

ESCALATING PERSECUTION OF GAYS AND  
REFUGEE PROTECTION: COMMENT ON *QUEER*  
*CASES MAKE BAD LAW*

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I. INTRODUCTION

In their article, *Queer Cases Make Bad Law*, James C. Hathaway and Jason Pobjoy argue that courts in the United Kingdom, Australia, New Zealand, and other jurisdictions have incorrectly analyzed cases involving LGBT applicants for refugee status, causing jurisprudential confusion and muddying decision making.<sup>1</sup> Hathaway and Pobjoy contend that these

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1. James C. Hathaway & Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U.J. INT'L L. & POL. 315 (2012). Under the U.N. Refugee Convention, a refugee is defined as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a partic-

courts have erred in two critical ways: first, in failing to correctly identify the persecutory harm that applicants who attempt to conceal their sexual orientation face, and second, in suggesting that any activity that LGBT applicants seek to engage in is encompassed within the protected ground of “membership in a particular social group.” Hathaway and Pobjoy highlight the legal inaccuracies in conclusions reached by the Australian High Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* and by the U.K. Supreme Court in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* and emphasize the risk of “doctrinal distortion” in assessing well-founded fear, persecutory harm, and the scope of the particular social group ground as a result of errors in these courts’ analyses.<sup>2</sup>

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ular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” Convention Relating to the Status of Refugees art. 1, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; *see also* Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2006) (“[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”).

2. Hathaway & Pobjoy, *supra* note 1, at 338. In *S395*, a majority of the High Court of Australia (McHugh, Kirby, Gummow, & Hayne, JJ; Gleeson, CJ, Callinan, & Heydon, JJ, dissenting) held that the Refugee Review Tribunal erred in finding that a gay couple from Bangladesh did not have a well-founded fear of being persecuted because they would have to conceal their sexual orientation. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473, 490–92 (Austl.). Justices McHugh and Kirby concluded: “In so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed.” *Id.* at 492 (McHugh & Kirby, JJ). *See also* *Refugee Appeal No. 74665/03* [2005] INLR 68, at para [116] (N.Z.) (noting that, “[w]hile we readily agree with this statement [that an LGBT applicant should not be forced to take steps to avoid harm], it is nevertheless a statement of a conclusion and the joint judgment regrettably offers no principled explanation as to why behaviour should not have to be modified

Specifically, Hathaway and Pobjoy posit that in focusing on the exogenous harms, including physical harm and discrimination, feared by LGBT applicants, adjudicators in *S395* and in *HJ and HT* improperly overlooked the impact of endogenous harm, including emotional and psychological harm, suffered by LGBT applicants who are forced to conceal their sexual orientation. Hathaway and Pobjoy also argue that, in their zeal to embrace a liberated society in which LGBT persons can live openly and freely, these same adjudicators failed to recognize the limitations built into the nexus clause of the Refugee Convention, which protects applicants at risk of serious harm for reasons deemed “fundamental,” not for any and all reasons. Hathaway and Pobjoy emphasize that risks accruing to LGBT applicants from such activities as “going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates”<sup>3</sup> fall outside the scope of the refugee definition. They contend that the U.K. Supreme Court in *HJ and HT* erred in suggesting that refugee law protects those engaged in such activities.

This comment will address each of these contentions in turn, highlighting U.S. jurisprudence in sexual orientation cases, which have generally made “good” law. We will also address what we believe to be the most salient issue in LGBT asylum cases—namely escalating attacks on LGBT persons around the world and hurdles to corroborating applicants’ claims due to the dearth of country condition documentation and misreporting and under-reporting by NGOs and state agencies charged with documenting human rights violations.

We will first explore the well-established principle that serious emotional and psychological harm, accompanied by a

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or hidden”). In *HJ and HT*, the U.K. Supreme Court considered the claims of a gay man from Iran and a gay man from Cameroon. It concluded that “if a person has a well-founded fear that he would suffer persecution on being returned to his country of nationality if he were to live openly as a gay man, then he is to be regarded as a refugee for purposes of the Convention, even though, because of the fear of persecution, he would in fact live discreetly and so avoid suffering any actual harm.” *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [69], [20 11] 1 A.C. 596, 643 (Lord Rodger of Earlsferry) (appeal taken from Eng. & Wales C.A.). Lord Rodger explained that “what is protected is the applicant’s right to live freely and openly as a gay man.” *Id.* [78], [2011] 1 A.C. at 646 (Lord Rodger).

3. *HJ and HT*, [2010] UKSC 31, [78], [2011] 1 A.C. at 646 (Lord Rodger).

failure of state protection, can rise to the level of persecution. As Hathaway and Pobjoy astutely note, the adjudicators in *S395* and *HJ and HT*, failed to recognize the psychological harm that applicants who are forced to conceal their sexual orientation suffer. The authors correctly emphasize the critical importance of considering both physical and non-physical harm suffered and feared by asylum applicants in assessing applicants' well-founded fear. We will build on their excellent and detailed analysis of endogenous harm, addressing the U.S. law basis for recognizing a broad range of persecutory harms, including physical, psychological, economic, and cumulative harm.

Next, we will explore which rights are protected under the Refugee Convention and address the importance of using human rights standards to adopt a principled approach to determining which infringements on activities constitute serious violations of core rights. As the Canada Supreme Court explained in its seminal *Canada v. Ward* decision and as the New Zealand Refugee Status Appeals Authority underscored in *Refugee Appeal No. 74665/03*, persecutory harm should be defined in terms of violations of core rights, with human rights standards serving as a measure for assessing the seriousness of the harm.

We will then turn to the meaning of the elements of nexus and grounds under the Refugee Convention and explore the anti-discrimination principles that define and limit the grounds. It is well-established under U.S. and international law that sexual orientation qualifies under the membership in a particular social group ground (and can be the basis for claims under the other Convention grounds, as well). Indeed, in the United States, an early case brought by an LGBT applicant helped establish the particular social group ground in U.S. jurisprudence. As explained further below, a protected status, like sexual orientation, is defined by an immutable or unchangeable characteristic, status, or belief, and not by activities per se. The Refugee Convention thus only protects activities that are so intrinsic or fundamental to the ground so as to be inseparable from the characteristic or belief. Such activities are in effect expressions of the ground (although activities or

beliefs may also be important evidence of the ground).<sup>4</sup> Hathaway and Pobjoy correctly posit that the nexus and grounds analyses of the U.K. Supreme Court in *HJ and HT* and the Australia High Court in *S395* are inconsistent with the non-discrimination principles that inform the Convention grounds. In their article, they specifically take issue with Lord Rodger's formulation of what it means to "live freely and openly as a gay man." As Hathaway and Pobjoy persuasively explain, where activities are "no more than marginally connected to one of the forms of protected status, . . . the ensuing risk of being persecuted cannot reasonably be said to be 'for reasons of' a Convention ground."<sup>5</sup>

Hathaway and Pobjoy's thought-provoking article brings to light the Australian and U.K. courts' evasion of some key doctrinal issues and underscores the need for appropriate legal analysis. Hathaway and Pobjoy correctly identify the jurisprudential inconsistency in these courts' approaches to understanding the protected ground of sexual orientation as opposed to the other grounds, such as religion and political opinion, where courts and administrative tribunals have drawn principled lines separating protected activities that are authentic expressions of the protected ground from unprotected forms of activity that are detached from the ground. In our opinion, however, the jurisprudential confusion highlighted by Hathaway and Pobjoy may be better addressed in the context of persecutory harm, rather than in evaluating nexus and

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4. An absolute distinction should not be made between activities and the protected belief or characteristic of the particular ground: "[O]ften evidence of political opinion consists of the action an applicant takes consistent with that opinion or in an affiliation linked to his or her belief." DEBORAH ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 291 (2011). Courts have held, for example, that a woman's flight or resistance may be evidence of her political opinion. *See, e.g., Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1435 (9th Cir. 1987). As Lord Hope notes in *HJ and HT*, "[t]he group is defined by the immutable characteristic of its members' sexual orientation or sexuality. This is a characteristic that may be revealed, to a greater or lesser degree, by the way the members of this group behave. In that sense, because it manifests itself in behaviour, it is less immediately visible than a person's race. . . . To pretend that it does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are . . . ." [2010] UKSC 31, [11], [2011] 1 A.C. at 621 (Lord Hope of Craighead).

5. Hathaway & Pobjoy, *supra* note 1, at 377-78.

grounds. It may be analytically clearer to re-frame what activities should be protected under the Convention in terms of violations of core rights, rather than in terms of the scope of the sexual orientation ground. We believe this is precisely the framework the New Zealand tribunal endorsed in *Refugee Appeal No. 74665/03*.

Finally, we will draw on our experiences representing LGBT asylum applicants and highlight the main challenges we see in this area of refugee law, including critical issues of corroboration, the failure of NGOs and states to report increasingly brutal attacks on LGBT persons around the world and the accompanying failure of adjudicators to find that applicants' fear is in fact well-founded. Given the escalating and severe psychological and physical harm suffered and feared by LGBT applicants for protection, the risks associated with the relatively trivial activities at the margins that Hathaway and Pobjoy take issue with may be largely hypothetical. Unfortunately human rights organizations often do not have the resources, time, or inclination to devote to documenting physical, emotional, psychological, economic, and other harm suffered by LGBT asylum seekers around the world, and applicants, who have first-hand knowledge of conditions in their countries of origin, must therefore attempt to educate adjudicators in understanding the conditions they face if forced to return. As elaborated below, this is a critical problem, which deserves greater exposure and attention.

## II. EMOTIONAL OR PSYCHOLOGICAL HARM IS WELL-ESTABLISHED AS A FORM OF PERSECUTORY HARM IN THE UNITED STATES AND INTERNATIONALLY

The international refugee regime provides protection from persecution where the state has failed to protect an applicant's basic human rights because of one of the enumerated grounds.<sup>6</sup> The U.N. Refugee Convention does not define persecution or delineate specific persecutory harms, but persecu-

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6. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 104–05 (1991); Canada (Att'y Gen.) v. Ward, [1993] 2 S.C.R. 689, 709; *Refugee Appeal No. 71427/99* [2000] NZAR 545, at paras [48]–[50] (N.Z.); *Butler v Att'y Gen.* [1999] NZAR 205, at para [47] (N.Z. CA); *Horvath v. Sec'y of State for the Home Dep't*, [2000] UKHL 37, [2001] 1 A.C. 489, 495 (appeal taken from Eng. & Wales C.A.).

tion is widely recognized as “the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.”<sup>7</sup> The Convention’s Preamble specifically references core international human rights legal instruments and frames refugee law within a human rights context.<sup>8</sup> As a result, courts and administrative adjudicatory bodies have emphasized the relevance and importance of “international human rights and humanitarian law . . . in evaluating whether particular acts constitute persecution . . . .”<sup>9</sup> In their article, Hathaway and Pobjoy contend that in sexual orientation cases where applicants for refugee status are capable of concealing their identity, courts have failed to recognize the “endogenous” or emotional and psychological harms LGBT persons suffer when forced to suppress their sexual orientation, focusing instead on the risk of implausible “exogenous” or physical harm that is unlikely to occur given applicants’ efforts to conceal their

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7. HATHAWAY, *supra* note 6, at 102–05 (providing a seminal analysis of the meaning of persecution and referring to persecution as a “sustained or systemic risk, rather than just an isolated incident of harm”). See also *Refugee Appeal No. 71427/99*, at paras [48]–[50]; *Horvath*, [2001] 1 A.C. 489 (Lord Hope, Lord Browne-Wilkinson, Lord Clyde, and Lord Hobhouse of Woodborough); *Islam v. Sec’y of State for the Home Dep’t (Shah)*, [1999] UKHL 20, [1999] 2 A.C. 629 (Lord Steyn, Lord Hoffman, and Lord Hutton) (appeal taken from Eng. & Wales C.A.); *Ward*, [1993] 2 S.C.R. at 709; U.N. High Comm’r for Refugees, UNHCR & INTERNATIONAL PROTECTION: A PROTECTION INDUCTION PROGRAMME 21 (June 30, 2006), available at <http://www.unhcr.org/publ/PUBL/44b5005c2.pdf> (“Persecution consists of human rights abuses or other serious harm, often, but not always, perpetrated in a systemic or repetitive way. Rape, domestic violence, unlawful detention and torture are some examples of human rights abuses.”).

8. See Refugee Convention, *supra* note 1, pmb1. (“Considering that the Charter of the United Nations and the Universal Declaration of Human Rights . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.”).

9. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM OFFICER BASIC TRAINING COURSE: INTERNATIONAL HUMAN RIGHTS LAW 4 (2005), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTTC%20Lesson%20Plans/International-Human-Rights-Law-31-aug10.pdf> (“Reference to international law may assist in determining whether an applicant meets the definition of refugee, if there is not United States law addressing the specific legal issue at hand.”). “The *Universal Declaration of Human Rights*, *The International Covenant of Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) are the three most important international instruments pertaining to human rights and are collectively known as the International Bill of Human Rights.” *Id.* at 7.

identity. Hathaway and Pobjoy highlight the importance of non-physical or endogenous harms in analyzing applicants' fears of persecution. As Hathaway and Pobjoy emphasize, many states parties to the Refugee Convention, as well as scholars and commentators,<sup>10</sup> are increasingly recognizing emotional and psychological harm as serious forms of persecutory harm relevant to the past persecution inquiry and to determining whether an applicant for refugee status has a well-founded fear of persecution.

Under U.S. law, "persecution may be emotional or psychological, as well as physical."<sup>11</sup> The U.N. Convention Against Torture, ratified by the United States and incorporated into U.S. law, explicitly includes mental pain or suffering as torture.<sup>12</sup> The U.S. Citizenship and Immigration Service Asylum

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10. See, e.g., ANKER, *supra* note 4, at 217–20.

11. *Id.* at 217 (quoting *Mansour v. Ashcroft*, 390 F.3d 667, 677 (9th Cir. 2004)); see also *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011) (stating that, in addition to significant physical force, "nonphysical harm of equal gravity" can constitute persecution, and noting that this is an important qualification "because refusing to allow a person to practice his religion is a common form of persecution even though the only harm it causes is psychological"); *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003) (observing that petitioner's persecution included forced military service, as well as "physical and psychological abuse," being "forced to kill his friend, to watch the murder of his parents, and to view the mutilation of innocent civilians"); *Fisher v. I.N.S.*, 79 F.3d 955, 962 (9th Cir. 1996) (noting that, "persecution . . . encompass[es] both physical and mental suffering"); *Khassai v. I.N.S.*, 16 F.3d 323, 329 (9th Cir. 1994) (Reinhardt, J., concurring) (noting that beyond physical harm, "there are other equally serious forms of injury that result from persecution"); *Kovac v. I.N.S.*, 407 F.2d 102, 106–07 (9th Cir. 1969) (finding that with the deletion of the adjective "physical" from the statute's definition of persecution, Congress intended to include mental, economic, and other suffering within the meaning of persecution).

12. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention]. The Asylum Office has applied this definition to psychological harm under the Refugee Convention. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ASYLUM OFFICER BASIC TRAINING COURSE: ASYLUM ELIGIBILITY PART I: DEFINITION OF REFUGEE; DEFINITION OF PERSECUTION; ELIGIBILITY BASED ON PAST PERSECUTION 30–31 (2009) [hereinafter AOBTC, ASYLUM ELIGIBILITY PART I], available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Definition-Refugee-Persecution-Eligibility-31aug10.pdf>. In its reservations, declarations and understandings ratifying the Torture Convention, the United States specifically included "prolonged mental harm caused by or resulting from" threat of severe physical pain, threat of death,



Office has applied recognized that, “‘persecution’ encompasses more than physical harm or the threat of physical harm so long as the harm inflicted or feared rises to the level of persecution.”<sup>13</sup> Examples of recognized psychological harm in U.S. law include: severe mental suffering, threat of imminent death, threat that another person will be tortured or killed, prolonged receipt of threats, being forced to witness harm to others, and “forced compliance with religious laws or practices that are abhorrent to an applicant’s beliefs.”<sup>14</sup> U.S. jurisprudence recognizing forced renunciation and concealment of beliefs as persecutory harm is particularly robust.<sup>15</sup> Emotional harm is especially salient in cases of gender-based violence, especially those involving rape or female genital mutilation,<sup>16</sup>

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or the threat that someone else will be put to death. U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. 36, 198 (1990). See also *In re H-M-V*, 22 I. & N. Dec. 256, 267 (B.I.A. 1998) (“To be considered ‘torture’ under the Convention Against Torture, an act (or series of acts) must . . . involve the infliction of severe pain or suffering, either physical or mental.” (citing Torture Convention, *supra*, art. 1)).

13. AOBTC, ASYLUM ELIGIBILITY PART I, *supra* note 12, at 16.

14. *Id.* at 18, 30–31 (citing *Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993)); see also *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (noting that threats to an individual and the individual’s close relatives give rise to a reasonable fear of future persecution); *Quiñonez-Perez v. Holder*, 635 F.3d 342, 344 (8th Cir. 2011) (“Persecution is an extreme concept which includes the infliction or threat of death, torture, or injury to one’s person or freedom.” (citations omitted)); *Sok v. Mukasey*, 526 F.3d 48, 54 (1st Cir. 2008) (“[W]e have often acknowledged that credible threats can, depending on the circumstances, amount to persecution, especially when the assailant threatens the petitioner with death, in person, and with a weapon.” (citations omitted)).

15. ANKER, *supra* note 4, at 225 (citing *Kazemzadeh v. U.S. Att’y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) (“[H]aving to practice religion underground to avoid punishment is itself a form of persecution.”); *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1003 (8th Cir. 2006); *Krotova v. Gonzales*, 416 F.3d 1080, 1086 (9th Cir. 2005) (“In addition to the economic pressure and physical violence against Petitioner, her inability to practice her religion is significant.”); *Muhur v. Ashcroft*, 355 F.3d 958, 960–61 (7th Cir. 2004); *Zhang v. Ashcroft*, 388 F.3d 713, 719–20 (9th Cir. 2004)). See also ANKER, *supra* note 4, at 417–19 (discussing religion-based conscientious objectors).

16. See ANKER, *supra* note 4, at 213–14 (“In addition to sexual and domestic violence, other forms of gendered violence have been recognized as human rights violations, including some that are imposed through cultural practice and tradition. . . . Female genital mutilation (FGM) is one of the most significant of these rights violations in terms of its ubiquity and the

which often results in “severe and long-lasting” mental suffering.<sup>17</sup> In addition, U.S. courts have also recognized that witnessing harm to a family member can constitute severe psychological harm that rises to the level of persecution.<sup>18</sup>

Hathaway and Pobjoy note the challenges that courts often face in identifying the harm feared by applicants who are forced to conceal their sexual orientation. The authors emphasize the failure of the U.K. Supreme Court in *HJ and HT* and the Australian High Court in *S395* to accurately determine the basis for the applicants’ well-founded fear of persecution in those cases, arguing that the courts should have acknowledged the severe emotional and psychological harm the applicants would have suffered if forced to live “discreetly.” Hathaway and Pobjoy also take issue with the approach of *Refugee Appeal No. 74665/03*, arguing that the tribunal in that case improperly framed the harm in terms of violations of the right to privacy, rather than in terms of nondiscrimination and psychological or emotional harm.

We do not necessarily agree with Hathaway and Pobjoy’s characterization of the New Zealand tribunal’s decision and

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severity of the harm. FGM is reported to take place in over forty countries and affects up to one hundred and forty million girls and women worldwide. There are several forms of FGM, the most damaging of which is infibulation, involving the cutting away (typically with unsterilized knives, old razor blades, broken glass, etc. under unsanitary conditions and without anesthesia) of large portions of female genitalia and then partial closing of the vaginal opening.” (citations omitted)).

17. *Id.* at 219 (citing *Tadesse v. Gonzales*, 492 F.3d 905, 912 (7th Cir. 2007); *Niang v. Gonzales*, 422 F.3d 1187, 1197 (10th Cir. 2005) (pointing to applicant’s “stress, shock, [and] psychological trauma”); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1097–98 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005); *Lopez-Galarza v. I.N.S.*, 99 F.3d 954, 962 (9th Cir. 1996) (“Rape at the hands of government authorities while imprisoned on account of one’s political views can be an atrocious form of punishment indeed. The severity of the harm of rape is underscored by the numerous studies revealing the physical and psychological harms rape causes.”)).

18. ANKER, *supra* note 4, at 218 (citing *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004) (finding “mental suffering” from “being forced to witness the pain and suffering of” daughter, who feared subjection to FGM in Ethiopia, constitutes persecution); *Khup v. Ashcroft*, 376 F.3d 898 (9th Cir. 2004); *Mashiri v. Ashcroft*, 383 F.3d 1112 (9th Cir. 2004); *see In re T-Z*, 24 I. & N. Dec. 163 (B.I.A. 2007); *Ouk v. Gonzales*, 464 F.3d 108, 111 (1st Cir. 2006) (“[U]nder the right set of circumstances, a finding of past persecution might rest on a showing of psychological harm.”)).

reasoning, and we take some issue with their focus on the particular social group ground as the limitation on protected activities, rather than the element of serious harm within persecution.<sup>19</sup> Hathaway and Pobjoy do not fully acknowledge the importance of the rights to equal treatment and non-discrimination in the New Zealand tribunal's decision. The decision in *Refugee Appeal No. 74665/03* specifically highlights the ICCPR articles that prohibit non-discrimination and ensure equal treatment of men and women<sup>20</sup> and devotes at least equal time to principles of equality and non-discrimination as it does to the right to privacy.<sup>21</sup> The tribunal adopts a well-reasoned approach to assessing rights violations and determining whether they rise to the level of persecutory harm.

### III. HUMAN RIGHTS STANDARDS SHOULD BE USED TO DETERMINE WHICH ACTIVITIES ARE PROTECTED UNDER THE REFUGEE CONVENTION

In determining whether violations of certain rights constitute persecutory harm, courts and adjudicators must consider the "nature of the right sought to be exercised" and whether the right is a "fundamental" or "core" human right.<sup>22</sup> Focusing on the question of persecution, rather than on the particu-

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19. Each of the elements of the refugee definition must be analyzed separately and each serves a distinct function in the definitional framework. See generally ANKER, *supra* note 4, ch. 1 for an overview of asylum law's legal protections and sources.

20. *Refugee Appeal No. 74665/03* [2005] INLR 68, at para [94]–[96] (N.Z.).

21. Quoting the Constitutional Court of South Africa in *Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at paras. 127–28 (1998) (Sachs J.) (S. Afr.), the New Zealand Refugee Status Appeals Authority noted that, "[i]n the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group." *Refugee Appeal No. 74665/03*, at para [110].

22. RODGER HAINES, THE INTERSECTION OF HUMAN RIGHTS LAW AND REFUGEE LAW: ON OR OFF THE MAP? THE CHALLENGE OF LOCATING APPELLANT S395/2002, ¶ 3, Int'l Ass'n of Refugee Law Judges, Australia/New Zealand, Chapter Meeting, Sydney, June 9, 2004, available at <http://www.refugee.org.nz/Reference/Sydney04.html>; see also Jari Pirjola, *Shadows in Paradise—Exploring Non-Refoulement As An Open Concept*, 19 INT'L J. REFUGEE L. 639,

lar social group ground, the New Zealand tribunal explained in *Refugee Appeal No. 74665/03* that,

the intention of the drafters was not to protect persons against any and all forms of even serious harm, but was rather to restrict refugee recognition to situations in which there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population.<sup>23</sup>

Courts have emphasized that persecution does not include “all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional.”<sup>24</sup> The harm must be “systemic”<sup>25</sup> and

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645–48 (2007) (noting that the nature of the right being violated offers some guidance as to whether a harm constitutes persecution).

23. *Refugee Appeal No. 74665/03*, at para [77].

24. *Sahi v. Gonzales*, 416 F.3d 587, 589 (7th Cir. 2005) (quoting *In re V-T-S*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997)); see also *Zhou Ji Ni v. Holder*, 635 F.3d 1014, 1017 (7th Cir. 2011) (“Although the concept of persecution is hardly rigid, we have distinguished it from ‘mere harassment.’” (citations omitted)); *Morgan v. Holder*, 634 F.3d 53, 58 (1st Cir. 2011) (“[P]ersecution is a term of art in immigration law . . . that ‘requires that the totality of a petitioner’s experiences add up to more than mere discomfiture, unpleasantness, harassment, or unfair treatment.’” (citations omitted)); *Ritonga v. Holder*, 633 F.3d 971, 975 (10th Cir. 2011) (“Persecution . . . must entail more than just restrictions or threats to life and liberty.” (internal quotation marks and citations omitted)); *Bracic v. Holder*, 603 F.3d 1027, 1034 (8th Cir. 2010) (“[Persecution] is an extreme concept that excludes low-level intimidation and harassment.” (internal quotation marks and citation omitted)); *Ahmed v. Gonzales*, 467 F.3d 669, 673 (7th Cir. 2006) (“Persecution inflicts substantial harm or suffering, but it need not be life-threatening or freedom-threatening.”).

25. See, e.g., *Touch v. Holder*, 568 F.3d 32, 38 (1st Cir. 2009) (quoting *Bocova v. Gonzales*, 412 F.3d 257, 263 (1st Cir. 2005)); *Butt v. Keisler*, 506 F.3d 86, 90 (1st Cir. 2007) (quoting *Alibeaj v. Gonzales*, 469 F.3d 188, 191 (1st Cir. 2006)) (noting that mistreatment must reach a “fairly high threshold of seriousness, as well as some regularity of frequency”); *Decky v. Holder*, 587 F.3d 104, 111 (1st Cir. 2009) (“The critical factor driving our determination that substantial evidence supports a finding of no persecution in this case is the absence of evidence of *systemic* mistreatment of comparable severity to the beating he suffered in the 1998 riots.”); *Baharon v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009) (“A key difference between persecution and less-severe [sic] mistreatment is that the former is ‘systematic’ while the latter consists of isolated incidents. Violence or threats to one’s close relatives is an important factor in deciding whether mistreatment sinks to the level of persecution.” (citations omitted)).

adjudicators and decision-makers must consider “its cumulative significance.”<sup>26</sup>

Adjudicators must analyze which rights are fundamental or core human rights and which are at the margin when determining whether a violation of those rights constitutes persecutory harm. For example, in reviewing whether a prohibition on same-sex marriage offends a core human rights obligation, the New Zealand tribunal in *Refugee Appeal No. 74665/03* concluded that “the claimed right [to same-sex marriage] is at, if not beyond, the margin of what international human rights law regards as being the protection owed to homosexuals.”<sup>27</sup> The tribunal explained that,

[u]nder the human rights approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of “being persecuted.” A prohibition is to be understood to be within the ambit of a risk of “being persecuted” if it infringes basic standards of international human rights law.<sup>28</sup>

As the tribunal notes, the normative consensus within the human rights regime is fluid and always changing.<sup>29</sup> The tri-

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26. *Vincent v. Holder*, 632 F.3d 351, 356 (considering “the totality of the circumstances” to find that “[t]he cumulative effect of the two incidents [of the murder of petitioner’s son and the burning of petitioner’s house] rises to the level of persecution”); *Fei Mei Cheng v. U.S. Att’y Gen.*, 623 F.3d 175, 192 (3d Cir. 2010) (“[I]n determining whether actual or threatened mistreatment amounts to persecution, ‘[t]he cumulative effect of the applicant’s experience must be taken into account’ because ‘[t]aking isolated incidents out of context may be misleading.’” (citation omitted)); *Martinez-Buendia v. Holder*, 616 F.3d 711, 716 (7th Cir. 2010); *Nzeve v. Holder*, 582 F.3d 678, 683 (7th Cir. 2009) (noting that an immigration judge “must consider the record as a whole rather than addressing the severity of each event in isolation, without considering its cumulative significance” (internal quotation marks and citations omitted)).

27. *Refugee Appeal No. 74665/03*, at para [103]. The court similarly concludes that “refusal of permission to adopt a child cannot sensibly be described as ‘being persecuted.’” *Id.* at para [101].

28. *Id.* at para [115].

29. Some commentators have noted that rights may be subject to “progressive implementation only . . . [or] permissible derogations.” GUY S. GOODWIN-GILL & JANE McADAM, *THE REFUGEE IN INTERNATIONAL LAW* 94, 133 (3d ed. 2007) (“Assessments must be made from case to case, taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they

bunal argues that as international human rights norms evolve, restrictions on activities that are currently considered on the margin, such as same-sex marriage, may well be considered persecutory harm, but that time has not yet come.

Hathaway and Pobjoy contend that the U.K. Supreme Court over-reached in suggesting that activities such as sipping cocktails and attending Kylie concerts should be protected in a liberated society. As we explain below, Hathaway and Pobjoy argue that these activities fall outside the scope of the sexual orientation ground and do not, therefore, deserve protection under the Refugee Convention. Yet, we believe it may be analytically clearer, and fit better within the structure of the refugee definition, to consider whether infringements on these activities constitute a violation of a core right, or not. Since the activities Hathaway and Pobjoy take issue with—concerts, cocktails, and gossiping—are not grounded in core or fundamental human rights, infringements or restrictions on these activities may not per se be considered persecutory harm. However, restrictions or limitations on activities that are central to an applicant's "right to live freely and openly as a gay man" would constitute a violation of a fundamental human right and therefore rise to the level of persecutory harm. Human rights thus provide adjudicators with standards to assess what constitutes persecutory harm, thereby avoiding the doctrinal confusion highlighted by Hathaway and Pobjoy in their article.

#### IV. IMMUTABLE CHARACTERISTICS DEFINE THE GROUNDS OF PERSECUTION, NOT ACTIVITIES PER SE

Under the refugee definition, claims of persecution or fear of persecution must be tied to one of the five statutory grounds—race, religion, nationality, membership in a particular social group, or political opinion.<sup>30</sup> The "for reasons of" language in the Convention (and the "on account of" lan-

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stand to be injured."); cf. Gregor Noll, *Asylum Claims and the Translation of Culture into Politics*, 41 *TEX. INT'L L.J.* 491, 494 (2006) (arguing that, "the very link between refugee law and human rights law is a frail one indeed").

30. Under U.S. law, an applicant must "establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason* for persecuting the applicant." Immigration and Nationality Act § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2005) (emphasis added).

guage in the U.S. statute) links the persecution to these grounds.<sup>31</sup> As Hathaway and Pobjoy emphasize, it is well-established in the United States and internationally that these grounds are defined by immutable or unchangeable characteristics protected by basic human rights principles that are considered fundamental to human dignity.<sup>32</sup> Because the grounds contained in the Refugee Convention are fundamentally defined by beliefs and characteristics, not by activities,<sup>33</sup> attempts to delineate which activities fall within a protected ground and which do not are inherently problematic. To the extent that such an analysis is necessary, it should, as Hathaway and Pobjoy correctly argue, be guided by the same non-discrimination principles that circumscribe the other grounds of protection.

The Board of Immigration Appeals explained in its seminal *Matter of Acosta* decision that, “[a]pplying the doctrine of ejusdem generis [specific words in a statute should be construed ‘consistent with’ the general words], we interpret the

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31. ANKER, *supra* note 4, at 266; GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 38–39 (1st ed. 1983) (explaining that the grounds of persecution identify “characteristics . . . worthy of special protection” that result in marginalization of the individual in his or her society), *quoted in* Canada (Att’y Gen.) v. Ward, [1993] 2 S.C.R. 689, 734; HATHAWAY, *supra* note 6, at 135–36 (1991) (noting that this principle has informed refugee law from its origins in the early part of the twentieth century).

32. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by* *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987) (“The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. . . .”); James C. Hathaway & Michelle Foster, *Development: Membership of a Particular Social Group*, 15 INT’L J. REFUGEE L. 477, 478–79 (2003); GOODWIN-GILL & MC-ADAM, *supra* note 29, at 92–93 (“The references to ‘race, religion, nationality, membership of a particular social group, or political opinion’ illustrate briefly the characteristics of individuals and groups which are considered worthy of special protection. These same factors have figured in the development of the fundamental principle of non-discrimination in general international law, and have contributed to the formulation of other fundamental human rights.”).

33. As noted above, activities can be expressions of the underlying ground. See *supra* note 4. See generally ANKER, *supra* note 4, ch. 5 (outlining grounds of persecution in U.S. asylum law).

phrase ‘persecution on account of membership in a particular social group’” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common characteristic that is immutable or so fundamental to conscience that a person cannot or should not be forced to change it.<sup>34</sup> Consistent with this reasoning, the UNHCR, U.S. courts, and administrative bodies, as well as tribunals in other jurisdictions, have universally recognized sexual orientation as a characteristic that is not properly subject to change and that can therefore define membership in a particular social group.<sup>35</sup> Indeed, the Board of Immigration Appeals’ relatively early decision in *Matter of Toboso-Alfonso*, which involved a gay asylum applicant from Cuba, was one of the first cases to apply the principles in *Acosta* to a specific characteristic or class of applicants.<sup>36</sup> The *Toboso-Alfonso* deci-

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34. *In re Acosta*, 19 I. & N. Dec. at 233; see also Deborah Anker, *Membership in a Particular Social Group: Developments in U.S. Law*, 1566 PLI/CORP 195, 198–99 (2006) (discussing the immutability analysis in *Acosta*); Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 64 (1998).

35. See *Canada (Att’y Gen.) v. Ward*, [1993] 2 S.C.R. 689, 739 (specifically listing sexual orientation as a particular social group); *Islam v. Sec’y of State for the Home Dep’t (Shah)*, [1999] UKHL 20, [1999] 2 A.C. 629 (appeal taken from Eng. & Wales C.A.) (using the example of sexual orientation to support considering women in Pakistan as a particular social group); U.N. High Comm’r for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, ¶ 32 (Nov. 21, 2008) [hereinafter UNHCR Guidance Note], available at <http://www.unhcr.org/refworld/docid/48abd5660.html> (stating that sexual orientation can be considered innate, unchangeable or fundamental to human dignity and that claims relating to sexual orientation are generally considered part of the “membership of a particular social group” ground); Council Directive 2004/83/EC of 29 Apr. 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, art. 10(1)(d), 2004 O.J. (L 304) 12, 17 (EU), available at <http://www.unhcr.org/refworld/docid/4157e75e4.html> (defining social group in part as one where “members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it,” and stating that “a particular social group might include a group based on a common characteristic of sexual orientation”).

36. *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990). In 1980, the United States enacted specific statutory measures incorporating



sion is just one of many cases brought by LGBT applicants that have helped create not “bad,” but “good,” law in the United States.<sup>37</sup> It bears noting that, at least in the United States, difficult cases—cases with undeveloped factual records or analytic frameworks—have in some important instances moved refugee law jurisprudence forward. For example, in *Lazo-Majano*, the Ninth Circuit found that a woman’s flight from domestic violence could be an expression of a political opinion.<sup>38</sup> The Ninth Circuit’s reading of a political opinion into the context of Lazo-Majano’s life and actions was far ahead both of itself and of its time: the analytic underpinnings for imputed political opinion claims were undeveloped at the time and the case was not clearly framed in terms of imputed political opinion. Similarly, in *Fatin v. INS*, the court found that feminism could be a political opinion, despite a woefully inadequate administrative record that resulted in a denial of refugee protection in that case.<sup>39</sup>

Hathaway and Pobjoy contend, however, that the U.K. Supreme Court in *HJ and HT* overreached in implying that the risk following from *any* form of behavior or action by an LGBT

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the Refugee Convention, which it had ratified into U.S. law in 1968. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980). See generally Deborah Anker & Michael Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981).

37. See *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (explaining that “[s]exual orientation . . . is the basis for inclusion in a particular social group”); *Moab v. Gonzales*, 500 F.3d 656, 660–62 (7th Cir. 2007) (reversing a finding that the late addition of a claim of persecution based on sexual orientation undermined petitioner’s credibility); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (affirming that, “all alien homosexuals are members of a ‘particular social group’” and finding a gay Lebanese man eligible for asylum); *Comparan v. Gonzales*, 144 F. App’x 673, 674–75 (9th Cir. 2005) (citing *Karouni* favorably); *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1087–88 (9th Cir. 2005) (citing *Karouni* favorably); *Pena-Torres v. Gonzales*, 128 F. App’x 628, 630 (9th Cir. 2005) (citing *Karouni* favorably); *Amanfi v. Ashcroft*, 328 F.3d 719, 721–22, 730 (3d Cir. 2003) (holding that the definition of persecution “on account of” membership in a particular social group includes the persecutor’s perception that the applicant was a homosexual); *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 547 (6th Cir. 2003) (noting that the BIA recognized homosexuals as a particular social group in *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990)).

38. *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1435 (9th Cir. 1987) (“If the persecutor thinks the person guilty of a political opinion, then the person is at risk.”).

39. *Fatin v. I.N.S.*, 12 F.3d 1233, 1241–43 (3d Cir. 1993).

applicant for asylum falls within the sexual orientation ground. They argue for a principled approach to identifying which activities or behaviors fall within the protected ground and which do not, specifically taking issue with Lord Rodger's reasoning that "what is protected is the applicant's right to live freely and openly as a gay man[, which] . . . involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them."<sup>40</sup>

Hathaway and Pobjoy correctly posit that the Refugee Convention protects only against risks accruing from activities that are inherent in an applicant's membership in a particular social group, but determining which activities are, in fact, inherent in or integral to an applicant's identity and status is an evolving and contextual consideration. Lord Rodger emphasizes that "gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution." Sipping cocktails, attending concerts, and gossiping are relatively trivial examples resulting from Lord Rodger's unfortunate speculative foray. Other activities, which are more fundamental expressions of identity, may, however, be deemed fundamental and should therefore be analyzed as such.<sup>41</sup>

In the United States, the distinction between homosexual status and actions or conduct has generated long-standing conflict in sexual orientation cases, especially in cases involving prosecution of homosexuals and criminalization of homosexual conduct under state law.<sup>42</sup> In *Matter of Toboso-Alfonso*, the applicant suffered harassment and abuse at the hands of Cuban officials, where the Cuban regime had an official anti-homosexual policy.<sup>43</sup> Although the legacy Immigration and

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40. *HJ (Iran) v. Sec'y of State for the Home Dep't (HJ and HT)*, [2010] UKSC 31, [77]–[80], [2011] 1 A.C. 596, 645–47 (Lord Rodger) (appeal taken from Eng. & Wales C.A.).

41. As noted *supra*, activities can constitute manifestations of immutable beliefs and characteristics. See ANKER, *supra* note 4, at 294–99, 328–35 (analyzing various actions which may be considered expressions of political opinions).

42. See generally UNHCR Guidance Note, *supra* note 35 (discussing laws criminalizing homosexual conduct and how such laws are persecutory).

43. *In re Toboso-Alfonso*, 20 I. & N. Dec. at 823.

Naturalization Service (INS) did not dispute that homosexuality was an immutable characteristic, the INS argued that a conduct-based group should not be recognized as a particular social group.<sup>44</sup> The Board responded that Toboso-Alfonso's treatment was on account of his status, not his activities,<sup>45</sup> explaining that evidence of harassment, threats, and detentions were not the result of "misconduct" by the applicant or "enforcement of laws against particular homosexual acts," but rather manifestations of "the government's desire that all homosexuals be forced to leave their homeland."<sup>46</sup>

Since *Toboso-Alfonso*, U.S. adjudicators have frequently found that attacks on, or prosecution of, individuals for actions that reflect their sexual orientation, such as homosexual intimacy, attending gay discos, or cross-dressing, constitute persecution on account of sexual orientation.<sup>47</sup> In *Karouni v. Gonzales*, the Ninth Circuit rejected the argument that a gay Lebanese man should choose between persecution and a "life of celibacy,"<sup>48</sup> holding that Karouni should not be forced either "to change 'an innate characteristic . . . so fundamental,' or to relinquish such an 'integral part of [his] human freedom.'"<sup>49</sup> The Third Circuit similarly rejected an argument that a gay Argentinian repeatedly beaten by the police and arrested as he left gay discos was persecuted not on account of a

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44. *Id.* at 822.

45. *Id.*

46. *Id.* at 822–23.

47. *See, e.g., Bromfield v. Mukasey*, 543 F.3d 1071, 1077 (9th Cir. 2008) ("There is nothing neutral about the government's use of a statute to prohibit homosexual conduct but not any other sexual activity. Because the prohibition is directly related to a protected ground—membership in the particular social group of homosexual men—prosecution under the law will always constitute persecution.").

48. *Karouni v. Gonzales*, 399 F.3d 1163, 1172–73 (9th Cir. 2005). *See also Pozos v. Gonzales*, 141 F. App'x 629, 632 n.2 (9th Cir. 2005) (stating that it would be "unreasonable" to assume that the petitioner would refrain from homosexual actions or feelings).

49. *Karouni v. Gonzales*, 399 F.3d at 1173 (quoting *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1094 (9th Cir. 2000); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)). *See also Refugee Appeal No. 1312/93 (Re GJ)* [1998] INLR 387 (N.Z.) ("It might be said that the appellant could avoid persecution by being careful to live a hidden, inconspicuous life, never revealing his sexual orientation. . . . [W]e are of the conclusion that to expect of him the total denial of an essential part of his identity would be both inappropriate and unacceptable.").

protected ground, but because he left gay discos late at night.<sup>50</sup> The court called this a “distinction without difference” and found that homophobic language used by the police and their targeting of the applicant only when he left gay discos made it “clear that the police were motivated by [the applicant’s] sexuality.”<sup>51</sup> In *Hernandez-Montiel v. INS*, the Ninth Circuit found that a transgender Mexican was a member of the particular social group of “gay men with female sexual identities,”<sup>52</sup> and concluded that the persecution the applicant experienced was related to characteristics fundamental to his identity, not to his fashion, as the Board had incorrectly concluded.<sup>53</sup> “Punishment” for apparently trivial activities (e.g., frequenting a gay bar) often is pretextual for persecution on account of LGBT status; the severity of the harm inflicted (e.g., beatings, harassment, prolonged imprisonment) may itself be evidence of the pretextual underlying reason. As the *Karouni* court noted, the persecutory agent may not be concerned with the activities per se, but rather with the applicant’s sexual minority status. The stories of LGBT applicants, if fully told, rarely involve restrictions on trivial activities (drinking the cocktail of their choice), but rather suppression of their core identity, including violations of their critical rights to intimacy and the formation of loving relationships.

U.S. courts have similarly embraced activities that are fundamental to beliefs in religion cases, concluding that the religion ground embraces both the right to hold certain beliefs

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50. *Maldonado v. U.S. Att’y Gen.*, 188 F. App’x 101, 103–04 (3d Cir. 2006).

51. *Id.* at 104. *See also* *Razkane v. Holder*, 562 F.3d 1283, 1286, 1288 n.2 (10th Cir. 2009) (noting that the distinction between a country “with laws that criminalize homosexual conduct and a country that persecutes homosexuals because of their homosexual status . . .” would not necessarily require denial of refugee status).

52. *Hernandez-Montiel*, 225 F.3d at 1094–95.

53. *Id.* at 1095 (“Geovanni’s female sexual identity must be fundamental, or he would not have suffered this persecution and would have changed years ago.”); *see also* *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052 (9th Cir. 2006) (citing *Hernandez-Montiel* approvingly in finding that a man with a female sexual identity was a member of a protected category); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 785 (9th Cir. 2004) (describing Reyes as a homosexual male with a “deep female identity”).

and the right to practice the beliefs.<sup>54</sup> As the UNHCR has explained, open religious expression and “[b]earing witness in words and deeds” is central to religious beliefs.<sup>55</sup> The Seventh Circuit affirmed in *Floroiu v. Gonzales* that religious groups are entitled to refugee protection even when their public activities and religious advocacy provoke persecution.<sup>56</sup> In *Zhang v. Ashcroft*, the Ninth Circuit rejected the immigration judge’s finding that Zhang could avoid persecution in China by practicing Falun Gong in the privacy of his own home, emphasizing that

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54. ANKER, *supra* note 4, at 412–17; see Universal Declaration of Human Rights, G.A. Res 217 (III) A, pmb., art. 18, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, arts. 18, 27, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; U.N. High Comm’r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/Rev.1, ¶ 71 (Jan. 1992), *available at* <http://www.unhcr.org/refworld/docid/3ae6b3314.html>. The Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, has underscored the importance of both “the freedom to have and adopt a religion or belief” and the “negative freedom not to belong to any religious group or to live without religious confession.” Asma Jahangir, Interim report of the Special Rapporteur on freedom of religion or belief, ¶ 46, U.N. Doc. A/63/161 (July 22, 2008); see also U.N. Human Rights Comm., General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), ¶¶ 7–8, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993).

55. U.N. High Comm’r for Refugees, Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, 5–8 (Apr. 28, 2004), <http://www.unhcr.org/refworld/docid/4090f9794.html> [hereinafter UNHCR Religious Claims Guidelines]. The state has only a limited right to restrict religious practices when such restrictions are imposed lawfully for purposes of “protect[ing] public safety, order, health, or morals or the fundamental rights and freedoms of others.” ICCPR, *supra* note 54, art. 18(3); HATHAWAY, *supra* note 6, at 145 (noting two elements of definition of religion); see also UNHCR Religious Claims Guidelines, *supra*, at 5–6 (discussing the legitimacy of limitations or restrictions on the exercise of freedom of religion); Karen Musalo, *Irreconcilable Differences? Diverging Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179, 1216 (1994) (commenting upon the “distinction between the absolute nature of freedom of belief and the more relative right to manifest these beliefs”); *In re Liadakis*, 10 I. & N. Dec. 252, 254 (B.I.A. 1963) (noting Supreme Court recognition of two aspects of First Amendment: “freedom to believe and freedom to act, the first being absolute but the second subject to regulation for the protection of society”) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940)).

56. *Floroiu v. Gonzales*, 481 F.3d 970 (7th Cir. 2007).

requiring Zhang to practice his beliefs in secret “would be contrary to basic principles of religious freedom and the protection of religious refugees.”<sup>57</sup>

Activities and actions may be key indicators or expressions of a protected characteristic, but adjudicators’ analysis of the membership in a particular social group ground should focus on immutable and/or unchangeable characteristics and beliefs, not on social perceptions of what sexual orientation or identity means and how it should manifest itself. Recent divergence from this immutable and/or unchangeable characteristic analysis by the Board of Immigration Appeals and courts in the United States has caused significant jurisprudential confusion and analytical chaos. Although for more than twenty years, U.S. courts regularly applied the *Acosta* immutable and/or unchangeable characteristic framework to understanding membership in a particular social group, in 2006, the Board of Immigration Appeals added a new criterion of “social visibility” to the analysis.<sup>58</sup> Under the Board’s new framework, appli-

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57. *Toufighi v. Mukasey*, 538 F.3d 988, 994 n.11 (9th Cir. 2007) (“The law . . . is clear that a finding that an applicant would have to practice her faith in hiding would support, not defeat, her application for asylum.”) (citing *Zhang v. Ashcroft*, 388 F.3d 713, 719–20 (9th Cir. 2004)). See also *Iao v. Gonzales*, 400 F.3d 530, 532 (7th Cir. 2005) (noting that a person could have a well-founded fear of persecution, even if he concealed his adherence to Falun Gong in order to avoid serious harm).

58. The Board simply asserted that the new social visibility test was consistent with precedent because “decisions involving social groups have considered the recognizability, i.e. the social visibility, of the group in question,” despite any actual precedent to support its reasoning. *In re C-A-*, 23 I. & N. Dec. 951, 959–60 (B.I.A. 2006); see *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (“But regarding ‘social visibility’ as a criterion for determining ‘particular social group,’ the Board has been inconsistent rather than silent. It has found groups to be ‘particular social groups’ without reference to social visibility. . . .”). In setting forth this new requirement, without explanation, the Board contravened well-established principles of administrative law. *Sepulveda v. Gonzales*, 464 F.3d 770, 771–72 (7th Cir. 2006) (“Obviously administrative agencies can change their minds. But they are required to give reasons for doing so.”); *Lal v. I.N.S.*, 255 F.3d 998, 1007 (9th Cir. 2001) (overruling the Board’s interpretation of its own regulation because suddenly changing its interpretation was an “arbitrary act”), amended on reh’g, 268 F.3d 1148, 1148 (9th Cir. 2001) (granting government’s request that the opinion be amended to show that the BIA did not, in fact, change its interpretation of the regulation to require ongoing disability, but considered it as a factor in the analysis); *Fatma E. Marouf*, *The Emerging Importance of ‘Social Visibility’ in Defining a ‘Particular Social Group’ and its Potential Impact on Asylum*

cants asserting PSG claims have to establish immutability *plus* social visibility.<sup>59</sup> In some cases, U.S. adjudicators have required that an applicant be literally visibly identifiable,<sup>60</sup> an especially problematic requirement in cases involving sexual orientation where a finding of “visibility” would force adjudicators to reach improper conclusions based on their own stereotypes. The court in *Razkane v. Holder* recognized this mistake and found that the immigration judge improperly brought into evidence his own views that because Razkane did not have effeminate mannerisms or dress, he would not be identified as a homosexual.<sup>61</sup> Commentators<sup>62</sup> and federal courts alike

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*Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 66–68 (2008) (arguing that BIA’s formulation of “social visibility” is ambiguous and conflicts with UNHCR interpretation, and that the Board treats “protected characteristic” and “social visibility” as dual requirements rather than alternative tests).

59. See *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009) (noting that Board’s requirement that one must prove social visibility in order to establish membership in a protected social group is unclear); see also ANKER, *supra* note 4, at 344–48. The Board claimed it was basing its social visibility test, at least in part, on UNHCR Guidelines but its analysis was based on a misreading of the UNHCR guidelines. See U.N. High Comm’r for Refugees, Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶¶ 10–13, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter UNHCR Social Group Guidelines] (defining social visibility not exclusively in terms of externally visible characteristics).

60. See *Scatambuli v. Holder*, 558 F.3d 53, 60 (1st Cir. 2009) (“[T]he universe of those who knew of the petitioners’ identity as informants was quite small; the petitioners were not particularly visible.”); *Xiang Ming Jiang v. Mukasey*, 296 F. App’x 166, 168 (2d Cir. 2008) (“[N]othing in the record reflects that he possesses any characteristics that would allow others in Chinese society to recognize him as someone caught between rival gangs.”); *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (“Persons who resist joining gangs have not been shown to be part of a socially visible group within Honduran society, and the respondent does not allege that he possesses any characteristics that would cause others in Honduran society to recognize him as one who has refused gang recruitment.”); *In re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) (“When considering the visibility of groups of confidential informants, the very nature of the conduct at issue is such that it is generally out of the public view. In the normal course of events, an informant against the Cali cartel intends to remain unknown and undiscovered. Recognizability or visibility is limited to those informants who are discovered. . . .”).

61. *Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009) (remanding because of the immigration judge’s improper reliance on stereotyped no-

have sharply criticized this social visibility test, and the U.K. Supreme Court's reasoning in *HJ and HT* improperly focuses attention on actions that are externally visible rather than on traits that are fundamentally unchangeable or that a person should not be forced to change.<sup>63</sup>

#### V. ATTACKS ON LGBT PERSONS AROUND THE WORLD ARE ESCALATING AND MOST CASES INVOLVE VIOLATIONS OF CORE HUMAN RIGHTS, NOT RIGHTS ON THE MARGIN

Hathaway and Pobjoy's understandable concern about the overbreadth of the U.K. Supreme Court's decision is based largely on Lord Rodger's elaborate discussion of what it means

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tions of what gay men should look like); *see also* *Ali v. Mukasey*, 529 F.3d 478, 491–92 (2d Cir. 2008) (remanding because of immigration judge's use of stereotypes about the applicant's personality); *Mockeviciene v. U.S. Att'y Gen.*, 237 F. App'x 569, 574 (11th Cir. 2007) (criticizing the reasoning of the immigration judge as to the credibility of the petitioner's sexual orientation yet ultimately upholding the immigration judge's review); *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (finding "personal and improper" an immigration judge's opinion that, because Shahinaj did not speak or dress like a homosexual, his claim of persecution was invalid); Melanie Conroy, *Real Bias: How REAL ID's Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants*, 24 BERKELEY J. GENDER L. & JUST. 1, 18 (2009); Fadi Hanna, Case Comment, *Punishing Masculinity in Gay Asylum Claims: In re Soto Vega, No. A-95880786 (B.I.A. Jan. 27, 2004)*, 114 YALE L.J. 913, 913 (2005) (criticizing a Board of Immigration Appeals ruling denying a gay man's asylum claim because he did not appear visibly homosexual); *Vega v. Gonzales*, 183 F. App'x 627, 628 (9th Cir. 2006) (holding that an asylum seeker's proof of past persecution establishes a rebuttable presumption that he has a reasonable fear of future persecution).

62. *See, e.g.*, Marouf, *supra* note 58, at 66–68 (arguing that the Board of Immigration Appeals departs from precedent and international authority when it uses "social visibility" as either an important factor or a requirement in its decisions); ANKER, *supra* note 4, at 344–47 (summarizing academic and judicial criticism of the Board's adoption of the "social visibility" framework).

63. *See Benitez Ramos v. Holder*, 589 F.3d at 429 ("Being a member of a gang is not a characteristic that a person 'cannot change, or should not be required to change,' provided that he can resign without facing persecution for doing so.") (citing *Arteaga v. Mukasey*, 511 F.3d 940, 945–46 (9th Cir. 2007)); *Gatimi v. Holder*, 578 F.3d at 615 (noting that the BIA had found groups to be "particular social groups" without regard to social visibility). *But see Scatambuli v. Holder*, 558 F.3d at 59–60 (explaining that "social visibility" is relevant to the particular social group analysis); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (deferring to the Board's "social visibility" requirement).



“to live freely and openly as a gay man.”<sup>64</sup> However, in our practice, we have found other issues to be the core challenges in LGBT cases. Most LGBT asylum seekers are not fleeing countries where they face a risk of persecution for reasons of having cocktails, attending concerts, or gossiping with friends; rather, LGBT asylum seekers generally flee countries in which they are wholly incapable of survival, let alone going to a bar or a disco. As Lord Hope explained in *HJ and HT*, in recent years escalating attacks on LGBT persons have been “fanned by misguided but vigorous religious doctrine,” including “[t]he ultra-conservative interpretation of Islamic law that prevails in Iran” and “[t]he rampant homophobic teaching that right-wing evangelical Christian churches indulge in throughout much of Sub-Saharan Africa.”<sup>65</sup> The LGBT clients with whom we work are facing increasing serious physical and psychological harm and escalating attacks in countries around the world—most cases involve violations of rights that fit squarely within core human rights, not rights on the margin. In practice, the critical issues in LGBT cases include corroborating LGBT asylum claims and documenting the escalating attacks suffered and feared.

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64. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [77]–[80], [2011] 1 A.C. 596, 645–47 (Lord Rodger) (appeal taken from Eng. & Wales C.A.).

65. As Lord Hope notes:

Persecution for reasons of homosexuality was not perceived as a problem by the High Contracting Parties when the Convention was being drafted. For many years the risk of persecution in countries where it now exists seemed remote. It was the practice for leaders in these countries simply to insist that homosexuality did not exist. This was manifest nonsense, but at least it avoided the evil of persecution. More recently, fanned by misguided but vigorous religious doctrine, the situation has changed dramatically. . . . The death penalty has just been proposed in Uganda for persons who engage in homosexual practices. Two gay men who had celebrated their relationship in a public engagement ceremony were recently sentenced to 14 years’ imprisonment in Malawi. They were later pardoned in response to international pressure by President Mutharika, but he made it clear that he would not otherwise have done this as they had committed a crime against the country’s culture, its religion and its laws. Objections to these developments have been greeted locally with derision and disbelief.

*Id.* [2], [2011] 1 A.C. at 618.

The major challenges in asylum cases in recent years have been the heightened corroboration requirements and rigid criteria for assessing credibility imposed by adjudicators, which have moved far beyond the requirements of the Refugee Convention. Although refugee law mandates that applicants' testimony be accorded the benefit of the doubt, in practice, an asylum seeker's testimony alone is not generally sufficient to establish eligibility for protection under the Refugee Convention.<sup>66</sup> Adjudicators are increasingly demanding unavailable proof both of applicants' homosexuality and of attacks on those similarly situated. LGBT asylum seekers often have the most current and relevant information on human rights violations in their countries of origin, but require corroboration by reports or expert testimony to establish the legal validity of their claims. However, given fears of retaliation for reporting attacks, such documentation is often unavailable.

Government attorneys have used the statement in some U.S. State Department Country Reports on Human Rights Practices indicating no reports of violence or discrimination against LGBT persons to argue that no attacks are occurring. Yet, in our experience, this is not actually the case. The lack of documentation stems from a failure of NGOs and states to document and report on these issues, as well as from the extreme repression of LGBT communities in countries of origin, such that victims do not report abuses to the authorities or even to local or international NGOs.

Recent cases our clinic has worked on involve: a gay man from the Democratic Republic of Congo who was violently beaten both there and in Kenya, where the police themselves led him to his attackers; gay men from Brazil who have been brutally raped and violated; and gay men from Guatemala who have suffered constant abuse and lived their whole lives attempting to hide their sexuality for fear of attack. While some states have paid lip-service to protecting gay rights and to implementing top down policies to enforce those rights, on the ground, these policies are not taking effect, and violent attacks and repression have continued and indeed, as recognized by Lord Hope in *HJ and HT*, even escalated.

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66. See ANKER, *supra* note 4, at 95–97 (noting the limitations of testimony by asylum seekers and the recent trend regarding corroborating evidence).

## VI. CONCLUSION

LGBT persons face extraordinary violence and repression in countries around the world. As several tribunals and courts have recognized, and as Hathaway and Pobjoy underscore, LGBT applicants for refugee status often fear not only physical harm, but also the endogenous harm of suppressing and concealing their identity. The key challenges in LGBT cases, based on our experience representing LGBT refugees, are corroborating applicants' fears of harm and increasing requirements for corroborative proof, which in some cases have even been encoded in law, contradicting established refugee law principles regarding sufficiency of the applicant's testimony in establishing his or her claim.

"Queer" cases raise issues that warrant more attention in the literature about constraints on and priorities of NGOs and governments in reporting human rights violations: the story behind the evidence of underreporting has not been told. As noted, asylum seekers themselves may be one of the best sources of country condition information, but their testimony is often not given weight without the imprimatur of a recognized expert or NGO. NGO reporting may, however, be unavailable depending on the resources and priorities of human rights organizations, donors, and states parties in promoting their own agendas. The complexities that arise in attempting to obtain accurate information from closed societies deserve further investigation.<sup>67</sup>

Advocacy to encourage reporting on violation of human rights abuses suffered by LGBT persons is critical.<sup>68</sup> U.S.

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67. See Robert Bernstein, Op-Ed., *Rights Watchdog, Lost in the Middle East*, N.Y. TIMES, Oct. 20, 2009, [www.nytimes.com/2009/10/20/opinion/20bernstein.html](http://www.nytimes.com/2009/10/20/opinion/20bernstein.html) (discussing the difficulty of obtaining information in a closed society in the context of the Gaza Strip). Human Rights Watch's Refugee Program obtains important information from refugees who have fled repressive countries, since closed societies are often impenetrable and people who flee often provide the only insight into the actual situation on the ground. Interview with Bill Frelick, Director, Human Rights Watch Refugee Program, (Oct. 18, 2011).

68. Human Rights Watch, The International Gay and Lesbian Human Rights Commission, Global Rights and a few other groups have done important reporting on these issues, but given the escalating attacks on LGBT persons around the world and the obstacles to obtaining information, additional reporting is imperative.

NGOs have played a key role in encouraging the U.S. State Department to report on these issues more systematically and thoroughly.<sup>69</sup> The current U.S. administration takes LGBT issues more seriously than have previous administrations, and reporting is becoming more of a priority.<sup>70</sup> The U.S. State Department is attempting to remedy the information vacuum on treatment of LGBT persons by issuing a “toolkit,” which will be distributed to foreign service officers around the world who are charged with drafting the country reports on human rights practices.<sup>71</sup> Countries in the European Union have already developed such toolkits to encourage more complete reporting on this issue.<sup>72</sup>

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69. The Council for Global Equality has been at the forefront of the movement to push for better reporting by the U.S. State Department. For a summary of their position on this issue, see COUNCIL FOR GLOBAL EQUALITY, <http://www.globalequality.org/who-we-are/issues/human-rights> (last visited Oct. 19, 2011). Immigration Equality has also done excellent work, raising awareness regarding the plight of LGBT persons around the world and providing legal assistance to those who flee persecution. For a description of the group’s work, see IMMIGRATION EQUALITY, <http://www.immigrationequality.org/> (last visited Oct. 19, 2011).

70. U.S. Secretary of State Hillary Clinton has said that LGBT issues are the next frontier of human rights, and President Obama mentioned LGBT issues in his General Assembly speech before the United Nations. Hillary Rodham Clinton, Sec’y of State, Remarks on the Human Rights Agenda for the 21st Century (Dec. 14, 2009), <http://www.state.gov/secretary/rm/2009a/12/133544.htm>; *Obama Addresses Global Gay Rights in UN Speech*, COUNCIL FOR GLOBAL EQUALITY BLOG (Sept. 21, 2011), <http://globalequality.wordpress.com/2011/09/21/obama-addresses-global-gay-rights-in-un-speech/>; Kyle Sennett, *Clinton Calls Gay Rights the ‘New Frontier’ Precedes WH Statement Opposing Ugandan Anti-Gay Bill*, EXAMINER.COM (Dec. 17, 2009), <http://www.examiner.com/hillary-clinton-in-national/clinton-calls-gay-rights-the-new-frontier-precedes-wh-statement-opposing-ugandan-anti-gay-bill>.

71. *Gay Rights Are Human Rights*, COUNCIL FOR GLOBAL EQUALITY BLOG (Nov. 10, 2010), <http://globalequality.wordpress.com/2010/11/10/gay-rights-are-human-rights/>.

72. Council of the European Union, Working Party on Human Rights, *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People*, COHOM (2010) 162 (June 17, 2010), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/st11179.en10.pdf>. For documentation and tools developed by states parties, see *International Publications on LGBT Human Rights*, COUNCIL FOR GLOBAL EQUITY, <http://www.globalequality.org/publications/international-publications-on-lgbt-human-rights> (last visited Nov. 18, 2011).

LGBT persons suffer violent repression in many countries where there is little or no reporting on the harms inflicted on them. NGOs and states parties reporting on LGBT human rights abuses must document this escalating violence, and develop strategies for eliciting information from individuals who often fear coming forward and for obtaining information from states that deny the very existence of LGBT persons in their communities. The problem of underreporting in the face of the increased evidentiary requirements of corroboration deserves greater attention in the scholarly literature.