or the belief that non-virgin brides should be stoned, would be outlawed and prosecuted, while prejudice against LGBTIQI+ people may not, always. Additionally, it seems tenuous to suggest that selling a service or product necessarily means condoning everything about those who buy it from you. Providing a service, in most cases, seems more analogous to selling someone a meal than raising the toast at mealtime. One is not necessarily expected to take part in the figurative celebration at all, when providing the food.

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<sup>77</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press, pg. 93

<sup>78</sup> Bible, *New International Version*, 1978, Zondervan, Deuteronomy 22: 20, 11.

<sup>79</sup> Cavan Sieczkowski, Huffington Post, [Anti-Gay Harlem Pastor Defends 'Jesus Would Stone Homos' Sign - http://www.huffingtonpost.com/2014/03/24/anti-gay-harlem-pastor-stone-homos\\_n\\_5021710.html](http://www.huffingtonpost.com/2014/03/24/anti-gay-harlem-pastor-stone-homos_n_5021710.html)

*Inconsistent treatment of similar secular claims of conscience*<sup>80</sup> is another challenge. Historically, similarly sincere claims of conscience from secular quarters have not been given equal status to religious ones – so a boy whose family tradition was to pass an heirloom knife from father to son as a rite of passage would not be granted exemption to take his knife to school, in Leiter’s case study, though the claim of conscience was equally in sincerity to that of the Sikh boy. In addition, courts and governments have tended to avoid ruling such cases – possibly because secular claimants have no scripture to refer to in terms of validating the sincerity of their claim or establishing a link to their conscience. This potentially negates the option of making a secular claim of conscience altogether. Leiter argues that similarly sincere secular claims of conscience should be given equal treatment before the law.<sup>81</sup>

*Inherent unfairness to all those not granted exemption* - even without comparisons between religious and secular demands for exemption, or between demands emanating from different religions, the question arises why all citizens cannot enjoy the privileges being granted to a religious group on the basis of beliefs. If the practice is benign enough to allow the exception, it should be benign enough to be allowed as a rule, Leiter suggests. Or else, the practice should not be allowed at all, given that it is based on beliefs that are arbitrary, categorical, insulated from evidence and often pernicious. He relates his view back to the Sikh boy<sup>82</sup>, pointing out that the exception is also inconsistently applied in terms of location – the Kirpan is allowed at school, but not in court or on an aeroplane, despite that fact that schools are also potentially risky places – possibly even riskier than courts and aeroplanes, given issues of impulse control and volatile relationships between learners and teachers.

Although two individuals may hold equally sincere convictions, they may be subject to *inconsistent legal evaluation*. They may not be equally articulate in verbalising them, have differing access to counsel, face differently disposed judges, differently composed juries, or juries that are demographically predisposed to favour alleged victims of religious crimes (per Nussbaum). Therefore, different individuals may not have equal means or opportunity to convince authorities of the depth, sincerity and validity of their convictions, or how they led to certain actions (in the case of a criminal proceeding).

*Epistemological inadequacy* - to qualify for active accommodation or affirmative respect, Leiter argues, religion would need to cross the bridge of epistemological credibility – just like any other ethical claim. This would be the only basis upon which to respect religion *qua* religion, which is something that has not been possible to date. For this reason, none of Leiter’s arguments made for accommodation of religion are based on a religion *qua* religion rationalisation – there simply aren’t any credible foundations for such arguments.

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<sup>80</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press, pg. 133

<sup>81</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press, pg. 93

<sup>82</sup> *Ibid.* pg. 1

### 3.7 Active accommodation – an example

The problem with granting a religious request for special treatment is illustrated when Leiter highlights the difference between passive and active accommodation in the case of Simon Blackburn<sup>83</sup>. When the contemporary philosopher was asked to participate in Jewish religious observance on a Friday (Shabbat) evening, and declined, the host's argument was that it was simply a matter of "respect" (presumably trying to equate participation with basic respect / passive accommodation). Blackburn, however, viewed the request for his participation as an unreasonable request for active rather than passive accommodation. Blackburn asserts that (by a reasonable person test) he would not have been expected to participate, had the request for observance come from members of the Hale Bopp Comet Cult. By his definition, then, the respect expected by his host goes beyond passive accommodation. Since it requires specific behaviour by a non-believer with respect to the object of the respect, the participation Blackburn's host was asking for falls into the active accommodation category. There seem to be just two things that distinguish mainstream religious practice from what would be regarded by many as cults, on the fringes of religious practice:

- i. Popularity – number of adherents, effectively rendering resistance to the religion highly onerous or even dangerous.
- ii. Religious scope/cultural creep – religious practice which becomes so ubiquitous that it becomes cultural artefact and is often unquestioningly practiced in a "secular" manner and assumed to be benign.

Both of these seem to apply to BBH/HS, where homophobic attitudes justified biblically seem to be held by very large numbers of believers, and where that homophobia has become ingrained into broader culture as well. In the Blackburn example, the host's request, and his argument, amounted to a reversal of grudging Hobbesian toleration<sup>84</sup>, where a majority won't eliminate or persecute a disfavoured minority only because they cannot get away with it. Mainstream religion asks the question because it can get away with it – it's too big to be taken to task in any serious way, and often its practices have become construed as cultural rather than religious.

In South Africa, not only was religion a systemic part of the country's culture in the form of phenomena like "Christian National Education"<sup>85</sup>, but so was homophobia, in terms of the common-law crimes of sodomy and "commission of an unnatural sexual act." On the 8th of May 1998, these remnants of from Roman-Dutch law were found unconstitutional by the Witwatersrand Local Division of the High Court (*National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>86</sup>). As deeply influential aspects of South African culture, the church and the state went out of their way in Apartheid South Africa to criminalise,

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<sup>83</sup> Ibid. pg. 73

<sup>84</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press, pg. 9

<sup>85</sup> Hofmeyer, JM, 1982, "An examination of the influence of Christian National Education on the principles underlying white and black education in South Africa 1948 – 1982", University of the Witwatersrand.

<sup>86</sup> New York Times, unattributed, 1998, [South African Court Ends Sodomy Laws](https://www.nytimes.com/1998/05/09/world/south-african-court-ends-sodomy-laws.html) - <https://www.nytimes.com/1998/05/09/world/south-african-court-ends-sodomy-laws.html>

stigmatise and persecute gay individuals in a manner that fluidly exploited the seamless religio-political mix to instil a deeply rooted homophobia in South African culture.

### **3.8 Undue limitation of religious freedom**

While it is crucial to ensure sufficient liberty for all from such categorical, epistemologically unfounded moral claims, it is also very important to avoid undue limitation of the free practice of religion. Nussbaum sends out some clear cautions in terms of the inconsistent application of law to single out religion for special discrimination.<sup>87</sup> Citing the Biblical command to remove the log from one's own eye before pointing out the mote in the eye of one's brother<sup>88</sup>, Nussbaum highlights inconsistency and hypocrisy in the application of law with respect to limiting of religious freedoms.<sup>89</sup> "Inconsistency," she says, is the "deepest and most basic ethical failing of all, the failure to acknowledge the equal reality of others," referring to the criticism of others over issues that we as critics are often guilty of ourselves, and failure to hold ourselves to those same standards. Nussbaum focuses mainly on Islamophobia, and the strongest example she uses is the banning of the burqa. Possibly her strongest example involves the banning of the Burqa in certain parts of Europe, or in certain European nations' schools, on the basis of threats to security, national identity or female objectification. She points out that the wearing of Catholic garb by teachers, or the wearing of headscarves (by the general population) that cover the entire head during the Winter have elicited no such concerns from or towards citizens who, ethnically or religiously, would not be considered immigrants or descendants of immigrants. It seems obvious that in strictly logical terms, such laws could (or should, if consistently applied) be over-inclusive in terms of banning perfectly ordinary behaviours. Both Leiter and Nussbaum identify also the risk of being under-inclusive in terms of non-religious claims of conscience that should enjoy equal status with religious claims but are turned down or never heard due to inconsistent application of laws<sup>90</sup>.

#### **Oppressor versus oppressed**

Nussbaum's arguments tend to focus on the justifiable protection of marginalised communities – particularly those that face Islamophobia, and undue prohibition of religious expressions that are more or less harmless to others. This dissertation casts certain groups of adherents of religion in the role of *oppressors*, rather than oppressed. Hence, the need for consistency as it pertains to BBH/HS is that the limitation of the religious practice is inconsistent by virtue of being *under-enforced* when compared to other forms of BBH/HS, rather than being *over-enforced*.

I agree very much with Nussbaum's assessment that the enforcement of limitations on religious practice should be consistent with other, non-religious practices, and I additionally submit that this should apply equally to either secular or religious practices, whichever side of the prejudicial equation they find themselves on. In other words, my thesis is that BBH/HS

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<sup>87</sup> Martha C. Nussbaum, 2012, *The New Religious Intolerance*, The Belknap Press of Harvard University Press, pp. 98-138,

<sup>88</sup> Bible, *New International Version*, 1978, Matthew 7:3-4, Zondervan.

<sup>89</sup> Martha C. Nussbaum, 2012, *The New Religious Intolerance*, The Belknap Press of Harvard University Press, pp 102, 114, 122,

<sup>90</sup> Brian Leiter, 2013, *Why Tolerate Religion?*, Princeton University Press, pg. 37

is not currently treated with as much gravity as other forms of hate speech and should be given more attention in order to *enhance* the extent to which H/HS of all kinds are treated consistently – by focusing on the current shortfall of attention to the biblically-based variety.

Nevertheless, Nussbaum’s caveat is an important one. Inasmuch as it is important (per Leiter, pp 68-91)) to i) legislate sufficient basic freedoms that include freedom for non-harmful religious practices and ii) avoid special exemptions for practices that result in unfair legal favour towards religious beliefs that are categorical, arbitrary and epistemically unsound, the bar that potentially restricts basic civil liberties should not be selectively or artificially raised to discriminate against a specific religion.

In general, both Leiter and Nussbaum argue for passive accommodation of religion, and are cautious about arguing for active accommodation, though Nussbaum seems particularly sympathetic towards Islam, in particular. Nonetheless, the combined force of their arguments is that the bar should ultimately be set at the lowest level compatible with equal freedom, and minimal harm, for all.

### 3.9 Waldron on Hate Speech

Rawls argues that intolerant religions that make categorical demands non-adherents would die out in societies that are well structured and value pluralism.<sup>91</sup> Waldron expands on Rawls’ work, arguing<sup>92</sup> that societies should protect two common goods by means of hate speech legislation. He argues that hate speech competes for control of a society by trying to establish its own norms, as “the wolves call to one another across the peace of a decent society”. In the case of BBH/HS, the emphasis would be slightly different, given that homophobic views are often the existing norm<sup>93</sup>, and the society only appears decent inasmuch as a tyrannical majority’s prejudices go largely unmolested by a marginalised minority of LGBTQI+ people. His argument in favour of hate speech legislation is built on two pillars.

First, he argues for the social important of *inclusivity* – that members of all demographic groups should be able to go about their business without fear of being verbally or physically assaulted or excluded from society. He refers to hate speech as a “sort of slow-acting poison, accumulating here and there, word by word, so that eventually it becomes harder and less natural for even the good-hearted members of the society to play their part in maintaining this public good”<sup>94</sup>.

Second, he argues that the *dignity* of all members of society should be protected, and that the importance of one’s dignity should be viewed from the perspective of those whose dignity is being impugned. His view is that this dignity is “more than just some Kantian aura”, but that it involves their reputations and the social standing that allows them to act and be treated as

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<sup>91</sup> John Rawls, 1993, *Political Liberalism*, NY; Columbia University Press, pp 196-198

<sup>92</sup> Jeremy Waldron, 2014, *The Harm in Hate Speech*, Oxford University Press

<sup>93</sup> Gauteng City-Region Observatory “Quality of Life Survey”, 2015, pg.24, [http://www.gcro.ac.za/media/redactor\\_files/GCRO\\_QoL\\_2015\\_Press\\_pack\\_low\\_res.pdf](http://www.gcro.ac.za/media/redactor_files/GCRO_QoL_2015_Press_pack_low_res.pdf)

<sup>94</sup> Jeremy Waldron, 2014, *The Harm in Hate Speech*, Oxford University Press, pg. 4

respected and trusted members of society to the same degree as people from any other group<sup>95</sup>.

In other words, Waldron says hate speech legislation should aim to protect people's dignity against assault. For LGBTQI+ people, it protects their basic freedoms, as expressed in terms of access to fairness, equal treatment by the law and good faith dealings with other members of society on the basis of charitable assumptions about their reputations. In tying his arguments into Rawls' harm principle, he points out <sup>96</sup>that his views of hate speech law do not seek to protect people from offense, but rather from actual harm. This concept is equivalent to the actual prejudice I have addressed in my description of the harm principle and the harm cause by BBH/HS. Waldron defends the claim that such laws can maintain a clear distinction between indignity and offense, and that "A person's dignity or reputation has to do with how things are with respect to them in society, not how things feel to them." So the manner in which they are treated can have a more far-reaching and objective impact on their wellbeing, than subjective feelings of shock, hurt, anger etc. Indeed, in terms of the harmful effects of spoken words, as we have seen from arguments around the harm principle above, words can even have a lasting physiological impact, not to mention a psychological one.

As Waldron points out, the aim of hate speech is "to besmirch the basics of their reputation, by associating ascriptive characteristics like ethnicity, or race, or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing"<sup>97</sup>. Sexual orientation is equally ascriptive.

### 3.10 Challenges to Waldron

Among the challenges to his own view, Waldron presents those of Ronald Dworkin and Ed Baker<sup>98</sup>. Dworkin's view is that where an individual has a right, "it is wrong for him to be denied the exercise of that right even when social utility would be advanced by the denials." Waldron counters by saying that it's easy to take this view when the opposing side to Dworkin's view is abstractly referred to as "social utility", rather than trying to argue for one individual's right to speak being prioritised over the harm that the speech might cause to a second individual. As Waldron puts it:

It is a fault of Dworkin's analysis that he does not say nearly enough about trumping the prevention of harm. Though he acknowledges that rights-as-trumps may be defeated, defeat is envisaged only in the case of a conflict with other rights or when there is some threat of moral catastrophe. Harm as such, or harm whose prevention is not the clear subject of a right, is not discussed.<sup>99</sup>

One could argue that LGBTQI+ people have equal rights in that they have an equal ability to answer hate speech with better, stronger ideas – their rights are maintained in that sense. I submit in reply that, LGBTQI+ people have many other rights that may be jeopardised in the

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<sup>95</sup> Ibid. pp 5-6

<sup>96</sup> Jeremy Waldron, 2014, *The Harm in Hate Speech*, Oxford University Press pg. 106

<sup>97</sup> Ibid. pg. 5

<sup>98</sup> Ibid. pp 159-164

<sup>99</sup> Ibid.



presence of hate speech, and that in terms of the Law of Equal Liberty, the homophobe's right to swing a bigoted arm stops at the tip of the LGBTQI+ person's already-bloodied nose. In terms of Waldron's position it would seem reasonable to assert that LGBTQI+ people's right to be treated equally by virtue of having their good reputations (and concomitant assumptions about their characters) maintained seems to be infringed upon by hate speech that labels LGBTQI+ people as unnatural, abominable, and so on. Such infringements can indeed cause real-world harm, whether in the form of psychological damage or in terms of the treatment they expect from other members of society. For this reason, Dworkin's argument does not seem to meet the requirements of the Law of Equal Liberty.

Similarly, Baker's position on freedom of expression includes toleration of hate speech. His position is based on the autonomy of the individual, and the argument that every person's ability to be themselves should be respected. Baker's argument is that the government's role is to give every individual the space to be themselves, and express their views publicly, no matter the substance of their views. In the sense that the speaker's views capture her true thoughts, they are as legitimate as any other, so whether she expresses homophobic speech – or speech that is morally neutral or benign – is immaterial. Baker views any limitations on free speech as unacceptable because they infringe on the agent's autonomy. Baker is not really concerned about the effect of the hate speech on the society, or on the targets of the hate speech. He cares most about the speaker's autonomy, even if her hate speech causes harm to other members of the community. Baker doesn't seem to consider marginalised communities such as LGBTQI+ people in his analysis, which seems to include the premise that all groups have an equal voice, avoids dealing with the harm hate speech might cause, and dismisses concerns as choosing to take offense.

Waldron's response<sup>100</sup> emphasizes Baker's seeming avoidance of the fact that hate speech causes harm to societal *inclusivity* and *personal dignity* and therefore causes serious harm to individuals from marginalised groups (like LGBTQI+ people) when they try to exercise their rights as free and equal members of society. Waldron points out that hate speech destroys the fairness of a society for those in vulnerable positions, who cannot expect to be treated fairly, to express themselves with equal freedom or be kept safe from more active harms like psychological damage or even the possible increase in physical violence resulting from a bigoted culture (there might be recourse to public safety officials once attacks happen, but the increased frequency of physical attacks based on the disdain for, and dehumanisation of, marginalised groups would not be checked, if hate speech is allowed to go unlimited). Using racism as an example, Waldron states:

To the extent that the message conveyed by the racist already puts them on the defensive, and distracts them from the ordinary business of life... to that extent, the racist speech has already succeeded in one of its destructive aims.<sup>101</sup>

Baker does not seem to provide any compelling argument for the harm caused by hate speech to be ignored. He also ignores the asymmetry inherent in being a marginalised minority when he tries to suggest that a legal framework that theoretically allows everyone an equal voice facilitates equal freedom for all. First, the mental resilience of a person who is consistently psychology assaulted by a society that regards her as subhuman is not likely to equal that of

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<sup>100</sup> Jeremy Waldron, 2014, *The Harm in Hate Speech*, Oxford University Press, pg. 165

<sup>101</sup> *Ibid.* pg. 171

someone who is taught and lives, from birth, as if they have no reason whatsoever to feel inferior – quite the contrary, in fact. The oppressed person is far less likely to feel confident or safe enough to exercise her theoretical right to speak. Secondly, her ability to access mass communication channels (as a result of this lack of confidence), or even to be fairly represented in the mass media, is often limited. LGBTQI+ people are often presented as stereotypes<sup>102</sup> – with gay men typically depicted as sexually immoral, and overly obsessed with appearances, while lesbian women are often depicted in the opposite to that caricature. Bisexual and transgender characters are rare or cast as immoral or mentally ill. These stereotypes are often similar to the way oppressed racial, religious or other groups are portrayed and often demonise their subjects.<sup>103</sup> LGBTQI+ characters are frequently limited to playing the bad guys, or to supporting roles. Given this reality, Baker’s “colourblind” approach, in isolation, would therefore effectively promote the perpetuation of the oppression - because the status quo is already oppressive and tyrannical majorities are not typically known to cede their privileges to the disfavoured.

A common argument in favour of allowing hate speech is that hate speech laws would only drive bigots underground<sup>104</sup>. More generally, there is a corollary argument that public hate speech has value in terms of evaluating, and countering it.<sup>105</sup> This argument, while it isn’t false, needn’t apply in all cases, and is not enough to persuade Waldron that hate speech laws are not required. For him there is still the question of weighing harms against each other. He is uncertain which would be greater and argues that isolating bigots to hamstringing their ability to communicate could be a good in itself. I would argue, in addition to Waldron’s point, that forcing bigots to operate in secret and overtly labelling their speech as so shameful that it cannot be uttered in public would contribute to a set of public norms where the positive, the benign and the shameful are all labelled appropriately. As argued by Naomi Mezey, law and culture tend to be viewed as discrete but are actually deeply entwined and tend to influence one another profoundly.<sup>106</sup> I do not argue that this impact on culture would eradicate bigoted attitudes (or even bigoted speech, where uttered in private) but only that the common public understanding of what is acceptable and what is not would be more appropriately calibrated, and that bigoted views could be actively and fearlessly called out in public or private social contexts to a greater extent than they are.

Waldron agrees and, while he admits that we may pay the price of sacrificing some transparency, he argues that forcing bigots to operate in secret denies them access to public exposure and strips them of respectability. Effectively, their operations and communications become riskier in the sense of them being outed as bigots, and also reduces the ease with which they can join with other, like-minded people. This makes the operation of organised

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<sup>102</sup> Raley, Amber B.; Lucas, Jennifer L., 2006. "Stereotype or success? Prime-time television's portrayals of gay male, lesbian, and bisexual characters", *Journal of Homosexuality*. 51 (2): pp 19–38.

<sup>103</sup> Mazur, M. A., & Emmers-Sommer, T. M., 2002. "The Effect of Movie Portrayals on Audience Attitudes about Nontraditional Families and Sexual Orientation". *Journal of Homosexuality*. 44 (1), pp 157–179.

<sup>104</sup> Jeremy Waldron, 2014, *The Harm in Hate Speech*, Oxford University Press, pp 95-96

<sup>105</sup> Trevor Burrus, *Why Offensive Speech Is Valuable*,

<https://www.forbes.com/sites/trevorburrus/2015/03/23/why-offensive-speech-is-valuable/#232644a76023>

<sup>106</sup> Naomi Mezey, 2001, *Law As Culture*, Georgetown University Law Center, pg. 3,

<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1310&context=facpub>

bigotry more difficult and complicates their attempts to link up with other bigots and recruit new members.

While Waldron admits that his arguments for hate speech legislation may not convince his detractors, he notes that almost all democracies have hate speech laws and states his “Modest Intention” in his opening chapter.<sup>107</sup> He refers to his critics’ (mis)characterization of hate speech laws as codifying and banning “speech that we hate”. Waldron argues that this is not the full extent of the harm of hate speech, and that in considering how to deal with the phenomenon, the best arguments in favour of hate speech law should be considered. These arguments identify harms more substantial than offense. He notes that almost all democracies have hate speech laws and that this fact alone should give hate speech legislation detractors in the US (and, by implication, elsewhere) pause to consider whether they may have missed something. In terms of the distrust of governments and majorities (who, some would argue, could abuse hate speech laws in their own favour) Waldron points out<sup>108</sup> that:

...hate speech is an area where, against all odds, majorities prove us wrong. In every advanced democracy where they are given the opportunity, majorities legislate to put this sort of protection in place because they care about the plight of minority communities. And, by and large, this legislation is administered responsibly.

Waldron’s book uses Islamophobia as its paradigmatic frame of reference in dealing with hate speech. It does not directly address gay rights, except in a single passing reference<sup>109</sup>. But Waldron provides strong arguments on which to base the position that hate speech does more than cause offense, that the potential reasons to avoid hate speech legislation may cause more harm than not creating such laws, and that countries like the US have been a little too absolutist in their approach to freedom of speech.

### **3.11 Corvino, Anderson and Girgis on religious liberty and discrimination**

Corvino, Anderson and Girgis are not directly concerned with hate speech, but with the broader concept of religious liberty and discrimination against LGBTQI+ people, specifically with regard to same-sex marriage.

Corvino supports same-sex marriage, while Anderson and Girgis oppose it. The book, based on US jurisprudence<sup>110</sup> effects with similar to those of the South African Bill of Rights, assumes the separation of church and state with regard to same-sex marriage. It’s opening chapter<sup>111</sup> states that the important question is not *whether* governments should allow same-sex marriage but rather: “Now that same-sex couples are marrying, while a significant portion of the country remains opposed, how can we all peacefully coexist?”<sup>112</sup>.

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<sup>107</sup> Jeremy Waldron, 2014, *The Harm in Hate Speech*, Oxford University Press, pg. 11

<sup>108</sup> Jeremy Waldron, 2014, *The Harm in Hate Speech*, Oxford University Press, pp 202-203

<sup>109</sup> Ibid.

<sup>110</sup> *Obergefell v. Hodges*, (2015) 135 S.Ct. 2071

<sup>111</sup> John Corvino, Ryan T. Anderson, Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination* (Oxford University Press, pg. 2

<sup>112</sup> Ibid. pg. 3

While same-sex marriage is not directly synonymous with BBH/HS, it is currently one of the predominant battlefronts, particularly within South African churches. The expression of opposition to same-sex marriage also seems to (necessarily) entail the expression of BBHS, at the very least (since opposition is typically biblically based and seems to be homophobic by definition), and possibly BBHHS. Given Corvino, Anderson and Girgis' focus on how the proponents and opponents of same-sex marriage can "all peacefully coexist", their book provides a relevant frame of reference within which to consider the impact of BBH/HS and when it should and shouldn't be punished by law or social disapproval.

BBH/HS is commonly uttered in the context of Christian disagreement with same-sex marriage, as well as the refusal to recognise, officiate or provide other ancillary wedding-related (like the now-notorious cake-baking examples) services to gay couples. Corvino, Anderson and Girgis therefore address several relevant BBH/HS principles in their handling of the topic of same-sex marriage discrimination.

Specifically, Corvino, Anderson and Girgis weigh the right of religious individuals to practice and express their faith against the rights of LGBTQI+ people not to be unfairly discriminated against. The question becomes particularly practical when religious believers expect and demand the right to be conscientious objectors when it comes to the services mentioned above. South African law currently even permits *state employees*<sup>113</sup> to decline to provide officiation services on the basis of conscience. In considering the question of religious freedom versus the civil rights of LGBTQI+ people, the appropriate extent of state intervention is also critical, as free societies typically strive to limit state intervention only to what is absolutely necessary in order to maintain equal liberty, and prevent undue prejudice, for all.

Corvino argues<sup>114</sup> for religious freedom as "a core value of our nation and of any just society." He points to existing exemptions from legal vaccination requirements for parents who object on the basis of their faith. (As an aside, I would argue that such exemption constitutes special respect in terms of Leiter's views above, since such exemptions are probably not in line with the views of most non-believers and even many (if not most) religious people who understand the value of vaccinations, and could cause significant harm to society, so I'm not certain this is the best example to use.) Corvino specifies, however, that while religious liberty imposes on society the need to pay extra attention to its maintenance, that extra attention should not extend to harmful discrimination. Religious opponents of same-sex marriage take a different view, regarding their religious freedom as official approval to discriminate (fairly, in their view) against those requesting services for same-sex marriages.<sup>115</sup> Corvino's position is that such discrimination is a manifestation of what he calls "The Puritan mistake", where he echoes Leiter's view that religious behaviours often reflect

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<sup>113</sup> South African Parliament, *Civil Union Amendment Bill*, No. 11 of 2018,

<https://www.parliament.gov.za/press-releases/national-assembly-passes-civil-union-amendment-bill>

<sup>114</sup> John Corvino, Ryan T. Anderson, Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination* (Oxford University Press, pg. 103

<sup>115</sup> Michael Stone, Progressive Secular Humanist, 2016, *Kentucky Judge Refuses To Marry Atheists* - <https://www.patheos.com/blogs/progressivesecularhumanist/2016/07/kentucky-judge-refuses-to-marry-atheists/>

the tyranny of the majority – majorities act in certain ways because they believe they can get away with the behaviour relatively unchallenged. Corvino says that “Such distortion betrays religious liberty’s greatest legacy”<sup>116</sup>.

The premises of Corvino’s arguments are the principles of pluralism and equality under the law. Only exceptional circumstances justify exceptions to these principles in his view, and in deciding where to grant such exceptions, Corvino stresses the importance of the principle on which the law is justified, the goods and harms that might result from its application and any undue burdens the law might place on those affected by it.

Corvino states that where a law that is generally effective would be seriously harmful, create an unfair burden for a particular minority or be self-defeating, exemptions might be worth considering<sup>117</sup>. Religious people sometimes argue that the inherent profundity of their convictions, and their divine source, should justify special exemptions from certain laws. Corvino views these arguments as over-inclusive as well as under-inclusive, due to the inconsistency with which beliefs are held even within religious groups, that some religious claims may not be important (or harmless) enough to warrant exemptions even though they are sincere, and that profound claims can also be found outside of religion. “Not every religious claim is deep and important, and not every deep and important claim is religious,” he states<sup>118</sup>. Corvino also addresses the argument that religion is a “fundamental good”. As he points out, for this argument to justify exemptions, those who use it would have to be able to establish in epistemic terms why their religion is true, if it is to be distinguished from other religions’ conscience-based exemptions, or secular ones.

Corvino posits that the strongest argument for exemptions<sup>119</sup> would be where such special treatment mitigate historical unfair discrimination based on religious conviction, and thereby limit current conflict that manifests in unconscious privilege or deliberate oppression. His caveat in this regard is that special treatment to mitigate this harm is only appropriate when other important considerations like the consistent application of law are also considered. Using same-sex marriages as an example, Corvino points out that the “solution” of allowing LGBTQI+ people to marry without obtaining the signature of a state clerk might negate some of the discontent over religious state employees’ refusal to perform such duties, but would still symbolically place a burden on LGBTQI+ people.

Corvino identifies<sup>120</sup> material and dignitary harm as the two key traits of unfair discrimination. “Dignitary harm”<sup>121</sup> is the practice of treating someone as morally inferior and draws strength from a legal history in the US (mirrored in South Africa’s past by the common law crime of sodomy) that actively outlawed homosexual acts. That these acts were

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<sup>116</sup> John Corvino, Ryan T. Anderson, Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination* (Oxford University Press, pg. 103

<sup>117</sup> John Corvino, Ryan T. Anderson, Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination* (Oxford University Press, pg. 54

<sup>118</sup> *Ibid.*, pg 57

<sup>119</sup> *Ibid.*, pg. 65

<sup>120</sup> *Ibid.*, pg. 77

<sup>121</sup> Similar to Waldron’s harm to dignity.

prohibited by law tends to support the homophobe's assumption that LGBTQI+ people are morally inferior<sup>122</sup>. In words strongly confirming Waldron's views on hate speech, Corvino refers to current anti-discrimination norms as giving LGBTQI+ people "a place at the table in public life" to a "long marginalized" group.

While Corvino specifies<sup>123</sup> that he is opposed to widespread exemptions to these laws, for the reasons described above, he mentions three ways in which discrimination against LGBTQI+ people might be prohibited while simultaneously allowing believers to practice their faith. All three face challenges and would be objectionable to Libertarians. i) He suggests that certain services not be covered by anti-discrimination laws, specifically he thinks that customised services rather than standard services be excluded. ii) He suggests that businesses that want religious exemptions to anti-discrimination laws be required to give public notice of their position, so that LGBTQI+ people are forewarned. iii) Current reality in the US. He suggests that exemptions not be granted but that businesses be allowed to publish their objections to serving LGBTQI+ couples.<sup>124</sup> The latter two would aim to avoid the humiliation of discovering only after the process of engaging a service provider had begun, that they do not wish to be associated with a gay couple.

This humiliation is the basis for an example<sup>125</sup>, where Corvino introduces the case study of the Bowman-Cryers wedding. Rachael and Laurel Bowman-Cryer are a lesbian couple who were denied a cake baking service by Aaron and Melissa Klein of "Sweet Cakes by Melissa," explicitly on the basis of Leviticus 18:22: "You shall not lie with a male as one lies with a female; it is an abomination." Aaron Klein specified that he and his wife did not bake cakes for LGBTQI+ weddings due to their religious beliefs. This happened only at a second meeting for a cake tasting after one member of the couple had encountered the service provider and obtained their contact details at a wedding expo. In terms of the State of Oregon's Equality Act, discrimination in public accommodation on the basis of "race, colour, religion, sex, sexual orientation, national origin, marital status or age" is banned. The Kleins were fined US\$135,000 for emotional distress relating to the discrimination.

Corvino points out<sup>126</sup> that, at most, the Kleins could reasonably be wary of being complicit in the celebration of the marriage. However, they were not asked to participate in the wedding, they were simply asked to bake a cake, and even if the cake contained a message of some sort, that message was the couple's, not the Kleins'. The latter would simply ice the message on their behalf. Corvino uses the example of a wedding photographer, who might disagree with a couple on everything from the colour of the wedding décor to the theology expressed in the service but isn't necessarily celebrating it herself by simply taking pictures of the event.

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<sup>122</sup> Naomi Mezey, 2001, *Law As Culture*, Georgetown University Law Center, pg. 3, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1310&context=facpub>

<sup>123</sup> John Corvino, Ryan T. Anderson, Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination* (Oxford University Press, pg. 85

<sup>124</sup> *Ibid.*, pp 81-87

<sup>125</sup> *Ibid.*, pg. 78

<sup>126</sup> *Ibid.*, pp. 89-90

In terms of this example in the context of this dissertation, a key question would be “what constitutes speech?” – and hate speech in particular. This applies not only from the perspective of the bakers and the manner in which they express their unwillingness to provide a service. It also applies, per Corvino, in the sense that the basis for their refusal is the claim that, by providing the service, they would be condoning / supporting same-sex marriage in general. I can see no reason why the baking of a cake or even the writing of a message on behalf of someone else necessarily entails condonation of the other party’s view – even a view directly expressed in the message. To add to Corvino’s photographer example, I can think of instances where far more extensive messages are shared or written by parties who disclaim any association with those messages. For example, online news portals regularly state that the views of public commentators on their articles, or even columnists paid by those publications, are not the views of the publishers themselves. There is simply no necessary entailment in this regard.

I would add that, by singling out the sexual orientation of a couple and not the other aspects of their personhood that could be disagreed with, the Kleins are engaged in a form of special pleading that says only their sexual orientation is being condoned by baking the cake. Perhaps the couple are believers in contraception, and the baker is extremely opposed to it (also on religious grounds). It seems unlikely a baker would deny a cake baking service on this basis, even though contraception is arguably as sensitive a religious issue to certain religions as homosexuality is – and is, equally, a key component of marital life.

Corvino’s point is that the “complicity claim in this case is inextricably tied to a speech claim.”<sup>127</sup> If anything, as Corvino points out, the Kleins engage in actual speech to a greater extent by refusing the service than they would by providing it. To participate, or celebrate, is to express enjoyment – which is not necessarily implicit in the provision of a cake at all. Yet, by refusing to provide the cake, they express active disapproval. They have interjected with a moral value claim about same sex marriage, where they would not have done so by simply baking the cake – even with someone else’s message written on it.

### **3.12 Challenges to Corvino**

Anderson and Girgis’s overall response is based on the principle of human goods<sup>128</sup>. They outline this by referring to “the most basic ways in which people can be well, or flourish . . . ways of being and acting that it makes sense for us to want for their own sake.” In terms of political morality, they focus (somewhat like Dworkin and Baker above) on the rights of the individual potentially expressing the BBH/HS. They claim that the state’s responsibility is to maintain, as far as possible, the civil liberties of a citizen, and to encumber her as little as possible with unnecessary or difficult burdens. Anderson and Girgis identify personal integrity (the extent of alignment between the agent’s conscience and her moral/religious beliefs) and also her alignment with a higher source of belief as primary values. They argue that government’s duty to guard religious freedom must exclude any needless limitations on its practice, and that when personal religious obligations are indeed limited, such limits

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<sup>127</sup> John Corvino, Ryan T. Anderson, Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination* (Oxford University Press, pg. 90

<sup>128</sup> *Ibid.* pg. 125

should be scrutinised more closely. The human goods they describe are being infringed upon, and they rightly expect Corvino and other proponents of anti-discrimination laws to provide sufficient justification in such circumstances. People should be free to pursue their own perceived moral and religious obligations "unless doing so would chip at other facets of the common good"<sup>129</sup>.

Anderson and Girgis compare conscience-based exemptions<sup>130</sup> for marriage officiants to the exemption granted to doctors opposed to abortion since the case of *Roe v. Wade*<sup>131</sup>. They state that this solution has worked "for four decades on abortion." Their argument is that forcing religious people to provide services to LGBTQI+ couples does little good but simultaneously causes serious harm to the human goods they (Anderson and Girgis) emphasise. Their suggestion is that government should exempt its employees from providing services when they object to the type of marriage being performed – especially when it can do so with little harm being caused. They do, however, concede that such objections should not override other considerations in all circumstances, and that government should adopt a moral particularist approach, considering the specifics of each scenario.

Anderson and Girgis cite the civil rights case of *Obergefell v. Hodges*<sup>132</sup>, when the Supreme Court of the United States concluded that the Due Process and Equal Protection Clauses of the US Constitution's 14<sup>th</sup> amendment guarantee same-sex couples the right to marry. Their take is that personal liberties should nevertheless dictate *Obergefell* be applied with as little burden on religious people possible as possible.

In a macrocosmic sense, they assert that state-recognised marriage can be realised without having to limit the religious freedoms of private parties. This may be true theoretically, but as will be mentioned later, the dearth of marriage officiants (or willing ones) in a particular geographical area may make this a practical difficulty that places undue burden on the same-sex couple - to travel long distances, after possibly undergoing the humiliation of being refusing service on the basis that the bible says they are unnatural, abominable, etc. These types of views can cause concomitant psychological and other harms and are, as per Leiter, categorical, non-evidence-driven religious beliefs. They contribute to a dehumanising culture where violence and other practical forms of discrimination against LGBTQI+ people are common<sup>133</sup>.

Corvino's opponents try to claim that racial oppression is far worse than oppression of LGBTQI+ people. Anderson and Girgis argue, on that basis, that LGBTQI+ people do not have as strong a case for legal protection from unfair discrimination. Their assertion is that

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<sup>129</sup> Ibid. pg. 136

<sup>130</sup> John Corvino, Ryan T. Anderson, Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination* (Oxford University Press, pg. 113

<sup>131</sup> *Roe v. Wade*, 1973, 410 U.S. 113.

<sup>132</sup> *Obergefell v. Hodges*, 2015, 576 U.S.

<sup>133</sup> OUT, Love Not Hate (LNH) Campaign, 2016, "[Hate Crimes against Lesbian, Gay, Bisexual and Transgender \(LGBT \) people in South Africa](#)",

The Love Not Hate Campaign, <https://www.out.org.za/index.php/what-s-hot/news/501-majority-of-lgbt-south-africans-live-in-fear-of-discrimination>



same-sex marriage involves a trait (presumably as opposed to what they consider to be a choice to be homosexual) and that, in contrast, refusal to officiate same-sex marriage involves a conviction of conscience. They refer<sup>134</sup> to “important personal and social goods” that would be infringed upon if Christians were forced to perform such marriages and go on to claim that anti-racism laws do not require people to sacrifice their consciences. The latter they name as their “main reason for opposing” anti-discriminatory SOGI<sup>135</sup> laws.

I submit that while ethnicity and melanin are indeed traits, and the existence of a gay gene is an as yet unreplicated claim of science (truth has arguably enjoyed too much a priori acceptance in the media<sup>136</sup>), there is no definitive confirmation yet that being homosexual is *not* a trait, and the limited available evidence indicates it might well be. If it were, that would make it qualitatively, similarly unfair to racial discrimination.

Furthermore, even if it were discovered that being homosexual were *entirely* a choice, would it matter in terms of moral reality? In the absence of i) objective epistemological proof of the existence of the biblical god, knowledge of its will, and its moral authority, and that it does indeed think homosexuality is morally wrong (and even Christian preachers debate this vociferously<sup>137</sup>), and ii) objective evidence that homosexual people, qua homosexuality, necessarily cause serious harm to others or to society, it would be difficult to see how continued (fair) discrimination against them could be justified in any case. The reason choice seems to enter the debate is because of a religious dissonance elicited by the potential that god may punish humans for their nature.

Anderson and Girgis also seem to ignore the fact that, at one time, anti-racism laws *would* have involved a similar cost to Christians in terms of their convictions of conscience. Slavery (and, later, other forms of racism like Apartheid) have very often been justified on biblical grounds. So (as with the overall premises of this dissertation) without going into the soundness of the biblical exegesis, it is quite plausible to say that a significant number of Christians have regarded their religiously-driven regard for claimed differences in racial groups with sufficient reverence to justify even extremely cruel and oppressive legislation. It seems implausible to suggest that they would regard the abrogation of such laws lightly with respect to their consciences. Indeed, Christianity and racism are often still linked today. In her book, *The Sin of White Supremacy: Christianity, Racism and Religious Diversity in America*<sup>138</sup>, Jeannine Fletcher, goes to great lengths to understand and elaborate on theology’s culpability in promoting the superiority of the Christian religion itself, and whiteness, above all. Her view is that “Theology was being constructed in a way that made it seem reasonable to say that only Christians had rights to the land. It was producing ideas that

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<sup>134</sup> John Corvino, Ryan T. Anderson, Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination* (Oxford University Press, pp 185-186

<sup>135</sup> Sexual orientation, gender identity

<sup>136</sup> O’Riordan K, 2012, “The life of the gay gene: from hypothetical genetic marker to social reality”, PubMed.gov - <https://www.ncbi.nlm.nih.gov/pubmed/22720828>

<sup>137</sup> Graeme Codrington, 2015, *The Biblical Case For Christians Affirming Same Sex Marriage*, <http://www.futurechurchnow.com/2015/07/23/the-biblical-case-for-christians-affirming-same-sex-marriage-part-1-the-arguments-against/#index>

<sup>138</sup> Fletcher, 2017, *The Sin of White Supremacy: Christianity, Racism and Religious Diversity in America*, Orbis.

made it reasonable to believe that enslaved Africans were better off because they're with Christian masters." For such believers, it seems likely that anti-racism laws would profoundly offend their deeply held convictions conscience.

Corvino, objects to their arguments, saying Anderson and Girgis do not take into account the *dignitary* harms entailed by discrimination, such as the onerous burdens LGBTQI+ people often still have to carry (like the need many still feel to remain closeted, and the very serious threats of social and familial rejection, physical violence and even legal sanction for consensual homosexual sex, in some cases). On the race issue, he agrees with my view<sup>139</sup> that Anderson and Girgis seem to forget that "people have used, and continue to use, religion to justify race-based bigotry in ways disturbingly similar to how they use it to justify anti-LGBT bigotry". Corvino's argument is that his interlocutors set unrealistically high standards for SOGI laws to meet, to the point where they would be unlikely to be passed into law if such conditions were imposed, and implies they are using a double standard, asking why they do not apply similar standards to laws regarding religious minority discrimination.

As part of their response Anderson and Girgis seem to want to give religion an automatic special status. They believe that "one source of the dynamism of American society is its long, vigorous respect for moral and religious liberty."<sup>140</sup> Asserting that religion has a special place in the maintenance of freedom of conscience and personal civil liberty, they are presumably trying to grant special dispensation for religious freedom and liberties above and beyond other civil liberties. Corvino responds by pointing out the extent to which religion has often played a role in the tyranny of the majority, and that it seems to have no special gift in this regard. Indeed, I submit that if religion had genuinely played a unique and necessary role in maintaining general civil liberties there might be an argument for granting it such special dispensation, but such arguments do not seem compelling; it is hard to see why religion (or religious freedom) must be cast as a *necessary* condition for such freedoms. There do not seem to be civil liberties (other than religious freedom itself) for which religious freedom is necessary.

Corvino summarizes the tyrannical majority concern<sup>141</sup> by saying: "One troubling aspect of this debate", he suggests, "is that the loudest voices in favor of religious liberty often seem all too happy to deny liberty to others when they themselves hold the power."

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<sup>139</sup> John Corvino, Ryan T. Anderson, Sherif Girgis, 2017, *Debating Religious Liberty and Discrimination* (Oxford University Press, pg. 102

<sup>140</sup> *Ibid.* pg. 150

<sup>141</sup> *Ibid.* pg. 105

## 4. Biblical doctrine

In order to establish the credibility of the claim that BBH and BBHHS are commonly preached and taught in the Sunday services and other gatherings of South African Christian churches on a biblical basis, I will first establish the extent of Christian dominance of religious demography in South Africa. I will identify the biblical basis for church doctrine on the subject and clarify my position on the interpretation of these texts with respect to necessary requirements to support my overall position. Then I will identify some major denominations within the Christian demographic and look at the stated policies and teachings of those groups. Finally, I will look at the societal harm caused by Christian dominance of South African religious demography with respect to BBH/HS.

It should be noted that I am not trying to claim that all, or even necessarily a majority, of South African Christians hold homophobic views. In fact, I would like to stipulate that there are significant numbers of Christians and Christian leaders who do not take a homophobic stance. Notable Christian leaders have publicly stated that they support LGBTQI+ people. Desmond Tutu<sup>142</sup>, Archbishop Emeritus of Cape Town in the Anglican Church of Southern Africa, as well as the Archbishop of Cape Town himself, Thabo Makgoba<sup>143</sup>, have openly supported gay rights.

Even the denominations whose policies and/or homophobic factions I will outline below, generally have strong pro-LGBTQI+ factions or members as well, though they're a minority in some cases. This split will become apparent in describing the power struggles around this issue within denominations. What seems clear, from the power struggles, is that (like the inter-denominational dispute over infant versus adult full-immersion baptism, and the schism brought about by the Reformation started by Martin Luther's 95 theses) the issue of homosexuality and its status in the church is a strongly polarising one, which has the potential to cause rifts even in otherwise (mostly) strongly homogeneous religious groupings.

All that is needed for my overall position to be relevant, in terms of potential harm, is that homophobic views are commonly held and preached, and could therefore constitute a harm, if the link between biblical writ, beliefs and harmful actions can be demonstrated.

In terms of Statistics South Africa's Community Survey 2016<sup>144</sup>, South Africa's Christian population represents slightly more than 78,02% of the population. The precise breakdown is Christianity 43 423 717; Islam 892 685; Traditional African religion 2 454 887; Hinduism 561 268; Buddhism 24 808; Bahaism 6 881; Judaism 49 470; Atheism 52 598; Agnosticism 32 944; No religious affiliation/belief 5 964 892; Other 1 482 210; Do not know 704 358; Total 55 650 716. Christianity is the clear and overwhelming leader, so if it can be demonstrated that a homophobic stance is held by a meaningful number of its individual

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<sup>142</sup> Rebecca Davis, Daily Maverick, [Analysis: Why Tutu's support for gay rights matters, 2013 -](https://www.dailymaverick.co.za/article/2013-07-29-analysis-why-tutus-support-for-gay-rights-matters/)

<sup>143</sup> News24 Correspondent, News24, 2016, [Makgoba 'pained' over Anglican same-sex debate outcome -](https://www.news24.com/SouthAfrica/News/makgoba-pained-over-anglican-same-sex-debate-outcome-20161001)

<sup>144</sup> Statistics South Africa, 2016, "Community Survey 2016", pp 40, 41 - <https://www.statssa.gov.za/publications/03-01-06/03-01-062016.pdf>

members, it can reasonably be deduced that homophobic sentiments are commonly preached at their meetings.

The latest figures for the relative sizes of Christian *denominations* in South Africa come from the 2001 census. The 2011 census did not request religious affiliation data from respondents. While it would be ideal to have more statistics, the combination with the community survey figures is indicative enough of which groupings are the largest and most likely to have influence in terms of their doctrine on homosexuality, one way or the other. The 2001<sup>145</sup> census breakdown of denominations within Christianity was as follows: (Denomination – Adherents – percentage of total SA Christian population)

Methodist, 3,305,404 (9.2%); Dutch Reformed, 3,005,698 (8.4%); Anglican; 1,722,076 (4.8%); Lutheran, 1,130,987 (3.2%); Presbyterian; 832,495 (2.3%); Baptist, 691,237 (1.9%); Congregational, 508,825 (1.4%); Other Reformed, 226,495 (0.6%);

*Total mainstream Protestant, 11,423,217 (31.9%).*

Pentecostal/Charismatic, 3,422,749 (9.6%); Apostolic Faith Mission, 246,190 (0.7%); Other Apostolic, 5,609,070 (15.7%);

*Total Pentecostal, 9,279,009 (25.9%).*

Zion Christian Church, 4,971,932 (13.9%); Other Zionist, 1,887,147 (5.3%); Ethiopian 880,414 (2.5%); iBandla lamaNazaretha, 248,824 (0.7%); Other African Independent, 656,644 (1.8%);

*Total African Independent, 8,644,961 (24.2%).*

Catholic, 3,181,336 (8.9%); Orthodox, 42,251 (0.1%); Other Christian, 3,195,477(8.9%).

*Grand Total: 35,765,251.*

While Christians may draw their doctrines from more than one source, BBH/HS from within Christian circles is generally based on scriptural references. Some believers might draw on other sources like the naturalistic fallacy to confirm the biblical reference to homosexuality being “unnatural”. (This is, ironically, also factually incorrect since homosexuality occurs naturally in hundreds of species in nature<sup>146</sup>). However, even the fallacy is most likely often based on biblical texts like Romans 1 26-27, listed below, which explicitly refers to having “exchanged the natural function for that which is unnatural”. These scriptural references are listed for the sake of completeness and making the link between written doctrine and spoken doctrine in the form of BBH/HS.

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<sup>145</sup> Statistics South Africa, “Census 2001”, [http://www.statssa.gov.za/?page\\_id=3892](http://www.statssa.gov.za/?page_id=3892)

<sup>146</sup> University of California, ScienceDaily – Riverside, 2009, [Same-sex Behavior Seen In Nearly All Animals, Review Finds](http://www.sciencedaily.com/releases/2009/06/090616122106.htm) - [www.sciencedaily.com/releases/2009/06/090616122106.htm](http://www.sciencedaily.com/releases/2009/06/090616122106.htm)

Levay, Simon, 2009, “Same-sex sexual behavior and evolution. Trends in Ecology & Evolution”, NCBI - [https://www.cell.com/trends/ecology-evolution/fulltext/S0169-5347\(09\)00154-2](https://www.cell.com/trends/ecology-evolution/fulltext/S0169-5347(09)00154-2)

Levay, Simon, 1996, *Queer Science: The Use and Abuse of Research into Homosexuality*, MIT Press. p. 207.

It is vital to note that just as not all members of churches take part in BBH/HS, not all theologians interpret these scriptures the same. There are equally sincere and well-researched theologians on both sides of the fence<sup>147</sup>.

Ordained Baptist minister Millard J. Erickson, a professor of theology and protestant Christian theologian, argues that humans, as creations of a God, cannot follow their own wills but must fulfil the function or purpose for which they are created<sup>148</sup>. While Christian philosopher William Lane Craig acknowledges that being homosexual is simply a state of attraction, he nevertheless states that acting on the attraction is “sinful”<sup>149</sup>.

The texts generally used by both theologians and average Christians, to justify BBH/HS, are: (All texts from New International Version)

Genesis 19:5 (Sodom)

5 They called to Lot, “Where are the men who came to you tonight? Bring them out to us so that we can have sex with them.”

Leviticus 18:22

“Do not have sexual relations with a man as one does with a woman; that is detestable.

Leviticus 20:13

“If a man has sexual relations with a man as one does with a woman, both of them have done what is detestable. They are to be put to death; their blood will be on their own heads.

Romans 1 26-27

26 For this reason God gave them over to degrading passions; for their women exchanged the natural function for that which is unnatural, 27 and in the same way also the men abandoned the natural function of the woman and burned in their desire toward one another, men with men committing indecent acts and receiving in their own persons the due penalty of their error.

1 Corinthians 6: 9-10

9 Or do you not know that the unrighteous will not inherit the kingdom of God? Do not be deceived; neither fornicators, nor idolaters, nor adulterers, nor effeminate, nor homosexuals, 10 nor thieves, nor the covetous, nor drunkards, nor revilers, nor swindlers, will inherit the kingdom of God.

1 Timothy 1:8-10

8 But we know that the Law is good, if one uses it lawfully, 9 realizing the fact that law is not made for a righteous person, but for those who are lawless and rebellious, for the ungodly and sinners, for the unholy and profane, for those who kill their fathers or mothers, for murderers 10 and immoral men and homosexuals and kidnappers and liars and perjurers, and whatever else is contrary to sound teaching, 11 according to the glorious gospel of the blessed God, with which I have been entrusted.”

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<sup>147</sup> Bongmba, Elias, 2016, “Homosexuality, Ubuntu, and Otherness in the African Church”, Rice University - [https://www.researchgate.net/publication/301668892\\_Homosexuality\\_Ubuntu\\_and\\_Otherness\\_in\\_the\\_African\\_Church\\_in\\_advance](https://www.researchgate.net/publication/301668892_Homosexuality_Ubuntu_and_Otherness_in_the_African_Church_in_advance);

Graeme Codrington, 2015, *The Biblical Case For Christians Affirming Same Sex Marriage*, <http://www.futurechurchnow.com/2015/07/23/the-biblical-case-for-christians-affirming-same-sex-marriage-part-1-the-arguments-against/#index>

<sup>148</sup> Erickson, Millard J., 1998, *Christian Theology*, 2nd ed. Grand Rapids: Baker Academic, pg. 38

<sup>149</sup> Craig, William Lane, 2003, *Hard Questions, Real Answers*, Wheaton, IL: Crossway - pg. 75

## 4.1 Church doctrine

Based on the factional battles described below, different denominations are at different stages of what appears to be a general trend towards more liberal views on homosexuality. I won't deal with every single denomination, but have selected the largest groups from the Catholic, Protestant and Pentecostal/Charismatic groups to assemble a large sample group of Christian views on the topic from what is regarded as mainstream Christianity in South Africa. Each group's publicly stated policies will be described, the state of that group's internal discussions with regard to homosexuality details, and then the size of that grouping added to the rest to create the overall sample.

### 4.1.1 Methodist

The Methodist Church of South Africa's inner turmoil with respect to homosexuality is best captured in its "Profession of the MCSA's Unity and Diversity Within the Context of the Church's Conversation on Same-Sex Relationships."<sup>150</sup> The profession reads as follows:

Among us are those who believe that the Bible is clear in its condemnation of all homosexual acts as contrary to the will of God. Also among us are those who believe that the Bible does not condemn all homosexual acts, namely those between two consenting adults in a mutually loving, faithful and committed relationship.

Among us are those who believe that the biblical norm for marriage is between one man and one woman only and that any deviation from this pattern is against the express will of God. Also among us are those who believe that God's primary concern is for the quality of our loving, and that two people of the same gender who truly love each other can enter into the bonds of marriage with the blessing of God and the church.

Among us are those who believe that those in loving, faithful and committed same-sex relationships can serve as leaders of the church and be ordained as ministers of the gospel. Also among us are those who believe that those in such relationships cannot serve in these ways.

That such deference is given to the anti-LGBTQI faction within the church is a clear indication that the church leadership is forced to accede, somewhat, to the demands of a clearly strong group within the denomination, politically, for reasons I will not speculate on.

### 4.1.2 Dutch Reformed

The Dutch Reformed Church is at a watershed with regard to its policy on homosexuality. It is currently embroiled in court proceedings, with opposing factions fighting over the suspension of an October 2015 General Synod decision to allow same-sex marriages, and gay ministers to have partners.<sup>151</sup> The decision was suspended in 2016, which led to the court action. While it is clear that a strong pro-gay lobby is at work within the church, it seems just as clear that there is a strong faction opposing gay rights. It therefore seems uncontroversial to presume that a significant number of the churches represented by the denomination's General Synod, and who back the court action to uphold the suspension of the pro-same-sex-

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<sup>150</sup> Methodist Church of Southern Africa, 2014, Conversation on Same-Sex Relationships, <https://www.methodist.org.uk/media/2110/marriage-mcsa1-a-profession-of-unity-and-diversity-0415.pdf>

<sup>151</sup> Leonie Wagner, Timeslive, 2018, Dutch Reformed Church to Defend Decision on Gay Clerics, <https://www.timeslive.co.za/news/south-africa/2018-08-21-dutch-reformed-church-to-defend-decision-on-gay-clerics/>

marriage decision, openly decry homosexuality as being “sinful” in terms of the biblical references provided here, based on the denomination’s strong focus on biblical values as stated: “...omdat ons erns maak met die Bybel as die Woord van God in die NG Kerk”. (“Because we’re serious about the Bible as the Word of God in the Dutch Reformed Church.”)<sup>152</sup> It also seems fair to assume such doctrine would be preached and shared in the various expressions of those local churches – services, prayer meetings, bible studies etc.

### 4.1.3 Charismatic

The charismatic churches in South Africa, while also not completely homogeneous in their approach, regularly and openly utter homophobic statements.

Prominent South African preacher and evangelist, Angus Buchan (best known as the leader of the so-called “Mighty Men” Christian movement, and as the individual upon whom the autobiographical “Faith Like Potatoes” movie was based) asserts that the LGBTQI “lifestyle” is contrary to biblical teaching, and that gay people are destined for hell. He has made claims about homosexuality being “curable” – implying that it is some sort of disease.<sup>153</sup>

Prominent charismatic movement, the Rhema Bible church, led by former bodybuilder Ray McCauley seems unequivocally opposed to same sex marriage. McCauley has been quoted as saying “his church could not agree with same sex marriages.

However if two people with the same sexual orientation choose to legalise their partnership and live in a monogamous relationship then we must respect that decision,’ he said. Our church is not into ‘gay bashing’. We... have gay people attending our services and are registered members.<sup>154</sup>

Despite the latter claim, however, some of his subsidiary churches have been known to expel married gay men from fellowship.<sup>155</sup>

Prominent Grace Bible Church made headlines when South African LGBTQI entertainer, Somizi, left a service because homosexuality was being labelled as “disgusting” and “sinful” from its pulpit.<sup>156</sup>

Well-known global charismatic denomination, New Covenant Ministries International, describes, on page 42 of a New Testament studies training manual

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<sup>152</sup> Kerkbode, Neels Jackson, 2016, [Só verskil die ng kerk oor die bybel](http://kerkbode.christians.co.za/2016/05/23/verskil-die-ng-kerk-oor-die-bybel/) (This is how the Dutch Reformed Church differs on the bible) - <http://kerkbode.christians.co.za/2016/05/23/verskil-die-ng-kerk-oor-die-bybel/>

<sup>153</sup> ITV. Com, unattributed, 2016, [South African pastor responds after Scottish Borders visit is cancelled amid homophobia accusations](http://www.itv.com/news/border/2016-08-19/south-african-pastor-responds-after-scottish-borders-visit-is-cancelled-amid-homophobia-accusations/) - <http://www.itv.com/news/border/2016-08-19/south-african-pastor-responds-after-scottish-borders-visit-is-cancelled-amid-homophobia-accusations/>

<sup>154</sup> IOL.com, South African Press Association, 2004, [SACC urges caution over gay marriages](https://www.iol.co.za/news/south-africa/sacc-urges-caution-over-gay-marriages-228514) - <https://www.iol.co.za/news/south-africa/sacc-urges-caution-over-gay-marriages-228514>

<sup>155</sup> Buchule Raba, Sunday World, 2015, ["Rhema Church Homophobic" says gay man](https://www.pressreader.com/south-africa/sunday-world/20150510/282054800601295) - <https://www.pressreader.com/south-africa/sunday-world/20150510/282054800601295>

<sup>156</sup> Vhangwele Nemakonde, Citizen, 2017, [Somizi Storms out of Grace Bible Church over homosexuality remarks](https://citizen.co.za/lifestyle/1404845/somizi-storms-out-of-grace-bible-church-over-homosexuality-remarks/) - <https://citizen.co.za/lifestyle/1404845/somizi-storms-out-of-grace-bible-church-over-homosexuality-remarks/>

(iii) God's unmistakable attitude to homosexuality (vv26-27: "shameful", "unnatural", "indecent", "perversion") as a product and manifestation of man's rebellion and corruption; ...<sup>157</sup>

#### 4.1.4 Roman Catholic

While there are known to be Roman Catholics who tolerate homosexuality, its official catechism is unambiguous in its condemnation of homosexual acts as depraved, “intrinsically disordered”, and “contrary to the natural law”.

Homosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex. It has taken a great variety of forms through the centuries and in different cultures. Its psychological genesis remains largely unexplained. Basing itself on Sacred Scripture, which presents homosexual acts as acts of grave depravity, tradition has always declared that 'homosexual acts are intrinsically disordered'. They are contrary to the natural law. They close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved.<sup>158</sup>

#### 4.1.5 Interdenominational Christian Lobby Groups

One of South Africa's more prominent and vocal Christian lobby groups is FOR SA (“Freedom of Religion SA”), whose stated mission is:

Discern the issues that affect the religious freedom of Christians in South Africa; Create public awareness and rally the support of the Church and Christians in South Africa; Address the relevant issues as a united Christian voice, doing so in the proper forum, in government or in society. FOR SA is a non-profit, non-denominational Christian organisation, whose ethos is *Bible-based*.<sup>159</sup>

One of FORSA's active<sup>160</sup> campaigns at the moment is to oppose the proposed *Civil Union Amendment Bill* maintain a long-standing “conscientious objection” clause in the *South African Civil Union Act*<sup>161</sup>. The group's aim is to allow government employees to continue to refuse service to same-sex couples requiring an officiant to register their marriages. Its early reach (which has most likely grown in the interim) was indicated during the course of a Western Cape Church's lobbying to maintain Christians' right to spank their children. This followed a report was made to the SA Human Rights Commission that claimed “the teaching violated the rights of children to be protected from maltreatment, neglect, abuse and degradation (as provided for in section 28(1)(d) of the Constitution).” That campaign saw, FOR SA garnering some 12 million Christian Signatures. While the Civil Union Amendment Bill is a different issue, and one certainly cannot assume that all those who support the right to spank, would also support taxpayer-funded state employees' right to express their religious convictions to avoid performing professional duties, it seems fair to say that FOR SA represents a significant proportion of the South African Christian population.

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<sup>157</sup> Nigel Day-Lewis, New Covenant Ministries International, undated, *New Testament Studies*, [http://www.ncmi.net/images/Resources/Bible\\_Survey\\_-\\_New\\_Testament\\_Studies.pdf](http://www.ncmi.net/images/Resources/Bible_Survey_-_New_Testament_Studies.pdf)

<sup>158</sup> Vatican, 2013, *Chastity and homosexuality*, Catechism of the Catholic Church - Article 6: The sixth commandment.; *Male and female He created them...*, Vatican.va. 29 October 1951. [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a6.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm)

<sup>159</sup> Freedom of Religion SA, undated, *Vision and Mission* - <https://forsa.org.za/about-us/vision-mission/>

<sup>160</sup> Freedom of Religion SA, undated, *Civil Union Amendment Bill on Collision Course with Concourt* - <http://forsa.org.za/civil-union-amendment-bill-parliament-on-collision-course-with-concourt/?fbclid=IwAR0GoQI7tHKdjAX4pYd0NR1KlhKWsqkszAB0aQ43OfMGe91GaMUb9fkvsc>

<sup>161</sup> South African Parliament, 2006, *Civil Union Act No. 17 of 2006: Civil Union Act, 2006* - [http://www.saflii.org/za/legis/num\\_act/cua2006139.pdf](http://www.saflii.org/za/legis/num_act/cua2006139.pdf)



Between just the four denominations above, without factoring in any lobby groups or any other denominations (and in terms of the 2001 census figures), the sample group adds up to 12,915, 187 (36.1% of the Christian population of South Africa), broken down as follows: Methodist (3,305,404 members; 9.2% of Christians), Dutch Reformed (3,005,698; 8.4%), Pentecostal / Charismatic (3,422,749; 9.6%); Catholic (3,181,336; 8.9%).

## 4.2 Scripture, Beliefs and Actions

It seems uncontroversial to assert that the Bible forms the main basis for Christian beliefs. For example, FOR SA's mission states explicitly that "FOR SA is a non-profit, non-denominational Christian organisation, whose ethos is Bible-based."<sup>162</sup> The Methodist Church of Southern Africa states:

At the same time, Christians read the Bible as part of a faith community, and read the Bible to put ourselves into the story of God's dealings with humanity. The Bible can be puzzling but it is continually a source of inspiration and direction in our lives.<sup>163</sup>

The Dutch Reformed Church regards the Bible as the inspired Word of God. It is the authority on which the church's doctrine is based. Indeed, its internal newspaper, the "Kerkbode", has a section on its website dedicated exclusively to understanding the Bible.<sup>164</sup> Among Charismatics, church names like "Grace Bible Church" and Rhema Bible Church" self-evidently proclaim the emphasis the book is given, while the Catholic Church regards the Bible as "Sacred Scripture"<sup>165</sup> and endeavours to make it available to adherent in as many languages as possible.

Whether the Biblically-based beliefs of Christians meaningfully affect their actions is, of course, an entirely separate question. While the solipsistic nature of individual reasoning and motivation would make it impossible to measure the extent of such effects, assuming they exist, there are several good reasons to think that beliefs do indeed inform and, at least to some degree, directly affect actions (including both speech and physical actions).

My argument is not that the bible is necessarily the sole cause of any given belief or action, though in some cases it is certainly plausible that there is near-complete causal link. Nevertheless it is clear that Christians exercise agency when reading the bible. For example, many will choose to ignore certain biblical practices (like the injunction in 1 Peter 2:18: "Slaves, in reverent fear of God submit yourselves to your masters, not only to those who are good and considerate, but also to those who are harsh.") if faced with a situation of actual slavery. Almost all Christians are likely to regard slavery as immoral and would expect justice to be served and slaves to be emancipated.

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<sup>162</sup> Freedom of Religion SA, undated doctrinal statement, *Vision and Mission* - <https://forsa.org.za/about-us/vision-mission/>

<sup>163</sup> Methodist Church of Southern Africa, undated doctrinal statement, *Reading the Bible* - <https://methodist.org.za/our-structure/who-we-are/what-is-distinctive-about-methodism/reading-the-bible/>

<sup>164</sup> Dutch Reformed Church (South Africa), undated doctrinal statement, *Verstaan die Bybel*, ("Understand the Bible") <http://kerkbode.christians.co.za/category/rubrieke/verstaandiebybel/>

<sup>165</sup> Vatican, undated, *Sacred scripture* - <http://www.vatican.va/archive/bible/index.htm>

Given that some Biblical injunctions are read and taken to heart, while others are not, it seems Christians read the Bible and decide that certain commands are literal, while others are to be read “contextually” or might be metaphorical (as in the case of parables or described events that seem to be scientifically unlikely – the large global population of theistic evolutionists who choose to see Genesis in a non-literal way would attest to this view, the Biologos organisation founded by Human Genome Project lead, Frances Collins<sup>166</sup>).

A reasonable assertion would seem to be that Christian beliefs (often strongly driven by biblical writ), along with other influences inform actions. It may be that some actions can, in specific context, be more directly attributable to a given belief based on a very specific scripture, but this cannot reasonably be applied to all situations, given the exercise of agency and decision-making described above, and the multiplicity of potential stimuli and other outside influences that could also affect belief. Clearly, more than one variable is at play, and Christians seem to decide whether or not to follow a given injunction based on a number of variables and, presumably, their internal sense of morality. Here are three reasons to think the bible affects Christians’ actions:

#### 4.2.1 Scripture commands it

The first reason to think that actions are informed by beliefs grounded in scripture, is that *scripture itself commands it*. Assuming that Christians regard scripture as the inerrant / infallible “Word of God”, see it as sacred, take it literally (or very seriously), and view its injunctions as guidelines meant for their lives, it seems intuitively true to say that it is bound to inform their life decisions – especially their moral ones, since the Christian moral framework is typically built around divine command theory, whose revelations are expressed in the Bible, when it comes to Christianity. A great example of this is the reference in the book of James, where the important of complementing one’s faith with works / actions is highlighted in no uncertain terms:

James 2:14-26 New International Version (NIV)

##### Faith and Deeds

14 What good is it, my brothers and sisters, if someone claims to have faith but has no deeds? Can such faith save them? 15 Suppose a brother or a sister is without clothes and daily food. 16 If one of you says to them, “Go in peace; keep warm and well fed,” but does nothing about their physical needs, what good is it? 17 In the same way, faith by itself, if it is not accompanied by action, is dead.

18 But someone will say, “You have faith; I have deeds.”

Show me your faith without deeds, and I will show you my faith by my deeds. 19 You believe that there is one God. Good! Even the demons believe that—and shudder.

20 You foolish person, do you want evidence that faith without deeds is useless[a]? 21 Was not our father Abraham considered righteous for what he did when he offered his son Isaac on the altar? 22 You see that his faith and his actions were working together, and his faith was made complete by what he did. 23 And the scripture was fulfilled that says, “Abraham believed God, and it was credited to him as righteousness,”[b] and he was called God’s friend. 24 You see that a person is considered righteous by what they do and not by faith alone.

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<sup>166</sup> Biologos Foundation, undated, [About Us: “BioLogos invites the church and the world to see the harmony between science and biblical faith as we present an evolutionary understanding of God’s creation.”](https://biologos.org/about-us) - <https://biologos.org/about-us>

This is echoed in Matthew chapter 25's parable of the sheep and the goats, where Christian believers are told that their inheritance will be decided when God separates the sheep from the goats, and the differentiating factor used to make the decision is that the sheep lived out their beliefs by means of the right actions, while the goats did not. Verses 41-45 seem to promise fairly dire consequences for failing to live out one's faith with deeds:

41 "Then he will say to those on his left, 'Depart from me, you who are cursed, into the eternal fire prepared for the devil and his angels. 42 For I was hungry and you gave me nothing to eat, I was thirsty and you gave me nothing to drink, 43 I was a stranger and you did not invite me in, I needed clothes and you did not clothe me, I was sick and in prison and you did not look after me.' 44 "They also will answer, 'Lord, when did we see you hungry or thirsty or a stranger or needing clothes or sick or in prison, and did not help you?' 45 "He will reply, 'Truly I tell you, whatever you did not do for one of the least of these, you did not do for me.'

#### 4.2.2 Christians profess it

Apart from the Bible itself telling us that actions are crucial to sincere Christian faith, Christians themselves profess that the Bible guides their actions. FOR SA's arguments with respect to their desires for corporal punishment to be enshrined as a right among parents whose religious convictions dictate such forms of discipline are derived directly from verses like Proverbs 23 (New International Version):

13 Do not withhold discipline from a child, if you punish them with the rod, they will not die. 14 Punish them with the rod and save them from death" and Proverbs 22: (New International Version): "15 Folly is bound up in the heart of a child, but the rod of discipline will drive it far away.

Given the *prima facie*, plain English meaning of the scriptures regarding homosexuality quoted above, it seems likely that at least some homophobia is, similarly, derived directly from scripture. It is trivially true to say that Christians who hold homophobic views use these scriptures to justify their views during the course of everyday speech.

Concerned Christian theologians stress the importance of reading the Bible in new / different ways. In "When faith does violence - Re-imagining engagement between churches and LGBTI groups on homophobia in Africa"<sup>167</sup>, Gerald O. West, Kapya Kaoma and Charlene van der Walt note that:

The particular significance and impact of the Bible are acknowledged on page 19, where the writers state plainly: "And work with the Bible we must. The Bible must be a site of struggle in our African contexts. We cannot ignore or bracket the Bible, as has been the case in much 'western' Euro-American queer Christianity. This is why we also need to do our own African work on queer sexuality. We must engage the Bible, both the toxic texts and the Bible in general. Re-reading the toxic so-called 'homosexuality' texts demythologizes them and enables queer Christianity to talk back to the Christian establishment (Lings 2013). Re-reading these texts also offers other more redemptive interpretive options. For example, if Genesis 18-19 'really' is about hospitality and not homosexuality, then perhaps this text can be read for inclusion of and hospitality towards 'strange(r)' sexualities. At the very least, the text speaks to the role of protecting the stranger from the established culture of the time. Just as Abram (and later Lot) defended the stranger from abuse, he also negotiated the protection of the people of Sodom and Gomorrah. Regardless of where the church sees itself in that story, the need to stand with the vulnerable is critical to biblical interpretation and appropriation.

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<sup>167</sup> The Other Foundation, Gerald O. West, Kapya Kaoma and Charlene van der Walt, 2017, [When Faith Does Violence](http://theotherfoundation.org/wp-content/uploads/2017/01/When-Faith-Does-Violence.pdf) - <http://theotherfoundation.org/wp-content/uploads/2017/01/When-Faith-Does-Violence.pdf>

### 4.2.3 Research confirms a link

The Pew Research Center's April 12, 2016 survey titled "Religion in Everyday Life" shows that everyday behaviour is very closely correlated with those things people regard as being important to their faith<sup>168</sup>.

Simply put, those who believe that behaving in a particular way or performing certain actions are key elements of their faith are much more likely to say they actually perform those actions on a regular basis. For example, among Christians who say that working to help the poor is essential to what being Christian means to them, about six-in-ten say they donated time, money or goods to help the poor in the past week. By comparison, fewer Christians who do not see helping the poor as central to their religious identity say they worked to help the poor during the previous week (42%).

The survey acknowledges that the causality between faith and actions could, in fact, flow in the opposite direction. While its questions tend to cover broad categories of behaviour that would generally be seen as moral by all people (interpersonal interactions, health and social consciousness) and not negative or antisocial behaviour, it should be remembered that, for those Christians who believe that homophobic behaviour is righteous and biblically ordained, that behaviour would, in fact fall into the category of moral imperative for them. As the survey points out:

Relatively few Christians see living a healthy lifestyle, buying from companies that pay fair wages or protecting the environment as key elements of their faith. But those who do see these things as essential to what it means to be a Christian are more likely than others to say they live a healthy lifestyle (by exercising, for example), consider how a company treats its employees and the environment when making purchasing decisions, or attempt to recycle or reduce waste as much as possible.

On that basis, one could reasonably assume, then that "those who do see [homophobic attitudes] as essential to what it means to be a Christian are more likely than others to say they [regard homosexuality as sinful, detestable, unnatural] etc."<sup>169</sup>

### 4.3 The argument so far

In the broader context of the literary review and the struggle between religious freedom and civil rights for LGBTQI+ people in the context of BBH/HS, the overall argument so far is that that South Africa is an overwhelmingly Christian majority, with 43,423,717 people (nearly 80% of the population) per the Statistics South African Community survey of 2016. Within that population, four of the major denominations – (conservatively – given the dated nature of the census) some 12,915,187 people (or 36.1% of the Christian population of South Africa per the census of 2001) have all been shown to be fighting pitched internal political battles over the issue of the sinfulness or otherwise of homosexuality.

We have also established that these four major denominations all regard the bible as a sacred text – a highly important source of moral guidance, based on their own doctrinal statements and public utterances. The link between the bible, their beliefs and ultimately their actions has been established on three grounds: i) that the bible (their sacred moral guide) itself commands Christian believers to translate their faith into actions, ii) that Christians

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<sup>168</sup> Pew Research Center, *Religion in Everyday Life*, April 12, 2016 - <http://assets.pewresearch.org/wp-content/uploads/sites/11/2016/04/Religion-in-Everyday-Life-FINAL.pdf>

<sup>169</sup> Per biblical references above.

themselves tell us that their actions are based on biblical writ and iii) that research has credibly demonstrated a strong correlation (notwithstanding the limits of the implications of correlation) between religious beliefs and the everyday actions of believers.

On the basis of this Christian majority, and these arguments, widespread homophobia in the general population of South Africa could then reasonably be deduced to come in large part from biblically based beliefs. Just on the basis of this sample group, conservatively assuming that only half of these denominations' members are anti-homosexuality, it seems fair to posit that broad based homophobic attitudes would be significantly motivated or even directly driven by the biblical references I've listed above.

#### 4.4 Prevalence

So how widespread is homophobic harm in South Africa? I will cite two studies in this regard: the 2015 Gauteng City-Region Observatory (GCRO) Quality of Life Survey<sup>170</sup> and the Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa, 2016, funded by the U.S. Department of State and conducted by "The Love Not Hate Campaign."<sup>171</sup>

The Quality of Life Survey<sup>172</sup>, conducted among 30,000 residents of Gauteng (South Africa's most populous) Province, is "...the largest social attitudes survey ever conducted in the Gauteng province. Over 200 questions are asked of residents from all parts of the province and every walk of life."

Of the respondents to the study, just 56% agreed that LGBTQI+ people deserve the same rights as other South Africans, and some 29% actively disagreed. The situation seems to be worsening, as same study conducted in 2013 showed that 71% agreed that LGBTQI+ people deserve the same rights as other South Africans. The study says the reason for the rising number of people who would not afford LGBTQI+ people the same rights as others is unclear, as is the reason more people are unsure or have no opinion. The study asks where the de-humanisation comes from. Given the Christian domination of South African demographics, and the links between the bible, beliefs and actions described above, it seems reasonable to assert that some of the dehumanisations comes from religious attitudes based on certain views of scripture.

It is even more disturbing seen alongside the 14% of residents who think it is acceptable to be violent towards gay and lesbian people (Figure 9 – pg. 29)<sup>173</sup>.

The study *Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa*, 2016<sup>174</sup>, cites the limited amount of data on the frequency of hate crimes

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<sup>170</sup> Gauteng City-Region Observatory, 2015, "Quality of Life Survey" -

[http://www.gcro.ac.za/media/redactor\\_files/GCRO\\_QoL\\_2015\\_Press\\_pack\\_low\\_res.pdf](http://www.gcro.ac.za/media/redactor_files/GCRO_QoL_2015_Press_pack_low_res.pdf)

<sup>171</sup> OUT, Love Not Hate (LNH) Campaign, 2016, "Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa" - <https://www.out.org.za/index.php/what-s-hot/news/501-majority-of-lgbt-south-africans-live-in-fear-of-discrimination>

<sup>172</sup> Gauteng City-Region Observatory, 2015, "Quality of Life Survey",

[http://www.gcro.ac.za/media/redactor\\_files/GCRO\\_QoL\\_2015\\_Press\\_pack\\_low\\_res.pdf](http://www.gcro.ac.za/media/redactor_files/GCRO_QoL_2015_Press_pack_low_res.pdf)

<sup>173</sup> Ibid.

<sup>174</sup> OUT, Love Not Hate (LNH) Campaign, 2016, "Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa", funded by the U.S. Department of State conducted by The Love Not Hate

against LGBTQI+ people in South Africa, and the need for reliable, current data to “inform services, interventions and advocacy.”<sup>175</sup> The study specifically aimed to “gather current data on the prevalence of LGBT discrimination and hate crimes in South Africa.” The survey covered the healthcare, secondary school, police and justice system sectors. While more granular data broken down by race, age, sexual orientation (within the LGBTQI+ spectrum), sex, gender identity, socio-economic status or province) was researched, we will focus on the major findings regarding the extent of fear of discrimination and its impact on self-esteem. The sample group included 2130 South Africans (1165 gay people, 687 lesbian people, 216 bisexuals people and 285 transgender people). The sample was evenly spread across South Africa and ranged in age from 16 years upwards (63% between 16 and 29 years old). While the study was slightly limited by the fact that only individuals with smartphones or other devices could be reached via the online survey, the bias was not enough to meaningfully skew the outcomes.<sup>176</sup>

The study revealed that over half (55%) of LGBTQI+ people in SA fear SOGI discrimination and that, in fact, 44% of respondents have actually experienced everyday discrimination in their everyday lives during the last two years. The homophobia at school level is extremely high at 56% who experienced H/HS at school in the last two years, and 88% of self-reported victims of discrimination and hate crimes expressing deep reservations about reporting to authorities, declining to report such incidents to the police, based on fears that police would not take them seriously, do anything with the complaint, were homophobic or even abusive towards LGBTQI+ people themselves. Killings: 41% of those surveyed knew of someone who had been murdered due to their sexual orientation or gender identity, and 7% had been assaulted by being punched, hit, kicked or beaten. The same proportion, 7%, had experienced violence at the hands of family, and 6% had sexually assaulted or even raped.

#### **4.5 Harm**

Apart from self-reported discrimination, evidence also seems to support the view that:

words, contrary to the popular “sticks and stones” trope, do cause harm – even physical harm.

...those individuals who reported experiencing verbal abuse from their peers during middle school years had underdeveloped connections between the left and right sides of their brain through the massive bundle of connecting fibers called the corpus callosum. Psychological tests given to all subjects in the study showed that this same group of individuals had higher levels of anxiety, depression, anger, hostility, dissociation, and drug abuse than others in the study.<sup>177</sup>

Then there is also strong evidence to support the claim that Christian teaching with respect to homosexuality exacerbates already-elevated mental health and suicide attempt rates among

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Campaign - <https://www.out.org.za/index.php/what-s-hot/news/501-majority-of-lgbt-south-africans-live-in-fear-of-discrimination>

<sup>175</sup> Ibid. pg. 2

<sup>176</sup> Ibid. pg. 3.

<sup>177</sup> Fields, R. D. 2010. “Sticks and Stones—Hurtful Words Damage the Brain.” Psychology Today, Webpage: <https://www.psychologytoday.com/blog/the-new-brain/201010/sticks-and-stones-hurtful-words-damage-the-brain>

gay people<sup>178</sup>. There is strong evidence to suggest that link between familial rejection and poor mental health is strong.

Results: Higher rates of family rejection were significantly associated with poorer health outcomes. On the basis of odds ratios, lesbian, gay, and bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse compared with peers from families that reported no or low levels of family rejection. Latino men reported the highest number of negative family reactions to their sexual orientation in adolescence.

Conclusions: This study establishes a clear link between specific parental and caregiver rejecting behaviors and negative health problems in young lesbian, gay, and bisexual adults. Providers who serve this population should assess and help educate families about the impact of rejecting behaviors. Counseling families, providing anticipatory guidance, and referring families for counseling and support can help make a critical difference in helping decrease risk and increasing well-being for lesbian, gay, and bisexual youth. PI in the form of BBH/HS preached and shared by respected religious authority figures, family and peers in close-knit communities is a credible cause of harm in respect of church communities or families potentially rejecting their children, or gay adherents of Christianity being prejudiced and finding their natural sexual orientation irreconcilable with their faith. As a result, there is real risk of them suffering psychological damage or, in extreme cases, even inflicting physical self-harm.<sup>179</sup>

Familial rejection is often tied to cultural and religious norms, which are defined in community. While the relationships are complex, the link between beliefs preached by religious leaders and those imposed on children by parents does not seem like a tenuous one to assert. An extreme example of such a harmful influence is Steven Anderson, pastor of the Faithful Word Baptist Church of Tempe, Arizona, who (while he is not based in South Africa) attempted to enter South Africa. He and members of his congregation were first granted, and later denied, entry into the country for what they described as a “mission trip” to “win souls” in September 2016. Their visas were declined by (then) South African home affairs minister, Malusi Gigaba, on the basis that they “promote hate speech and social violence.”<sup>180</sup>

His primary intolerance dates back years. In 2014 Anderson had stated: “the world could be Aids-free by Christmas if all gay people were executed.”<sup>181</sup> The pastor then publicly celebrated an occurrence of just the sort of thing his words encourage, prima facie, when commenting on a mass shooting at a gay nightclub in Orlando, Florida, in the USA.<sup>182</sup> Forty-

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<sup>178</sup> John Shore, 2017, Gay Teen Suicides, Bullying and Christianity: A Talk with the Trevor Project Director - [http://www.huffingtonpost.com/john-shore/a-talk-about-gay-teen-sui\\_b\\_745912.html](http://www.huffingtonpost.com/john-shore/a-talk-about-gay-teen-sui_b_745912.html)

<sup>179</sup> Ryan C, Huebner D, Diaz RM, Sanchez J., 2009, “Family rejection as a predictor of negative health outcomes in white and Latino lesbian, gay, and bisexual young adults” - <https://www.ncbi.nlm.nih.gov/pubmed/19117902>

<sup>180</sup> Ra'eesa Pather, Mail&Guardian, 2016, The Pastor of Hate and why Malusi Gigaba Barred him from SA - <http://mg.co.za/article/2016-09-13-the-law-the-pastor-of-hate-and-why-malusi-gigaba-barred-him-from-sa>

<sup>181</sup> Antonia Molloy, Independent, 2014, US Pastor Steven Anderson says Gay People Should be Executed for an AIDS-Free Christmas - <http://www.independent.co.uk/news/world/americas/us-pastor-steven-anderson-says-gay-people-should-be-executed-for-an-aids-free-christmas-9903543.html>

<sup>182</sup> Steven Anderson, Faithful Word Baptist Church of Tempe, Arizona YouTube channel <https://www.youtube.com/watch?v=Qzgx-DjvsO4> (Video removed during the writing of this dissertation for violating Youtube hate speech regulations)

nine people were killed. While the pastor makes a point of saying that he wouldn't encourage people to take up weapons to kill others, this seems more like an attempt to avoid legal sanction, or admitting his true thoughts, than a credible attempt to avoid causing harm or be more tolerant. In the context of his other comments, his disavowal of directly encouraging violence sounds weak and disingenuous. He goes further to claim USI in the form of "propaganda" against both Muslims and Christians.

The good news is that at least 50 of these pedophiles are not going to be harming children anymore, The bad news is that a lot of the homos in the bar are still alive, so they're going to continue to molest children and recruit people into their filthy homosexual lifestyle. The other bad news is that this is going to now be used as propaganda not only against Muslims, but also against Christians.<sup>183</sup>

As to whether Anderson's PI is could credibly be called harmful, it is important to note that while the Orlando shooting might be unusual in its extent, as I have demonstrated, violence against gay people is common, and even from within the LGBTQI+ community, suicide attempt rates due to psychological trauma for LGBT youth are very much inflated.

Lesbian, gay, and bisexual youth are up to four times more likely to attempt suicide than their heterosexual peers. LGB youth who come from highly rejecting families are more than eight times as likely to have attempted suicide than LGB peers who reported no or low levels of family rejection.<sup>184</sup>

A close associate of Anderson's is Cape Town pastor Oscar Bougardt who was recently sentenced to 30 days in jail suspended for five years<sup>185</sup> for contempt of court. Bougardt ignored a court order that he cease uttering BBH/HS. The Equality court judge, Lee Bozalek, said "Bougardt's comments advocated hatred and were clearly discriminatory." The contempt order followed a settlement Bougardt made with the SA Human Rights Commission in 2014 after being reported for homophobic hate speech, and agreeing to cease. In his latest statements, Bougardt said gay people are perverted, suggested that LGBTQI+ sexuality be recriminalized so that authorities should "deal with them like they do in Nigeria". Like Angus Buchan<sup>186</sup>, Bougardt blamed Cape Town's drought on "wickedness and homosexuality and church leaders who fail to preach the Bible and sodomite abomination".

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<sup>183</sup> Lindsay Bever, Washington Post, 2016, Pastor refuses to mourn Orlando victims: 'The tragedy is that more of them didn't die' - <https://www.washingtonpost.com/news/acts-of-faith/wp/2016/06/14/pastor-refuses-to-mourn-orlando-victims-the-tragedy-is-that-more-of-them-didnt-die/>

<sup>184</sup> Ryan, C.; Huebner, D. et al., 2009, "Family rejection as a predictor of negative health outcomes in white and Latino lesbian, gay, and bisexual young adults", pp 346-352, <https://www.ncbi.nlm.nih.gov/pubmed/19117902>;

John Shore, 2017, Gay Teen Suicides, Bullying and Christianity: A Talk with the Trevor Project Director, [http://www.huffingtonpost.com/john-shore/a-talk-about-gay-teen-sui\\_b\\_745912.html](http://www.huffingtonpost.com/john-shore/a-talk-about-gay-teen-sui_b_745912.html))

<sup>185</sup> Tammy Peterson, News24, 2018, Cape Town pastor found guilty of contempt of court for anti-gay slurs, <https://www.news24.com/SouthAfrica/News/cape-town-pastor-found-guilty-of-contempt-of-court-for-anti-gay-slurs-20180518>

<sup>186</sup> Jasmine Stone, 2OceansVideoNews, 2018, Angus Buchan Says It Will Rain When The People Of Cape Town Repent, <http://www.2oceansvibe.com/2018/02/06/angus-buchan-says-it-will-rain-when-the-people-of-cape-town-repent-video/>; Matthew Winfield, Huffington Post, 2018, Cape Town Does Not Need Buchan's Fire And Brimstone, [https://www.huffingtonpost.co.za/matthew-winfield/cape-town-does-not-need-buchans-fire-and-brimstone\\_a\\_23355781/](https://www.huffingtonpost.co.za/matthew-winfield/cape-town-does-not-need-buchans-fire-and-brimstone_a_23355781/)



What impact does this kind of speech have on gay teens, or LGBTQI+ people generally? What impact does it have on LGBTQI+ teens born into Christian families in groups like Anderson's, Bougardt's and Buchan's?

There is no reason to think that Christian families are any less likely than non-Christian families to have gay children. Christian families typically regard clergymen with reverence, and see them as moral authority figures (ergo, might take Anderson, Bougardt and Buchan seriously as moral guides). Given the links between their professed biblical grounding, their actions and the dominance of Christianity in South Africa, it seems fair to attribute a significant portion of the harm to gay people across South African society as noted in the studies<sup>187</sup> quoted, to their statements, and others like them.

Their words might also strengthen homophobic opinions evangelical believers already hold in their own right – opinions which might be expressed to their teen (and potentially LGBT) children. The risk of these words turning into words encouraging potentially violent behaviour on the one hand, or familial rejection prompting suicide on the other, is not only credible, it is probable. While it may be difficult to hold a specific preacher responsible for a specific act by linking their BBH/HS to the actions of another, it does not seem unreasonable to say that they are at least partially responsible for encouraging the culture that made those acts easy and even, per Anderson's statements about violence, encouraging homophobic believers to convert their statements into violence. Preachers and adherents making such statements must, reasonably, be held jointly responsible and blameworthy for the results of their words – even if they are not the sole or direct cause of that harm.

As such, social SI seems more than justifiable as a response and did, in fact, occur in the form of protests by LGBT groups, and the gathering of some 60,000 signatures in a petition to South Africa's Home Affairs department to deny Anderson entry into the country. In addition, legal SI also occurred in that the minister invoked the South African Immigration Act. He cited a section of the Act that deals with people prohibited from entering the country: "Section 29 (1) Foreigners regarded as prohibited persons: ...A member of or adherent to an association or organisation advocating the practice of racial hatred or social violence..." Given these responses, it seems that

Within national borders, South African citizens, such as Jon Qwelane in his case of hate speech towards homosexuals,<sup>188</sup> are subject to a different authority – the Human Rights Commission – when evaluating hate speech and are typically subject to fines rather than incarceration. However, it seems reasonable to deny foreigners access into South Africa when they are, in all likelihood, going to commit serious PI.

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<sup>187</sup> Gauteng City-Region Observatory, 2015, "Quality of Life Survey" -

[http://www.gcro.ac.za/media/redactor\\_files/GCRO\\_QoL\\_2015\\_Press\\_pack\\_low\\_res.pdf](http://www.gcro.ac.za/media/redactor_files/GCRO_QoL_2015_Press_pack_low_res.pdf);

OUT, Love Not Hate (LNH) Campaign, 2016, "Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa" - <https://www.out.org.za/index.php/what-s-hot/news/501-majority-of-lgbt-south-africans-live-in-fear-of-discrimination>

<sup>188</sup> South African Human Rights Commission, 2016, Free expression or hate speech and what it means for the Jon Qwelanes, <http://www.sahrc.org.za/index.php/sahrc-media/news/item/443-free-expression-or-hate-speech-and-what-it-means-for-the-jon-qwelanes>

Anderson responded on social media and made the counterclaim of USI in the form of limiting of his “religious freedom”:

I have been banned from South Africa AND the United Kingdom. I am not even allowed to have a connecting flight in London. ‘And when they opposed themselves, and blasphemed, he shook his raiment, and said unto them, Your blood be upon your own heads; I am clean; from henceforth I will go unto the Gentiles.’ - Acts 18:6 I feel sorry for people who live in South Africa, but thank God we still have a wide open door in Botswana. Stand by for reports of MULTITUDES saved in Botswana, where religious freedom still exists.<sup>189</sup>

In fact, Anderson was later deported from Botswana as well. While it is accurate to say that Anderson’s freedom of movement and association was curtailed, in terms of the principles established as part of the Law of Equal Liberty for All, and the potential for harm encouraged by his statements, the denial of entry into South Africa is FSI, rather than USI. Given the harms described above, the rights of South African society, and of LGBT individuals with it, must take precedence over Anderson’s right to travel here – both because he is an undesirable foreigner and it is within government’s mandate to protect its citizens against such individuals, and because (even without a South African court’s judgement having been expressed) it is safe to say that his statements amount to hate speech, and have a significant chance of contributing to serious societal and individual harm. In terms of Leiter’s arguments, it also seems reasonable to prioritise the wellbeing of South Africans over the right to share categorical, evidence-resistant religious claims.

In contrast to Anderson stands well-known South African preacher and evangelist, Angus Buchan. While some of the events described below did not take place in South Africa, Buchan himself is South African and the BBH/HS he expressed did take place here, as have subsequent statements relating to Cape Town’s drought being the result of sexual “deviancy” as cited above.

Buchan is best known as the leader of the so-called “Mighty Men”<sup>190</sup> Christian movement, and as the individual upon whom the autobiographical “Faith Like Potatoes”<sup>191</sup> movie was based. He stands in contrast to Anderson because, unlike Anderson, Buchan was not denied access to Scotland, but was de-platformed by a local church amid accusations of a history of homophobia. The Hope Church in Tweedbank, Galashiels, Scotland, cancelled his talk after local LGBT activists (Scottish Borders LGBT Equality), like in Anderson’s case, complained about previous comments the preacher had made.

While Anderson described gay people as sodomites and sinners and directly condoned, if not encouraged, violence against gay people, Buchan only asserted that their lifestyle was contrary to biblical teaching, and that they were destined for hell, and had made claims about

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<sup>189</sup> Staff Reporter, ENCA, 2016, [Your blood be upon your own heads: Pastor Anderson on ban](https://www.enca.com/south-africa/anti-gay-pastor-banned-from-entering-south-africa), <https://www.enca.com/south-africa/anti-gay-pastor-banned-from-entering-south-africa>

<sup>190</sup> Angus Buchan, Mighty Men Conference, <http://www.mightymenconference.co.za/>

<sup>191</sup> Regardt van den Bergh, 2006, Faith Like Potatoes, <https://www.imdb.com/title/tt0850667/>

homosexuality being “curable” – implying that it is some sort of disease.<sup>192</sup> The difference between the comments made by the two pastors lies in the extent of PI and, therefore, potential resulting harm.

The proprietors of the venue Buchan was going to use cited the possibility of “public offense” as their reason for cancellation. “In line with Scottish Borders Council policy - Live Borders has a responsibility to support the wellbeing of all people in the Borders and not to hire out any premises to events with the potential to cause public offense.”

Since their contract with Buchan gave them the right to cancel any event at their discretion in any case, they were within their legal rights to cancel for a reason of their choosing. In legal terms it could be argued (as I have done previously) that offense on its own is not sufficient grounds upon which to penalise Buchan. In other words, that the discomfort caused by Buchan’s PI may not warrant either social or legal SI because it does not actually cause harm. However, I would argue that the proprietors of the venue effectively misspoke, in that Buchan’s PI is a credible source of harm in respect of church communities or families potentially rejecting their children, or gay adherents of Christianity being prejudiced and finding their natural sexual orientation irreconcilable with their faith -and being harmed physically, psychologically, or choosing to inflict self-harm.<sup>193</sup>

While his statements might be said to be milder than Anderson’s with regard to the outright condonation of physical hate crimes against gay people by others, they might nevertheless be said to contribute to a society in which homosexuality is not only not tolerated, but is actively despised as sinful, unnatural and so forth, per biblical references.

In Buchan’s case, the PI he committed could also have resulted in very real harm to the venue and its proprietors in the commercial or professional senses, also, if their reputations had been tarnished through association with, or perceived condonation of, an alleged homophobe. More pertinent to the moral debate, however, is the more serious danger of judgement and rejection of gay people, and possible harm they may inflict on themselves as a function of psychological damage due to PI.

In response, Buchan makes a number of protests regarding the SI, which he feels is unfair, namely, that he had “come under the most severe attack and resistance I have ever experienced in my life since becoming a Christian in 1979.” This protest by Buchan seems to have little objective basis, and could only be taken seriously as a charge of USI if one assumes that Christianity’s claims of absolute truth and divine command with regard to homosexual sin are true – and that its norms are therefore objective by definition. It is, in essence, an appeal for sympathy based on the idea of persecution of Christians, and of Buchan himself – and has no real bearing on the objective fairness of the social SI as evinced by the Galashiels community.

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<sup>192</sup> ITV Report, unattributed, 2016, South African pastor responds after Scottish Borders visit is cancelled amid homophobia accusations, <http://www.itv.com/news/border/2016-08-19/south-african-pastor-responds-after-scottish-borders-visit-is-cancelled-amid-homophobia-accusations/>

<sup>193</sup> Martin Evans, Telegraph, 2014, [Christian teenager takes own life over misplaced fears about telling family she is a lesbian](http://www.telegraph.co.uk/news/religion/11299263/Christian-teenager-takes-her-own-life-over-misplaced-fears-about-telling-family-she-is-gay.html), <http://www.telegraph.co.uk/news/religion/11299263/Christian-teenager-takes-her-own-life-over-misplaced-fears-about-telling-family-she-is-gay.html>

Secondly, Buchan protests that “I love homosexuals, and I love lesbians, but I cannot condone their way of living, their lifestyle, because it is contrary to the teaching of God’s Holy Word!” This protest appears to be more of an admission of guilt with respect to harmful PI, than a realistic claim of USI or any genuine affection for LGBTQI+ people (which seems like a patronising statement to make in any case). While Buchan claims to love homosexuals, as an attempt to deny any harmful intent (and presumably in response to the Biblical injunction to “love your neighbour”), obedience to Divine Command seems like a dubious form of genuine love expression, and more of a case of following biblical injunction. Certainly, this form of “love” seems to require little emotional investment in the “beloved”, and little practical work on the part of the “lover,” except the ability to utter a superficial “I love homosexuals, because I am biblically commanded to love my neighbour.” The statement seems to imply love only in the sense that Buchan “loves all people” in obedience to the bible - and only in that he would prefer them to convert to his faith in order to avoid the threat of hell as believed in by him. The statement that he “cannot condone their way of life” is a direct value judgement – an indication of Buchan’s view that homosexual behaviour is unbiblical and therefore morally odious. It also seems to misrepresent homosexuality as a choice when, in fact, homosexuality is regarded by the Psychological Society of South Africa as a sexual orientation equivalent to heterosexuality.

Sexual orientation refers to a person’s emotional, affectional, romantic and sexual attraction to a person. It can also refer to a person’s core sense of identity based on those attractions, related behaviours, and membership in a community of others who share those attractions. Research and clinical experience further conclude that for most people sexual orientation is not ‘a choice’ or ‘voluntary’. The core aspects of sexual orientation, whether heterosexual, homosexual or bisexual, typically emerge by early adolescence, even though the individual may not yet have become sexually active.<sup>194</sup>

This (primary) intolerance has potential to cause real harm.

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<sup>194</sup> Prof. Juan A. Nel, Rev Chris McLachlan, Psyssa, 2018, [An Open Statement by the Psychological Society of South Africa’s Sexuality and Gender Division: Debates in the Dutch Reformed Church re Sexual Orientation and Misrepresentation of Pedophilic Disorder as Comparable to Same-sex Sexual Orientation](https://www.psyssa.com/wp-content/uploads/2018/10/PsySSA-SGD-open-statement-re-Dutch-Reformed-Church-debate-re-sexual-orientation_fin.pdf) - [https://www.psyssa.com/wp-content/uploads/2018/10/PsySSA-SGD-open-statement-re-Dutch-Reformed-Church-debate-re-sexual-orientation\\_fin.pdf](https://www.psyssa.com/wp-content/uploads/2018/10/PsySSA-SGD-open-statement-re-Dutch-Reformed-Church-debate-re-sexual-orientation_fin.pdf)

## 5. How BBH/HS is currently treated

The legal landscape in South Africa with respect to BBH/HS is relevant from two perspectives. First, the historical perspective, where putatively Christian (including homophobic) values were an inherent part of the South African Apartheid Regime. Second, the current legislative and judicial frameworks affect the way in which LGBTQI+ people are treated socially (culturally).

The former was a part of the country's legal framework in the form of phenomena like "Christian National Education"<sup>195</sup>, as was homophobia in terms of the crimes of sodomy and "commission of an unnatural sexual act."<sup>196</sup> On the 8th May 1998, these residual regulations from Roman-Dutch law were found unconstitutional by the Witwatersrand Local Division of the High Court (*National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>197</sup>).

While law and culture may be viewed as separate paradigms by some, they are likely more closely entangled than one may realise. The laws we grow up with are likely to form part of what we consider cultural and social norms and, conversely, our cultural mores are, presumably, what gave rise to the laws which express what we consider to be acceptable in the first place. As argued by Mezey in *Law As Culture*<sup>198</sup>:

When law and culture are thought of together, they are conceptualized as distinct realms of action and only marginally related to one another. For example, we tend to think of playing baseball or going to a baseball game as cultural acts with no significant legal implications. We also assume that a lawsuit challenging baseball's exemption from antitrust laws is a legal act with few cultural implications<sup>199</sup>. I think both of these assumptions are profoundly wrong, and that our understandings of the game and the lawsuit are impoverished when we fail to account for the ways in which the game is a product of law and the lawsuit a product of culture-how the meaning of each is bound up in the other, and in the complex entanglement of law and culture.<sup>200</sup>

The laws espoused by the Apartheid regime, including laws regarding homosexual sex, were likely to influence the views of South Africans on the social acceptability of homosexuality, thereby contributing to a climate aligned with the assumptions implicit therein – that LGBTQI+ people are immoral by nature.

In terms of contemporary law, the South African Constitution reads fairly unambiguously on issues of non-discrimination on the basis of sexual orientation, but there is still room for

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<sup>195</sup> Hofmeyer, JM, 1982, "An examination of the influence of Christian national education on the principles underlying white and black education in South Africa 1948 – 1982", University of the Witwatersrand.

<sup>196</sup> South African Parliament, *Immorality Act, Act No 23 of 1957*

<sup>197</sup> New York Times, unattributed, 1998, *South African Court Ends Sodomy Laws* - <https://www.nytimes.com/1998/05/09/world/south-african-court-ends-sodomy-laws.html>

<sup>198</sup> Naomi Mezey, *Law As Culture*, 200, pg. 3, Georgetown University Law Center, [mezeyn@law.georgetown.edu](mailto:mezeyn@law.georgetown.edu),

<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1310&context=facpub>

<sup>199</sup> See. e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. N.Y. Yankees*, 346 U.S. 356 (1953); *Federal Baseball Club v. Nat'l League*, 259 U.S. 200 (1922).

<sup>200</sup> Naomi Mezey, *Law As Culture*, 200, pg. 3, Georgetown University Law Center, [mezeyn@law.georgetown.edu](mailto:mezeyn@law.georgetown.edu),

<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1310&context=facpub>

ambiguity and bias in its application by judges. In its second chapter, the constitution contains a Bill of Rights<sup>201</sup> which specifies the freedoms enjoyed by citizens, in particular in section 9:

Equality (Section 9) Everyone is equal before the law and has the right to equal protection and benefit of the law; Human Dignity (Section 10) Everyone has inherent dignity and the right to have their dignity respected; Freedom of religion, belief and opinion (Section 15) Everyone has the right to freedom of conscience, religion, thought, belief and opinion; Freedom of expression (Section 16) Everyone has the right to freedom of expression, which includes— (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. This section specifically excludes hate speech, incitement to violence and war propaganda from protection under free speech considerations.

South African law prohibits hate speech, incitement to violence and propaganda for war by explicitly excluding from Constitutional free speech protections. According to the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000<sup>202</sup>:

No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—

be hurtful;

be harmful or to incite harm;

promote or propagate hatred.

The "prohibited grounds" include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Crimen injuria, which is defined as “unlawfully, intentionally and seriously impairing the dignity of another,”<sup>203</sup> can also be used to criminally prosecute perpetrators of hate speech, as was the case with former estate agent Vicky Momberg’s conviction for racism<sup>204</sup>, where she was sentenced to imprisonment for repeatedly using the word “ka\*\*ir\* to refer to police call centre agents and, later, to the police who came to assist her after a robbery. This could also, theoretically, be applied to SOGI cases.

A particularly strongly contested area of the struggle between civil rights and religious freedom, is the area of same-sex marriage or marriage equality. While the legal cases instituted may not always be explicitly about hate speech, it seems uncontroversial to say that, in the course of refusing to provide services to same-sex couples, service providers (including marriage officiants, bakers, seamstresses and so on are likely to justify their

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<sup>201</sup> South African Parliament, South African Constitution, Bill of Rights, Chapter 2, 1997, pp. 1-3 (<http://www.justice.gov.za/legislation/constitution/saconstitution-web-eng-02.pdf>)

<sup>202</sup> South African Parliament, Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) or the “Equality Act”, Act No. 4 of 2000 - <http://www.justice.gov.za/legislation/acts/2000-004.pdf>, section 9

<sup>203</sup> Clark, DM, 2003, South African Law Reform Commission Issue Paper 22 Project 130: Stalking. South African Law Commission.

<sup>204</sup> Rebecca Davis, Daily Maverick, 2018, Why the Vicky Momberg Racism Sentence Deserves Scrutiny, <https://www.dailymaverick.co.za/article/2018-03-29-analysis-why-the-vicki-momberg-racism-sentence-deserves-scrutiny/>

refusal to provide such services) by uttering speech that LGBTQI+ people would regard as denigrating and prejudicial.

In terms of legal precedent, it would seem that a residue of the previous regime persists, in some sense, because even though the *Civil Union Bill*<sup>205</sup> is law, marriage itself remains unequal. The legal distinction is now that heterosexual couples can have marriages, while same-sex couples are limited to civil unions. While the Constitutional Court did decide<sup>206</sup> that the Marriage Act (1961) had to be changed, the Civil Union Act was created instead. Effectively, the Marriage Act of 1961 (in which marriage is defined as being between one man and one woman) remains unchanged, and excludes same-sex relationships.<sup>207</sup> Same-sex couples who insist on being married under the old Act face the onerous task of applying to the court “for confirmation that the words “or spouse” are now deemed to be written into the act and thus applicable to all.”<sup>208</sup> Civil rights lawyers in the SOGI field see the reason for the distinction as religion.

After the Department of Home Affairs reluctantly held consultations with the populace throughout South Africa, where the general feeling was overwhelmingly against gay marriages, it gave them enough ammunition to retain the Marriage Act of 1961 unchanged and introduce the Civil Union Bill to (according to them) adhere to the Constitutional Court directive.

It means, in effect, that the Marriage Act exists mainly for heterosexuals who see marriage as a sacred religious institution to the exclusion of gays, and that the Civil Union Bill exists for same-sex couples and those heterosexuals not wishing to be burdened with the “outdated” label of “marriage”, or “religious marriage”.<sup>209</sup>

The moral frailty of this “centrist” legal approach to same-sex marriages was highlighted again, in the case of Johan Grobler vs Moreleta Park NG Kerk. Grobler, the complainant, was employed as a music teacher by the Moreleta Park Dutch Reformed Church, in Pretoria. Grobler was never asked about his sexual orientation during the hiring process. While the church, by all accounts, was happy with his performance as a teacher, his homosexual relationship was discovered by church members and prejudiced the employment relationship. Though not a member of the church, but an employee, Grobler was fired. The church’s response was that “The congregation’s opinion on sexual orientation is well known and has been published, and we cannot deviate from this point of view.”<sup>210</sup>

While the damages of more than R80 000 plus costs by the High Court may, prima facie, have seemed like a victory of civil rights over religious bigotry, it was not so. The ruling hinged on the fact that the relationship between Grobler and the church was an employment relationship, and that his sexual orientation was not asked for in the hiring process. The

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<sup>205</sup> South African Parliament, *Civil Union Bill*, No. 26 of 2006, <https://www.gov.za/documents/civil-union-bill>

<sup>206</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 542 (CC).

<sup>207</sup> Pierre De Vos, Daily Maverick, 2015, *Same-sex marriage in South Africa: Separate but unequal*, <https://www.dailymaverick.co.za/opinionista/2015-09-29-same-sex-marriage-in-south-africa-separate-but-unequal/>; *Steyn v Steyn* (6427/2010) [2010] ZAWCHC 224 (27 October 2010) sections 12-20, <http://www.saflii.org/za/cases/ZAWCHC/2010/224.html#sdfootnote1sym>

<sup>208</sup> Coenraad Kukkuk, 2012, *You, religion and the law* - <https://www.litnet.co.za/you-religion-and-the-law-coenie-kukkuk-takes-a-closer-look/>

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

question of whether churches enjoy protected status when it comes to discrimination against LGBTQI+ people, while other organisations do not, was not answered clearly, despite this being a landmark ruling.

The principle is currently being tested more directly in the Pretoria High Court. A number of complainants (Laurie Gaum; Frits Gaum; Judith Kotze and Michelle Boonzaaier) are challenging the Dutch Reformed Church which, in 2016 rescinded a 2015 decision of its Synod to allow Dutch Reformed LGBTQI+ ministers to marry and, by extension, solemnise same-sex unions.<sup>211</sup>

The position of the complainants relates back to the question left unanswered in the Grobler case. Legal counsel for the complainants has stated that while the Dutch Reformed church has some right to act autonomously, this right does not trump section 9 of the South African constitution's bill of rights.

You cannot privatise discrimination...and what the church cannot do is cut into section 9. We are not attacking what other people believe, the church can organise itself the way it likes, but it must not go outside of section 9. We have to accept that sexual orientation is there in section 9 and if it holds good for race and gender, then it holds true for sexual orientation.<sup>212</sup>

The outcome of this case is currently pending.

Another way in which legislation discriminating against LGBTQI+ people persists is in the form of conscience-based exemptions granted to state employees who refuse to officiate at/solemnise same-sex relationships. State employees are essentially granted the right to say that same-sex relationships are sinful in terms of their religion, and to refuse to serve LGBTQI+ member of the public on that basis, even though their salaries are paid from state coffers, which means that taxpayers, religious or otherwise, are paying for state employees' religious expression.

Earlier this year a US federal judge jailed Kim Davis, a Kentucky county clerk, for refusing to issue same-sex marriage licences. Davis was rightly held in contempt of court after the US Supreme Court legalised same-sex marriages across the US. Strangely, in South Africa section 6 of the Civil Union Act would have allowed Davis to continue to discriminate against same-sex couples by refusing to register same-sex marriages, even as a state employee.

More broadly, section 5 of the Civil Union Act enables *religious organisations* to refuse to solemnise same-sex marriages. The case of Gaum, Gaum, Kotze and Boonzaaier against the Dutch Reformed Church might have some impact on it.

In terms of the argument for reasonable separate of church and state, the situation changes when a state employee is involved. Section 6 of the Civil Union Act currently enables South African state-employed marriage officers to refuse services to same-sex couples on the grounds of their personal beliefs. This could be seen as inconsistent with the constitution itself. While it does allow limited involvement of religion in state institutions, the state may not use its "power, prestige and financial support" to promote a specific religion, or to

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<sup>211</sup> Leonie Wagner, Timeslive, 2018, [Dutch Reformed Church to Defend Decision on Gay Clerics](https://www.timeslive.co.za/news/south-africa/2018-08-21-dutch-reformed-church-to-defend-decision-on-gay-clerics/), <https://www.timeslive.co.za/news/south-africa/2018-08-21-dutch-reformed-church-to-defend-decision-on-gay-clerics/>

<sup>212</sup> Ibid.



promote religion versus non-belief, because “it would result in indirect coercion on non-believers and on religious minorities to conform to the majority view.”<sup>213</sup>

While an appeal to freedom of religion may justify section 5 of the Civil Union Act, allowing state employees to do the same would therefore seem to be unconstitutional, *prima facie*. The Civil Union Amendment Bill<sup>214</sup> aims to force state marriage officers to officiate same-sex marriages. Proposed by Cope MP, Deidre Carter, the Amendment Bill would close the door on marriage officers in the employ of the state to “inform the Minister of Home Affairs that he or she objects on the ground of conscience, religion, and belief to solemnising a civil union between persons of the same sex — and to be exempted from officiating over such marriages.”<sup>215</sup>

The bill was approved by Parliament<sup>216</sup> on the 6<sup>th</sup> of December, 2018, and will be passed on to a parliamentary committee for further evaluation.

As indicated in my introduction, in the last three years of reporting by the South African Human Rights Commission (SAHRC - 2014/15; 2015/16 and 2016/17) race-related discrimination was reported to the SAHRC 292, 505 and 486 times, respectively. During the same period, SOGI-related discrimination was reported 17, 26 and 24 times<sup>217</sup>. One might argue that the small reported numbers indicate a small demand for attention to BBH/HS. However, this does not align with the widespread harm reported by members of the gay community in independent research<sup>218</sup>, or with anecdotal evidence where even cases that (*prima facie*) seem worthy of prosecution are sometimes turned away by the SAHRC. LGBTQI+ rights lawyer, Coenraad Kukkuk, relates a case from 2003 when Danie Botha, a South African gospel singer, stood on a church pulpit and said, explicitly, “all gay people are going to hell”. Kukkuk made hate speech complaint to the South African Human Rights Commission, but the organisation declined to investigate, “as we have seen many times with our beloved SAHRC,” Kukkuk says<sup>219</sup>. He opines that if Botha had made a racially disparaging remark about the San people, the response would likely have been very different.

What we need in South Africa is a court ruling by the Constitutional Court, or at least a law, that clearly states that the supreme authority of this land is, in fact, the law and not doctrine and that religion is bound by all of it and not just those sections these religions seem to deem fit.<sup>220</sup>

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<sup>213</sup> Pierre de Vos, Constitutionally Speaking, 2015, *Religion In Schools: Time To Decolonise Our Education?* <https://constitutionallyspeaking.co.za/religion-in-schools-time-to-decolonise-our-education/>

<sup>214</sup> SA Parliament, 2018, No. 41475 of 1 March 2018, *National Assembly passes Civil Union Amendment Bill*, <https://www.parliament.gov.za/press-releases/national-assembly-passes-civil-union-amendment-bill>

<sup>215</sup> Clive Ndou, Weekend Witness, 2018, *Bid to Amend Civil Union Amendment Bill*, <https://www.news24.com/SouthAfrica/News/bid-to-amend-civil-union-act-20180521-3>

<sup>216</sup> SA Parliament, 2018, No. 41475 of 1 March 2018, *National Assembly passes Civil Union Amendment Bill*, <https://www.parliament.gov.za/press-releases/national-assembly-passes-civil-union-amendment-bill>

<sup>217</sup> South African Human Rights Commission, 2016/7, *Annual Trend Analysis Report*, pg.24, <https://www.sahrc.org.za/index.php/sahrc-publications/trends-analysis>

<sup>218</sup> OUT, Love Not Hate (LNH) Campaign, 2016, “Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT ) people in South Africa” - <https://www.out.org.za/index.php/what-s-hot/news/501-majority-of-lgbt-south-africans-live-in-fear-of-discrimination>

<sup>219</sup> Coenraad Kukkuk, 2012, *You, religion and the law* - <https://www.litnet.co.za/you-religion-and-the-law-coenie-kukkuk-takes-a-closer-look/>

<sup>220</sup> Coenraad Kukkuk, 2012, *You, religion and the law* - <https://www.litnet.co.za/you-religion-and-the-law-coenie-kukkuk-takes-a-closer-look/>

## 6. Conclusions

My contention was that BBH/HS cause the same harm inside the church as their non-biblically-based equivalents do, and as much as other forms of hate speech. So, more specifically, the question is not about whether BBH/HS should receive any legal or social punishment *at all*, but rather, whether it receives a proportionally appropriate amount of legal and social punishment.

As a result, my view is that they should be treated (in terms of both social moral opprobrium, and South African jurisprudence) like any other homophobic / hate speech, and any other form of hate speech. The evidence from the primary South African body tasked with human rights infringements (the SA Human Rights Commission) seems to be that BBH/HS (and in fact any homophobic hate speech) does not receive appropriate attention at all. Compared to racist hate speech, SOGI-related hate speech seems to draw a minute amount of attention in comparison. As reflected: in the last three years of reporting by the South African Human Rights Commission (SAHRC - 2014/15; 2015/16 and 2016/17) race-related discrimination was reported to the SAHRC 292, 505 and 486 times, respectively. During the same period, SOGI-related discrimination was reported 17, 26 and 24 times<sup>221</sup>. Cases like those of Penny Sparrow<sup>222</sup> have become fairly common, but cases of homophobic hate speech reported to the SAHRC / Equality Court, not as much.

Anecdotally, though the case of Oscar Bougardt has received some media attention, the amount does not (*prima facie*) seem to be as much as was received by the cases of Penny Sparrow or Vicky Momberg. The few cases that are reported, and receive attention, also seem to be off-set by cases like LGBTQI+ rights lawyer, Coenraad Kukkuk's reporting of South African gospel singer Danie Botha in 2003, when he said that "all gay people are going to hell". Kukkuk's report was declined for further investigation by the South African Human Rights Commission, "as we have seen many times with our beloved SAHRC," Kukkuk says<sup>223</sup>. He opines that if Botha had made a racially disparaging remark about the San people, the response would likely have been very different, which seems plausible, given the number of racist hate speech reports to the SAHRC, and the numbers and amount of press coverage that seem to result.

The low reporting rate of BBH/HS could plausibly be attributed to the fears expressed in the *Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa* study, where 88% of self-reported victims of discrimination and hate crimes declined to report such incidents to the police, based on fears that police would not take them seriously, do anything with the complaint, or were homophobic or even abusive towards LGBTQI+ people themselves.<sup>224</sup>

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<sup>221</sup> South African Human Rights Commission, *Annual Trend Analysis Report*, 2016/17, pg.24, <https://www.sahrc.org.za/index.php/sahrc-publications/trends-analysis>

<sup>222</sup> *ANC v Sparrow* (01/16) [2016] ZAEQC 1 (10 June 2016), <http://www.saflii.org/za/cases/ZAEQC/2016/1.html>

<sup>223</sup> Coenraad Kukkuk, 2012, *You, religion and the law*, <https://www.litnet.co.za/you-religion-and-the-law-coenie-kukkuk-takes-a-closer-look/>

<sup>224</sup> OUT, Love Not Hate (LNH) Campaign, 2016, "*Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa*" - <https://www.out.org.za/index.php/what-s-hot/news/501-majority-of-lgbt-south-africans-live-in-fear-of-discrimination>

My recommendation would be to address the disparity as follows: various social and state institutions (like those addressed in the OUT, Love Not Hate (LNH) Campaign of 2016 – healthcare, police and education) should be sensitized through training to the need to take seriously (and treat with special empathy) the needs of this marginalised minority. The SAHRC itself should be informed of the disparity, and preferably publicly state its determination to treat all forms of hate speech with equal severity. THE SAHRC should also be publically called out if it is indeed found not to do so on a consistent basis.

Given the reporting rates for racist hate speech, it seems implausible to suggest that racist hate speech in places as public as church services, prayer meetings and so forth would go unreported to the South African Human Rights Commission to the same degree as BBH/HS. The comparison with BBH/HS outside of Christian circles is more difficult, precisely because 80% of South Africans self-identify as Christians and while some utterances of BBH/HS can be directly traced to the conviction that the bible is a sacred moral guide, there are many instances where this cannot be done – and such utterances may reflect cultural roots rather than religious ones. While those making the utterances are very likely to fall within the 80% Christian group, it is challenging to understand the mix of cultural versus religious impact (inasmuch as those things can even be separated) without significant empirical research.

However, given this Christian majority, the likelihood of BBH/HS being uttered in everyday fashion all over South Africa seems inescapable. The number of complaints by the HRC seems disproportionately low (in comparison to racist hate speech reports to the SAHRC) given the common nature of these utterances. I see three possible reasons for this:

*The tyranny of the majority:* the vast majority of South Africans are Christians and may well be unlikely to have the will to report mainstream Christian leaders like Angus Buchan due to his popularity and their own bias in favour of biblical beliefs. The impact of this majority is visible in cases like that of Ecclesia de Lange, who was suspended by the Methodist Church not for cohabiting with her same-sex partner in the manse, or even for marrying her same-sex partner, but for “announcing her intention to enter into such a marriage on the basis that this pre-empted the outcome of a continuing debate inside the Methodist Church about whether the church should endorse equal marriage rights for all.”<sup>225</sup>

*The majority / minority disparity:* LGBTQI+ people are a small minority, whereas black people (historically disadvantaged by systemic racism in South Africa) are a vast majority and also enjoy significant support from many liberal allies in other race groups. Even though LGBTQI+ people do have allies as well, the sheer numbers of black people and allies sensitized to race issues is likely to be far higher.

*The relative priority of race:* For South Africa with its Apartheid past, race issues have always been acutely sensitive. LGBTQI+ issues seem to have enjoyed increased social and legal attention in the two-and-a-half decades since the end of apartheid, but are less specific to South Africa and were not the main subject of global sanctions, peace negotiations and transformation of social and legal norms in the same sense or to the same degree as issues of

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<sup>225</sup> Pierre de Vos, Daily Maverick, 2013, [The curious case of the pastor punished for honesty](https://www.dailymaverick.co.za/opinionista/2013-05-23-the-curious-case-of-the-pastor-punished-for-honesty/) - <https://www.dailymaverick.co.za/opinionista/2013-05-23-the-curious-case-of-the-pastor-punished-for-honesty/>

apartheid and race relations.

Constitutional Law Expert, Pierre de Vos, asks:

Why do religious beliefs and practices – especially the religious beliefs and practices of powerful and dominant religious groups – so often get a free pass from society and the courts? Should certain religious beliefs and practices not be evaluated in the same manner that all other beliefs and practices are evaluated to determine whether they are true and whether they infringe on the rights of others?<sup>226</sup>

Referring to the Catholic Church, one of the largest single denominations, he points out that the Pope has received positive media coverage for his focus on the poor, but while he “heads a church that institutionalises discrimination against women, gay men, lesbians and transgender people”. De Vos’ view is that the idea that a woman or a LGBTQI+ person could become pope or fill some other very senior role is unthinkable. Yet if the Catholic Church were a cultural body (like Afriforum or the Federasie van Afrikaanse Kultuurverenignings), De Vos believes there would be an outcry in the form of “widespread condemnation of its catastrophic denial of the basic human dignity of fellow citizens. Its leaders would have been vilified, instead of lauded as progressive visionaries.”

Given the commonplace nature of BBH/HS in church meetings (in terms of the data shared above) and the low BBH/HS reporting rates at the SAHRC, it seems that BBH/HS is not being reported even nearly to the extent that it could be, or should, given the potential harm being caused. While I agree with Popper, Brian Leiter and especially with Martha Nussbaum’s view that laws limiting religious speech and activities should be minimised so that equal civil liberties for all are maximised, the extent and nature of harm caused by BBH/HS would seem to be such that it does warrant greater attention – in the form of active reporting to authorities, and actual prosecution. BBH/HS does not seem to be proportionally represented, in terms of reporting and prosecuting, especially when compared to other forms of hate speech like racist hate speech, and the biblical codification of homophobia (per Brian Leiter) does not provide sufficient objective grounds for special protection against prosecution, either internally (given that there is no consistent view of homosexuality even from within Christianity – though there might be a majority one) or externally (compared to homophobic hate speech outside the church, or hate other forms of hate speech altogether).

To return to my research questions:

- i. To what extent does biblical doctrine influence the beliefs of South African Christians, inform their actions and speech, and affect wellbeing of LGBTQI+ people?
- ii. How is BBH/HS<sup>227</sup> currently treated in law, and socially, in comparison with other H/HS or in comparison with other types of hate speech altogether?
- iii. How should BBHHS and BBHS be treated in law, and socially?

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<sup>226</sup> Pierre de Vos, Daily Maverick, 2015, Discrimination: SA’s courts give religious beliefs and practices a free pass - [https://www.dailymaverick.co.za/opinionista/2015-07-30-discrimination-sas-courts-give-religious-beliefs-and-practices-a-free-pass/?fbclid=IwAR0TlzcMZbmXlOfyThrb2cOU\\_Wbg84lNFBUtcue3s\\_G8pV83eW\\_B7L-JZBs](https://www.dailymaverick.co.za/opinionista/2015-07-30-discrimination-sas-courts-give-religious-beliefs-and-practices-a-free-pass/?fbclid=IwAR0TlzcMZbmXlOfyThrb2cOU_Wbg84lNFBUtcue3s_G8pV83eW_B7L-JZBs)

<sup>227</sup> Combined acronym to refer to both Biblically-based homophobic hate speech, and Biblically-based homophobic speech.

In terms of the first question, I have drawn a clear line from Christian demographic dominance of South African society, through biblical doctrine to its impact on profoundly held Christian belief, and the latter's impact on speech/actions by believers. The reasons for thinking that actions are impacted by beliefs which, in turn are impacted on by scriptures were: i) that the bible itself exhorts believers to act on its precepts, ii) that believers themselves tell us that they do so, and iii) that research confirms a strong correlation between the everyday actions of believers and their strongly held beliefs<sup>228</sup>.

Given South Africa's (80%+ Christian) population<sup>229</sup> and the same-sex marriage struggles in the four largest denominations whose membership (in terms of the 2001 census figures) adds up to 12,915, 187 (36.1% of the Christian population of South Africa), the widespread incidence of BBH/HS can (at the very least, in part) be reasonably attributed to biblical writ and its impact on beliefs and actions.

In terms of the harm itself, I cited two major studies. First, the 2015 Gauteng City-Region Observatory (GCRO) Quality of Life Survey according to which just 56% of respondents agreed that LGBTQI+ people deserve the same rights as other South Africans, 29% actively disagreed, and 14% think violence towards LGBTQI+ people is acceptable. Second, the Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa (2016), which concluded that over half (55%) of LGBTQI+ people in SA fear SOGI discrimination and that, in fact, 44% of respondents have actually experienced everyday discrimination in their everyday lives during the last two years. I added to that, evidence of LGBTQI+ youth being up to four times more likely to attempt suicide than straight peers, with LGBTQI+ youth who come are rejected by their families being more than eight times as likely to attempt suicide than LGBTQI+ youth who do not suffer such rejection.<sup>230</sup>

The second question, then, relates to how BBH/HS is currently treated in terms of the law and society, followed by how I believe it should be treated. Biblically-based Homophobic or Hate Speech (BBH/HS), aimed at the LGBTQI+ community based on a particular interpretation of biblical texts, does receive both legal and social punishment. The legal sanction is exemplified by the case of Oscar Bougardt's sentencing by the South African Human Rights Commission, as a result of a report of BBHHS. The social sanction was evident from the ability to gather 60,000 signatures in a petition to South Africa's Home Affairs department to deny Pastor Steven Anderson entry into the country.

BBH/HS does receive both legal and social sanction in South Africa, but not as much as racist hate speech, not as consistently as racist hate speech, and not as much as it should, given the prevalence of harmful BBH/HS in South African society.

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<sup>228</sup> Pew Research Center, 2016, "Religion in Everyday Life", pg. 9, <http://www.pewforum.org/2016/04/12/religion-in-everyday-life/>

<sup>229</sup> Media Club South Africa, unattributed, 2001, [Fast Facts](http://www.mediaclubsouthafrica.com/landstatic/82-fast-facts), <http://www.mediaclubsouthafrica.com/landstatic/82-fast-facts>; Statistics South Africa, "Census 2001" [http://www.statssa.gov.za/?page\\_id=3892](http://www.statssa.gov.za/?page_id=3892)

<sup>230</sup> Ryan, C.; Huebner, D. et al., 2009, "Family rejection as a predictor of negative health outcomes in white and Latino lesbian, gay, and bisexual young adults", pp 346-352 - <https://www.ncbi.nlm.nih.gov/pubmed/19117902>;

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