

ASSESSING GLBTI REFUGEE CLAIMS: USING
HUMAN RIGHTS LAW TO SHIFT THE
NARRATIVE OF PERSECUTION WITHIN
REFUGEE LAW

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I. INTRODUCTION

The decision of the U.K. Supreme Court in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* (“*HJ and HT*”) represents a landmark ruling in several respects.¹ First, it offers a sharp departure from previous English jurisprudence, which had imposed a duty on gay, lesbian, bisexual, transexual, and intersex (GLBTI) applicants to take reasonable measures to conceal their sexual orientation so as to mitigate the prospect of persecution.² The rejection of this duty to be discreet by the Supreme Court effectively shifted the burden for the protection of a GLBTI refugee applicant from the applicant back onto the receiving State.³ Second, some of the language used by members of the Supreme Court in their decision marks a shift from the traditional approach to such issues through the binary of heterosexual and homosexual practices to terms such as gay, lesbian, and straight which are preferred by advocates for GLBTI equality.⁴ Third, rather than confine the protection to be afforded to GLBTI applicants to activities undertaken in private, the Supreme Court extended protection to all activities considered to be part of the immutable characteristics of a gay man whether in private and public spaces. In a passage that is surely to be quoted often, Lord Rodger declared:

[G]ay men are to be as free as their straight equivalents in the society concerned to live their lives

1. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [2011] 1 A.C. 596 (appeal taken from Eng. & Wales C.A.). The United Kingdom was not the first jurisdiction to provide refugee protection for gay men in such circumstances. See also *Refugee Appeal No. 74665/03* [2005] INLR 568 (N.Z.); *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473 (Austl.). See also James C. Hathaway & Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT’L L. & POL. 315, 324 n.35 (2012).

2. See, e.g., *J v. Sec’y of State for the Home Dep’t*, [2006] EWCA (Civ) 1238, [16], [2007] Imm. A.R. 73, [16] (appeal taken from Asylum & Immigr. Trib.) (U.K.).

3. Jenni Millbank, *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, 13 INT’L J. HUM. RTS. 391, 393 (2009).

4. Richard McKee, *Judgments Galore*, 24 J. IMMIGR. ASYLUM & NAT’LITY L. 334, 335.

in a way that is natural to them as gay men, without the fear of persecution.⁵

For many GLBTI advocates, the emphasis on equality underlying this passage will be seen as both an affirmation of the right to be different yet equal *and* a rejection of the idea that privacy (read: keeping GLBTI persons in the closet) is the “solution” to the “problem” of GLBTI refugee applicants.⁶

Thus, it is not surprising that the decision has been celebrated as a victory for GLBTI refugee applicants and is seen to represent a significant prizing away of refugee law from its heteronormative tendencies.⁷ But Hathaway and Pobjoy want to pause the celebrations and reassess, not the outcome of the decision, but its reasoning. For them the decision is far too instrumentalist and suffers from three significant and serious doctrinal flaws. First, it does not provide a convincing account of how the requirement under the Refugee Convention that an applicant must establish a well-founded fear of persecution can be satisfied, when on facts there is no “reasonable” likelihood or “real risk” that such harm will materialize.⁸ Second, in the opinion of Hathaway and Pobjoy, the Supreme Court essentially avoided any substantive discussion of the basis for persecution in circumstances where an applicant could take measures to avoid harm.⁹ Finally, the Supreme Court failed to set any limits on the scope of the protected activities deemed

5. *HJ and HT*, [2010] UKSC 31, [78], [2011] 1 A.C. at 646.

6. Jenni Millbank, *A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989–2003*, 14 SOC. & LEG. STUD. 115, 116 (2005); see also Wayne Morgan, *Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations*, 19 MELB. U. L. REV. 741, 753–756 (1994) (arguing that GLBTI decisions should not be based on the right to privacy because this right cannot encompass issues of violence and discrimination).

7. See, e.g., S. Chelvan, “Put Your Hands Up (If You Feel Love),” 25 J. IMMIGR., ASYLUM & NAT’LITY L. 56, 57 (2011) (“[O]ur Supreme Court’s decision . . . marked a phenomenal day, not just for LGBTI asylum law, but also for asylum law, LGBTI rights, and British justice!”); McKee, *supra* note 4, at 335 (describing the decision as a “landmark judgment”); Richard Buxton, *Asylum and the Doctrine of Internal Flight in the Light of HJ (Iran)*, 70 CAMBRIDGE L. J. 41, 42 (2011) (arguing that the principle underlying *HJ (Iran)* “should now illuminate the case of internal flight”).

8. Hathaway & Pobjoy, *supra* note 1, at 331, 345. This concern arose because it was held in *HJ (Iran)* that the applicants would voluntarily take measures to avert the risk by concealing their sexual orientation.

9. *Id.* at 346.

integral or inherent to leading a life as a gay man or, by implication, anyone identifying as GLBTI.¹⁰

In light of these concerns, Hathaway and Pobjoy set out to provide the reasoning, which they consider necessary to sustain both the outcome of the Supreme Court's decision in *HJ and HT* and its application to future cases. Central to this approach is a reliance on international human rights law to assist in the interpretation of the requirements under the Refugee Convention that a GLBTI applicant must establish "*a well founded fear of being persecuted*" and that this fear must be "*for reasons of*" the applicant's sexual orientation.

The aim of this paper is to offer some preliminary observations about the relationship between international refugee law and international human rights law in the context of GLBTI claims for refugee status. Part I seeks to examine the role of international human rights law in assessing whether there is a well-founded fear of persecution for a GLBTI applicant. Part II examines the extent to which international human rights law can be used to set the limits on activities that will warrant protection for a GLBTI applicant under the Refugee Convention. Four broad conclusions are offered.

First, distinctive interpretative communities exist within refugee law and human rights law, each of which has developed autonomous meanings for terms that may be used within each regime. This creates a need to exercise caution when importing terms from human rights law into refugee law to aid the interpretation of the Refugee Convention. Second, relative to the U.K. Supreme Court, the analysis of Hathaway and Pobjoy is ostensibly orientated towards a greater engagement with recognized international human rights. However, their rejection of the right to privacy as a potential basis for persecution is premature because it is based on an unnecessarily narrow reading as to the scope of this right. In contrast, their inclination to rely on the prohibition against cruel, inhuman, and degrading treatment is to be welcomed, but there is a need for some additional thinking about the implications of this approach. Third, the techniques suggested by Hathaway and Pobjoy to limit the scope of the "*for reasons of*" nexus requirement conceal some fundamental dilemmas that require further consideration. Indeed, one element of their approach

10. *Id.* at 335.

could potentially be interpreted as a modified version of the duty to be discreet, which was so forcefully rejected by the U.K. Supreme Court. Ultimately, however, the strength of their paper may rest in its capacity to shift the narrative with respect to the meaning of persecution within refugee law by challenging the historical nexus with physical harm and violence to an understanding that the psychological harm experienced as a result of self oppression can also amount to persecution.

II. CRITICAL BUT COMPLICATED: THE ROLE OF HUMAN RIGHTS IN ASSESSING PERSECUTION IN GLBTI CLAIMS

A. *The Need to Proceed with Caution*

A well-founded fear of being persecuted is a core requirement for a finding of refugee status under the Refugee Convention.¹¹ Although the Refugee Convention does not define persecution and there is no universally accepted definition,¹² most definitions tend to stress the need for serious harm and link persecution in some way to a violation of human rights. For example, according to the UNHCR Guidebook, a threat to life or freedom or “other serious violations of human rights” would constitute persecution.¹³ The EC Council Directive 2004/83/EC provides that acts of persecution must be “sufficiently serious by their nature or repetition so as to constitute a severe violation of basic human rights.”¹⁴ And for Hathaway and Pobjoy, who affirm the test originally developed by Hathaway in 1991, and which has been widely cited with approval since, it is “necessary to show the ‘sustained or systemic

11. Convention Relating to the Status of Refugees art. 1(A)(2), *opened for signature* July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

12. U.N. High Comm’r for Refugees (UNHCR), 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, ¶ 51 (Jan. 1992), *available at* <http://www.unhcr.org/refworld/docid/3ae6b3315.html>.

13. *Id.*

14. 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. 9(1)(a), 2004 O.J. (L 304) 12, 16 (EU), *available at* <http://www.unhcr.org/refworld/docid/4157e75e4.html>.

violation of basic or core human rights entitlements demonstrative of a failure of state protection.’”¹⁵

The theme common to each of these approaches is the idea of a serious or severe violation of a basic or core human right. Although this idea has become axiomatic within refugee law, it is problematic when viewed from the prism of a human rights jurist. For example, in human rights law, a *violation* will occur where there has been a failure of *state protection*.¹⁶ Thus, it makes no sense to speak of a human rights violation *and* a failure of state protection.¹⁷ And even if a human rights violation is taken to be demonstrative of a failure of state protection (which is true in human rights discourse), the Refugee Convention speaks of a state’s *inability* or *unwillingness* to protect an applicant. But the inability of a State to protect a human right is not necessarily a *violation* of a human right.¹⁸ It will depend on the reasonableness of a state’s actions in responding to an interference with a right. So does this mean that the Refugee Convention demands surrogate protection for an applicant in circumstances where the state of origin has not actually violated a human right? If so, this

15. Hathaway & Pobjoy, *supra* note 1, at 320.

16. In international law, a human right is an entitlement of an individual to a particular interest that gives rise to a duty or obligation on the State to respect, protect and fulfill that entitlement. JOHN TOBIN, *THE RIGHT TO HEALTH IN INTERNATIONAL LAW* (forthcoming Jan. 2012). Thus when determining whether there has been a violation of a human right there are two fundamental questions: (1) Was there an interference, limitation or engagement with the scope of the right and (2) if so, can the interference be justified (which is invariably reduced to a test of reasonableness)? *Id.*

17. *But see, e.g.*, Hathaway & Pobjoy, *supra* note 1, at 347 (“[S]uch harms will often amount to the violation of core internationally recognized human rights, they are, if coupled with the home state’s failure to counter the precipitating risk, appropriately recognized . . . as persecutory.”) Although they avoid the use of the phrase state protection they still treat separately a human rights violation and the actions of the home state.

18. At one point Hathaway and Pobjoy explain that “the requirement that there be a failure of state protection will be readily established by the failure of the state to provide a *meaningful response* to the precipitating cause of the serious harm.” Hathaway & Pobjoy, *supra* note 1, at 352 (emphasis added). Such a test is unknown to human rights law and is not used to assess whether there has been a violation of a human right.

would mean that refugee status would be possible in the absence of a human rights violation by a state.¹⁹

But if human rights remain central to an understanding of persecution, what constitutes a serious or severe violation of a human right? Is not every violation of a human right serious? And what is a basic, fundamental, or core human right? Are not all human rights recognized in international treaties said to be fundamental and are not all human rights interdependent and indivisible?²⁰ And to which human rights do the various tests for persecution refer – all those recognized under international treaties and customary international law or only certain kinds of rights? And how is the meaning of each right to be assessed? Are developments in regional human rights systems relevant to the interpretation of international human

19. Such a scenario could arise, for example, where the threat of serious harm to the applicant came from non-state actors but the state, due to a lack of resources and effective control of its territory, was simply *unable* to protect the applicant against this threat. In such circumstances, there would be an interference with the human rights of the applicant but there may not be a violation of the state's obligations because they were taking reasonable measures in light of available resources and operational constraints to protect against the harm. See *Osman v. United Kingdom*, App. No. 23452/94, 29 Eur. H.R. Rep. 245 (1999) (outlining the qualified nature of a state's obligations with respect to threats to the right to life that emanate from non-state actors). It is also worth noting that if this proposition is correct, namely that refugee status can be granted in the absence of a human rights violation, it may be more appropriate to talk of persecution in terms of a serious *interference* with a human right as opposed to a violation of a human right in circumstances where a state is unable or unwilling to protect against this interference.

20. For example, the preamble to the UDHR refers to fundamental human rights and the preamble to the Refugee Convention refers to the UDHR, which "affirmed the principle that all human beings shall enjoy fundamental human rights and freedoms without discrimination." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); Refugee Convention, *supra* note 11. See also Gunnar Beck, *Legitimation Crisis, Reifying Human Rights and the Norm Creating Power of the Factual: Reply to "Reifying Law": Let Them be Lions*, 26 PENN STATE INT'L L. REV. 565, 568 (2008) (noting that terms human rights and fundamental rights are often used interchangeably). With respect to the principle of interdependence and indivisibility see, for example, Vienna Declaration and Programme of Action, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993); Report of the Human Rights Council Report of the Third Committee, ¶ 3(a), U.N. Doc. A/62/434 (Dec. 3, 2011).

rights and if so to what extent? Of course, refugee scholars²¹ and to a lesser extent, some courts,²² have sought to grapple with these issues to varying degrees. Moreover, a detailed discussion of these issues is well beyond the scope of this paper.

It is, however, important to note that the series of dilemmas identified in the preceding paragraph indicates that there is a need for a greater dialogue between refugee and human rights lawyers, scholars, and judges. Distinctive interpretative communities have developed within each of these regimes, which have tended to develop somewhat autonomous meanings for terms that may be used within each regime.²³ This creates the potential for confusion when terms and concepts are interchanged across regimes and/or imported into one regime from another (some examples of the consequences of this approach will be discussed below). Thus, for example, it

21. See generally JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* (1991); JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005); James Hathaway, *The Relationship Between Human Rights and Refugee Law: What Refugee Law Judges Can Contribute, in THE REALITIES OF REFUGEE DETERMINATION ON THE EVE OF A NEW MILLENNIUM: THE ROLE OF THE JUDICIARY*, 80 (1998); MICHELLE FOSTER, *INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION* (2007).

22. See, e.g., *Refugee Appeal No 74665/03* [2005] INLR 68, at paras [56]–[91] (Hains, QC) (N.Z.). To a lesser extent, see also *OO (Sudan) v. Sec’y of State for the Home Dep’t*, [2009] EWCA (Civ) 1432, [22]–[48], [2010] All E.R. (D) 17 (June) (appeal taken from Asylum & Immigr. Trib.) (U.K.) (citing both English case law and scholarly works on whether homosexual discrimination may qualify under relevant refugee law).

23. The idea of interpretative communities is drawn from the work of the literary theorist Stanley Fish. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETATIVE COMMUNITIES* 14 (1980) (defining the author’s concept of interpretive communities). Fish claims that interpretative authority does not lie in the text or the reader but rather in the community of individuals who share internal “categories of understandings and stipulations of relevance and irrelevance,” which constrain and inform the interpretative process thereby generating meaning. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 141–42 (1989). Fish himself concedes that such a model would not necessarily produce universal agreement with respect to the meaning of a text. Indeed, he accepts that if the act of interpretation were performed by another community of individuals with a different set of expectations and assumptions, a different interpretation would emerge. *Id.* The way in which the refugee law “interpretative community” has engaged with and interpreted ambiguous legal terms that are also found within human rights law provides evidence of the sort of transformation between interpretive communities that Fish describes.

would be a mistake to rely too heavily on human rights law to reduce indeterminacy with respect to terms within refugee law given that the meaning of human rights standards is itself notoriously indeterminate and deeply contested.²⁴ This is not to say that dominant and more persuasive understandings as to the meaning of human rights standards do not exist.²⁵ It just requires an acknowledgement that the meaning of such standards is constantly evolving under international law. Thus, caution must be exercised when importing these terms as interpretative aids into refugee law. It would also be a mistake to selectively import aspects of human rights discourse into refugee law in ways that were not consistent with the entire system of international human rights law.

B. *The Need for System Coherence*

A persuasive interpretation of a treaty provision is one that must still pursue what I have called external system coherence, that is, coherence or harmonization, to the extent possible, with the system of international law.²⁶ This means that the resolution of any ambiguity within the Refugee Convention should be informed by, among other things, an attempt to achieve coherence or harmonization with the provisions of international human rights treaties. The efforts by Hathaway and Pobjoy to draw on international human rights law to inform the definition of persecution and set limits on the activities to be protected for a GLBTI refugee applicant reflect an awareness of the value of system coherence.

This position contrasts with the way in which members of the U.K. Supreme Court use international human rights law. For example, Lord Hope draws attention to the inclusion of the UDHR in the preamble to the Refugee Convention and proclaims that “[t]he guarantees in the Universal Declaration are fundamental to a proper understanding of the Conven-

24. See, e.g., Gunnar Beck, *supra* note 20, at 565.

25. See generally John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 1 (2010) (arguing that even well established human rights norms are still subject to significant ambiguity).

26. *Id.* at 33–37.

tion.”²⁷ He even relies on the inclusion of the UDHR in the preamble of the Refugee Convention as evidence that “[protection against non] discrimination was a *fundamental* purpose of the Convention.”²⁸ He then goes on to affirm the right of a gay man to freedom of association and to freedom of self-expression.

But this foray into human rights standards is brought to an abrupt halt when he proclaims that discrimination against members of a particular social group is not enough to attract refugee protection. The logic of this analysis is problematic from a human rights perspective. In the space of three consecutive paragraphs Lord Hope states that persecution involves a violation of a *core entitlement* under international law, he then identifies non-discrimination as a *fundamental purpose* of the Refugee Convention but subsequently declares that discrimination against members of a particular social group is not sufficient to establish refugee status. But he offers no explanation as to why a violation of a fundamental purpose of the Refugee Convention would not involve a violation of a core entitlement under international law.

A further source of concern stems from his decision to protect a gay applicant, who could avoid physical harm by concealing his sexual orientation, on the basis of what he describes as the *fundamental right* of gay men “*to be what they are*”—a right that is not actually expressly enumerated within international human rights law.²⁹ I want to say something more about this “right” later. But the point to stress here is that Lord Hope did not engage in any systemic or sophisticated inquiry as to how the meaning of persecution under the Refugee Convention should be informed by international human rights standards.

Lord Roger, with whom Lord Walker and Lord Collins agreed, was also content to ground his understanding of persecution in a right that does expressly exist within international human rights law. He affirmed the position taken in New Zealand and Australia that “refugee status cannot be denied by

27. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [15], [2011] 1 A.C. 596, 622 (Lord Hope of Craighead) (appeal taken from Eng. & Wales C.A.).

28. *Id.* [14], [2011] 1 A.C. at 622 (emphasis added).

29. *Id.* [11], [2011] 1 A.C. at 621.

requiring of the claimant that he or she avoid being persecuted by forfeiting a *fundamental* human right.”³⁰ But rather than trawl through several human rights treaties to identify the actual nature and scope of the right that would be denied he simply invented his own—“*the right to live openly without fear of persecution which the Convention exists to protect.*”³¹

In contrast, John Dyson SC was at least conscious of the need to ensure that the Refugee Convention was interpreted in light of the principles in its preamble, which include the requirement that all human beings, including refugees, should enjoy fundamental rights and freedoms. Moreover, he took the view that to impose on gay applicants a duty to be discreet “would deny them enjoyment of their fundamental rights and freedoms without discrimination.”³² But like his brother judges, he too was content to ground a finding of persecution in a right that is (perhaps surprisingly) not actually expressed in human rights treaties, namely “*the right to dignity,*” which he said “underpins the protection accorded by the Refugee Convention.”³³

The haphazard nature of this judicial reasoning is the cause of angst for Hathaway and Pobjoy. If persecution is to be considered a serious human rights violation, or a violation of a core human right, then there was a need for the members of the Supreme Court to ground their finding of persecution in an internationally recognized human right. But in which right should persecution be grounded for a GLBTI applicant in circumstances where there is no real risk of any exogenous threat materializing because the applicant will be able to avoid such harm by concealing their sexual orientation?

C. *Grounding Persecution in Privacy*

The New Zealand Refugee Status Appeals Authority (‘RSAA’) in *Refugee Appeal No 74665/03*, held that a gay man from Iran who would be forced to “exist in a state of induced self-oppression” because of his sexual orientation if returned to Iran, would be denied his right to privacy and thus satisfied

30. *Id.* [72], [2011] 1 A.C. at 644 (Lord Rodger of Earlsferry) (emphasis added).

31. *Id.* [67], [2011] 1 A.C. at 641.

32. *Id.* [113], [2011] 1 A.C. at 657 (Sir John Dyson).

33. *Id.*

the requirement of being persecuted under the Refugee Convention.³⁴ However, Hathaway and Pobjoy remain deeply skeptical about the legitimacy of using the right to privacy to establish persecution in such circumstances for several reasons. Their most basic concern is that the right to privacy under article 17 of the ICCPR—which cannot be subject to arbitrary and unlawful interference—may be restricted to a negative non-interference right rather than an affirmative right to “respect” for private life as appears under the ECHR.³⁵ They also echo the concern often raised in cases concerning sexual orientation, that protection for GLBTI persons on the basis of their right to privacy only serves to confine their sexual orientation to private spaces.³⁶

But this approach tends to overlook four considerations. First, article 17 of the ICCPR must be read in conjunction with article 2 of the ICCPR which provides that a State party undertakes to “respect and to ensure” the rights under the Covenant without discrimination.³⁷ Thus, there is a positive obligation on States to take reasonable measures to ensure the effective protection of the right to privacy.³⁸ Second, the protection against arbitrary and unlawful interferences with the right to

34. *Refugee Appeal No. 74665/03* [2005] INLR 68, at para [114] (N.Z.).

35. Hathaway & Pobjoy, *supra* note 1, at 354.

36. *Id.* at 355–56. See also Millbank, *supra* note 6, at 116 (suggesting the national response in Britain to sexual orientation claims by asylum seekers has been to create a duty on behalf of asylum seekers to protect themselves by hiding their sexuality); Wayne Morgan, *Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations*, 19 MELB. U. L. REV. 741, 753–56 (1994) (arguing that the classification of sexuality as a privacy issue disempowers gay men and lesbians by silencing those that contradict institutional voices).

37. U.N. Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) [hereinafter General Comment No. 31]. See also Tobin, *supra* note 25, at 37–39 (describing this requirement as internal system coherence which is identified as a key feature of a persuasive treaty interpretation).

38. See General Comment No. 31, *supra* note 37, ¶ 6 (explaining that states may restrict rights guaranteed under the Covenant only when necessary and only in proportion to legitimate aims). On the idea of positive duties under international human rights law and the shift from a focus on non-intervention by a state to enhancing or facilitating an individual’s ability to fulfill their choices, see SANDY FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* ch. 1 (2008).

privacy demands that any measures to restrict this right must be reasonable. In summary, this requires a State to establish, on the basis of objective evidence, that any interference with the right to privacy is for a legitimate aim and the measures used to achieve this aim are proportionate.³⁹ Third, implicit in the critique of the right to privacy by Hathaway and Pobjoy is an assumption that the scope of this right is confined to activities undertaken in private spaces.⁴⁰ This assumption is mistaken.

Although space does not permit a detailed examination of the scope of the right to privacy, it is important to stress that this right is not confined to the protection of activities that occur within the confines of a person's home (the physical private sphere). It extends to protection against arbitrary and unlawful interference in relation to all those activities that are within the personal autonomy of an individual, including sexual relationships, whether they occur in public or private and "covers the physical and psychological integrity of a person . . . [and] can sometimes embrace aspects of an individual's physical and social identity."⁴¹ It is for this reason that the right to privacy has been said to constitute a right to individual self-determination.⁴² Although this may be stretching the scope of the right too far, the European Court of Human Rights has certainly endorsed the idea that "*the notion of personal autonomy is an important principle*" underlying this right.⁴³ This contrasts with the literature on sexual orientation and human rights, which has tended to conceive of the right to privacy as a private space hidden away from the public glare when in fact personal behavior within public spaces, such as a display of affec-

39. General Comment No. 31, *supra* note 37, ¶ 6; *see also* United Nations, Econ. & Soc. Council, Comm'n on Human Rights, *Status of International Covenants on Human Rights*, annex ¶ 10(d), U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984).

40. Hathaway & Pobjoy, *supra* note 1, at 355 ("[T]here is surely a conceptual incongruity in relying on denial of a right to 'privacy' as the means by which to recognize the serious harm . . .").

41. *Pretty v. United Kingdom*, App. No. 2346/02, 2002-III Eur. Ct. H.R. 155, 193 (citations omitted). *See also* the more recent decision of *Stoicescu v. Romania*, App. No. 9718/03, [2011] Eur. Ct. H.R. 1193, [48]–[49] (confirming the principles declared in *Pretty*).

42. *Pretty*, 2002-III Eur. Ct. H.R. at 192 (describing argument raised by counsel for the applicant)

43. *Id.* at 193 (emphasis added).

tion, is well within the scope of the right to privacy. It is therefore premature to suggest, as Hathaway and Pobjoy do, that reliance on a violation of the right to privacy to establish persecution in cases where GLBTI applicants conceal their identity, “hangs by a thin thread.”⁴⁴

It is at this point in the analysis that the flirtation of the U.K. Supreme Court with human rights discourse also becomes relevant. All members of the Court were determined to extend protection for GLBTI applicants beyond activities that occur within the physical private sphere. They variously appealed to a “right to be who you are,” a “right to live life freely without persecution,” and a “right to dignity” to justify their decision that being forced to conceal one’s sexual orientation to avoid exogenous harm was still persecution. But they did not make the connection between the values that underlie these ideas and the scope of the right to privacy with its emphasis on personal autonomy. This failure is curious given that all members of the Court would have been very familiar with human rights discourse having adjudicated matters under the U.K. Human Rights Act against the backdrop of the European Convention on Human Rights.

From a moral perspective, the exhortations of the judges are quite defensible. Indeed, the rights to which they referred are all underpinned by ideas about autonomy, dignity, and freedom and echo much of literature on the philosophical justification for human rights.⁴⁵ But judges must also be cognizant of the legal regime within which they decide cases, and it would have been preferable for the members of the U.K. Supreme Court to justify their decision on the basis of recognized international human rights rather than an “autonomous

44. Hathaway & Pobjoy, *supra* note 1, at 358.

45. See generally JAMES GRIFFIN, *ON HUMAN RIGHTS* (2008) (arguing that the moral justification for human rights must be grounded in their capacity to advance the normative agency of an individual); Chris McCrudden, *Human Dignity and the Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008) (examining the idea of dignity as the foundation of human rights); Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFFAIRS 315 (2004) (linking human rights to his capabilities approach and his conception of freedom as not merely the absence of interference but as agency and the ability to exercise freedom).

style” of reasoning that led to their own rights creations.⁴⁶ The right to privacy is one such internationally recognized right that they failed to consider despite the fact that its normative content, with its emphasis on personal autonomy, is consistent with the very concerns that informed their decision. So too are the rights to equality and non-discrimination—rights that Hathaway and Pobjoy allude to but seem reluctant to develop in the context of persecution.⁴⁷

D. *Grounding Persecution in Equality and Non Discrimination*

As noted above, GLBTI advocates have, for some time, been urging a rejection of privacy norms as the basis for their protection under international human rights in preference for equality rights. But this submission was emphatically rejected by Justice Sachs in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 on two grounds. First, and consistent with the discussion about privacy in the preceding

46. RONALD DWORKIN, *LAW'S EMPIRE* 211 (1986) (warning that in a principles-based political community, individuals—including judges—are not free “to plant the flag of his [or her own moral] convictions over as large a domain of power or rules as possible”); Jeremy Waldron, *Judges as Moral Reasoners*, 7 INT'L J. CONST. L. 2, 6 (2009) (warning of the danger of judges adopting an autonomous style of reasoning).

47. In their criticism of what they perceive as Roger Haines' attempt to shoehorn a right to be visibly different into the right to privacy, Hathaway and Pobjoy indicate that it would be “more prudent to build on the structure of equality law in order to establish such a right.” Hathaway & Pobjoy, *supra* note 1, at 356. They then proclaim that the right to equality before the law under article 26 of the ICCPR could provide a powerful platform to support a right to be “out” or “visibly different.” *Id.* But they quickly retreat from this position for two reasons. First, they suggest that the Human Rights Committee tends to defer to state perceptions of reasonableness when assessing whether differential treatment is legitimate, and, second, they argue that there is an absence of normative consensus in favor of the equality norm extending to a right to be different. Both concerns are ill-founded. First, even if the HRC were guilty of excessive deference to states, would it not be excessively deferential of scholars to avoid critiquing the legitimacy of this approach and advancing an alternative approach? Indeed this is what Hathaway and Pobjoy are doing in their critique of the reasoning adopted by the U.K. Supreme Court. But their second concern is far more puzzling given that the U.K. Supreme Court has expressed one of the most compelling statements ever made by a judicial body about the right of gay men to be different from straight men but still enjoy equality. If ever there were a case to advance the idea that the right to equality affirms a right to be different, surely *HT and HJ* is the case.

section, the submission by GLBTI advocates “undervalue[d] the scope and significance of privacy rights” which were not “be restricted simply to sealing off from State control what happens in the bedroom.”⁴⁸ Second, as is well recognized within human rights law, “a single situation can give rise to multiple, overlapping and mutually reinforcing violations of constitutional rights.”⁴⁹ Thus, on the facts on the case, a law that allowed for discrimination against gays and lesbians violated not only the protection against equality under the South African Constitution but also the right to privacy.

Roger Haines QC employed this same reasoning in *RSAA No 74665/03* to support his finding that persecution existed notwithstanding the fact that the applicant’s voluntary concealment of his sexual orientation would avert any exogenous harm. According to Haines, this “self oppression” (a phrase which he borrowed from Justice Sachs) would amount to a violation of the right to privacy, the right to equality, and the right to non-discrimination conjointly under the ICCPR. And because these standards are fundamental human rights, it would provide the basis for a finding of persecution for the purposes of the Refugee Convention.⁵⁰

The logic of this reasoning is compelling. The rights to equality before the law and protection against discrimination are well recognized as fundamental human rights.⁵¹ Moreo-

48. *Nat’l Coal. for Gay and Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at paras. 111, 116 (1998) (S. Afr.).

49. *Id.* at para. 114.

50. *Refugee Appeal No. 74665/03* [2005] INLR 68, at paras. [106]–[115] (N.Z.).

51. See HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 115 (1945) (“The claim to equality before the law is in a substantial sense the most fundamental of the rights of man (sic). It occupies the first place in most written constitutions. It is the starting point of all other liberties.”). Similar sentiments are regularly expressed in courts and tribunals. See, e.g., U.N. Human Rights Comm., General Comment No. 18: Non-discrimination, ¶ 1, U.N. Doc. HRI/GEN/1/Rev.9 at 195 (Nov. 10, 1989) (“Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”); *Lifestyle Cmty. Ltd.* [2009] VCAT 1869 (Unreported, Bell J, P, Sept. 22, 2009, revised Sept. 30, 2009) 28 (Austl.) (stating that the “rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy”); *id.* at 68 (stating that section 8—the equality provision of the Victorian Human Rights Charter—is “the keystone in the protective arch of the Charter”).

ver, they complement a finding that “self oppression” constitutes a violation of the right to privacy. So whereas the right to privacy is concerned with protecting the personal autonomy of GLBTI refugee applicants, the focus on equality and non-discrimination is directed to ensuring that there is no less favorable treatment, direct or indirect, of persons who identify as GLBTI within a state relative to “straight” men and women. It is within this context that the comments of Lord Rodger have a particular resonance when he stated that:

[S]o far as the social group of gay people is concerned, the underlying rationale of the [Refugee] Convention is that they should be able to live freely and openly as gay men and lesbian women, without fearing that they may suffer harm . . . because they are gay or lesbian.⁵²

But for whatever reason he struggled to make the connection between the equality sentiments underlying these comments with the normative expression of such sentiments under the ICCPR. Had he done so, the legitimacy and persuasiveness of his decision would have been enhanced.

E. *Grounding Persecution in Cruel, Inhuman and Degrading Treatment*

The dissatisfaction of Hathaway and Pobjoy with the right to privacy as a basis for persecution forced them to turn to the prohibition against cruel, inhuman, and degrading treatment as a basis for finding a well-founded fear of persecution in cases where GLBTI refugee applicants conceal their sexual orientation to avoid what they term “exogenous harm.”⁵³ Their approach is understandable and to be welcomed. It shifts attention to the very real risk that GLBTI applicants will experience psychological harm—or “endogenous harm”⁵⁴ as they call it—because of their decision to conceal their sexual orientation to avoid exogenous harm.⁵⁵ It then links this harm to

52. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [65], [2011] 1 A.C. 596, 640 (Lord Rodger) (appeal taken from Eng. & Wales C.A.).

53. Hathaway & Pobjoy, *supra* note 1, at 359.

54. *Id.*

55. For example, with respect to the impact of discrimination on gay and lesbian adolescents, a recent study found that gay and lesbian students are

the widely accepted proposition that psychological harm can amount to cruel, inhuman, and degrading treatment provided the requisite level of harm is suffered.⁵⁶ Thus, there is merit in the idea that persecution in circumstances of “self oppression” for a GLBTI refugee applicant could be grounded in a violation of the prohibition against cruel, inhuman and degrading treatment under article 7 of the ICCPR. But would such an approach make the task harder than is necessary for GLBTI refugee applicants?

In the first instance, it would impose an evidentiary burden on GLBTI applicants to establish that the requisite level of harm for a finding of cruel, inhuman, and degrading treatment will be satisfied if they are returned. In contrast, reliance on the right to privacy (and indeed other rights such as equality and non-discrimination) merely requires an applicant to es-

twice as likely to have an eating disorder. S. Bryn Austin et al., *Sexual Orientation Disparities in Purging and Binge Eating From Early to Late Adolescence*, 45 J. ADOLESCENT HEALTH 238 (2009). Numerous studies have confirmed that they experience more bullying and sexual harassment than their heterosexual peers. Faye Mishna et al., “*Bullying of Lesbian and Gay Youth: A Qualitative Investigation*,” 39 *Brit. J. Soc. Work* 1598, 1599, 1602 (2009) (citing studies, and reporting that lesbian and gay youth face pervasive bullying). A major Australian study also indicates that these students are “more likely to self-harm, report a [sexually transmitted disease] and to use a range of legal and illegal drugs.” Lynne Hillier, Alina Turner & Anne Mitchell, *Writing Themselves In Again: 6 Years On—The 2nd National Report on the Sexuality, Health & Well-Being of Same Sex Attracted Young People in Australia*, at viii (Austl. Research Ctr. in Sex, Health & Soc’y, Monograph Series No. 50, 2005). Studies also have shown that the risk of suicide is much higher for same sex-attracted youth relative to heterosexual youth. S. Cochrane & V. Mays, *Lifetime Prevalence of Suicide Symptoms and Affective Disorders Among Men Reporting Same-Sex Sexual Partners*, 90 AM. J. PUB. HEALTH 573, 573 (2000) (citing studies showing greater suicide risk). Significantly, a common theme in these studies is that discrimination and social hostility towards gay and lesbian students undermines their well-being. See Hillier, Turner & Mitchell, *supra*, at 43–54 (finding that those who suffered from homophobic abuse were more likely to feel unsafe at school and at home and were more likely to self-harm and use drugs); Michael King et al. *A Systematic Review of Mental Disorder, Suicide and Deliberate Self Harm in Lesbian, Gay and Bisexual People*, 8 BMC PSYCHIATRY 70 (2008) (finding increased risk of suicide attempts, depression and anxiety disorders, and alcohol and substances dependence in lesbian, gay, and bisexual people); Ian Rivers & Nathalie Noret, *Well Being Among Same Sex and Opposite Sex Attracted Youth at School*, 37 SCH. PSYCHOL. REV. 174, 185 (2008) (finding gay and lesbian youth more likely to drink alcohol alone than their heterosexual peers).

56. Hathaway & Pobjoy, *supra* note 1, at 361–62.

establish that there has been an interference with this right, which cannot be justified. Thus, in practical terms, a violation of the right to privacy only requires applicants to establish that they concealed their sexual orientation to avoid exogenous harm.⁵⁷ For applicants to establish a violation of the right to cruel, inhuman and degrading treatment, they must establish both concealment *and* the requisite level of psychological suffering as a result of this concealment.

Second, their emphasis on the psychological harm caused by concealment is not accompanied by a detailed discussion as to the scope of the obligation imposed on a state to prevent such harm. The decision by a GLBTI applicant to conceal sexual orientation can be motivated by numerous factors—the threat of prosecution under criminal laws, fear of physical assaults by state agents or non-state actors, and fear of rejection or social isolation by family, friends, and peers. Most courts and commentators tend to suggest that voluntary concealment for purely social reasons is not persecution as it is not sufficiently serious and outside the scope of the State’s duty to protect against persecution. The members of the U.K. Supreme Court in *HJ and HT* certainly took this view.⁵⁸ But this approach is problematic for two reasons.

First, it makes assumptions about the relative seriousness of, for example, the threat of a bashing at the hands of state agents compared to the prospect of a lifetime of complete isolation from family, friends, or peers. Indeed, it tends to trivialize and overlook the often profound, impact of discrimination on the well being of GLBTI persons who suffer higher rates of

57. It is important to stress that the first evidentiary burden for a GLBTI applicant is to establish his or her sexual orientation, and studies have shown that in practice this can prove to be a significant challenge. *See, e.g.*, Jenni Millbank, *supra* note 3, at 391, 399 (“[I]n determinations on the basis of sexuality there will rarely be any ‘objective’ or external markers of the claimant’s membership of the group.”).

58. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [22], [2011] 1 A.C. 596, 625 (Lord Hope) (appeal taken from Eng. & Wales C.A.) (calling for a nuanced approach due to fear from that due to social pressure); *Id.* [82], [2011] 1 A.C. at 647–48 (Lord Rodger) (distinguishing an applicant living discretely in fear of persecution from one exercising discretion from social pressure); *Id.* [86], [100], [108], [2011] 1 A.C. at 648, 653, 655–56 (Lord Walker of Gestingthorpe, Lord Collins of Mapebury, and Sir Dyson) (agreeing with Lord Rodger’s reasoning).

suicide and mental illness relative to non-GLBTI persons.⁵⁹ Second, it also makes no attempt to implicate a state in either creating and/or condoning the social conditions within a society that tolerate or foster social isolation and discrimination against persons who identify as GLBTI. This is a complex issue and beyond the scope of this paper. But it warrants further attention if the protection against cruel, inhuman and degrading treatment is to be relied upon as a basis for persecution when GLBTI applicants are likely to suffer a real risk of psychological harm if they elect to conceal their sexual orientation in order to avoid other exogenous harms. It is not enough that the risk of such harm can be shown to exist. It must also be shown that the State had an obligation to protect the applicant against such harm *and* failed to do so for a finding of a violation of the prohibition against cruel, inhuman, and degrading treatment.

This discussion is not to discount the potential to rely on the prohibition against cruel, inhuman and degrading treatment as a basis for grounding a well-founded fear of persecution in circumstances of “self oppression” by a GLBTI refugee applicant. But there is a need to be wary of the complex and nuanced way in which this standard operates. Moreover, by adding this standard into the mix, there may be a risk of making the task for the GLBTI refugee applicant more complex than is necessary if standards such as privacy, non-discrimination, and equality can be used to establish a well-founded fear of persecution.⁶⁰

59. See, e.g., King et al., *supra* note 55, at 70 (finding it likely that social hostility, stigma and discrimination are at least part of the reason for the higher rates of psychological morbidity observed among GLBTI people).

60. There may be other rights within the corpus of international human rights that could also provide the basis for persecution under the Refugee Convention. For example, article 6 of the Convention on the Rights of the Child imposes an obligation on States to “ensure to the maximum extent possible the survival and development of the child.” The Committee on the Rights of the Child, the body responsible for implementation of the CRC, has explained that it “expects States to interpret ‘development’ in the broadest sense as an holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.” U.N. Comm. on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, ¶ 12, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

III. DETERMINING THE LIMITS OF PROTECTION—THE DIFFICULTY IN DRAWING THE LINE

The other major issue of concern to Hathaway and Pobjoy is the need to set limits on the “*for reasons of*” requirement under the definition of refugee with respect to the nexus between the persecution suffered by GLBTI applicants and their sexual orientation. For them, the U.K. Supreme Court failed to erect any boundaries on the scope of protected activities for GLBTI applicants. In their view, this not only undermines the credibility of the Supreme Court’s decision but also weakens its application in subsequent cases.⁶¹ In the Court’s defense, Lord Roger did allude in part to this dilemma when he raised the question of whether denial of the right to participate in a gay rights march would provide a basis for refugee status.⁶² But he rightly declined to entertain this issue, which was not relevant to the facts, and thus bypassed the broader issue as to the scope of protection for GLBTI applicants.

Dissatisfied with this approach, Hathaway and Pobjoy insist that it is necessary to set limits of the scope of the activities undertaken by a GLBTI refugee applicant that would fall within the “*for reasons of*” limb of the refugee definition. For them this question appears to be answered by using two techniques. First, recourse to what they describe as “the understandings of non-discrimination law, and international human rights law more generally”⁶³ and second, a test in which “the protected status of sexual orientation ought more generally to encompass any activity reasonably required to reveal or express an individual’s sexual identity.”⁶⁴ For reasons that will be outlined below, each of these approaches appears to be problematic. Indeed, a question arises as to whether their concern

61. Hathaway & Pobjoy, *supra* note 1, at 334. See Rosalind English, Case Commentary, *HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31 (07 July 2010)*, HUMAN RIGHTS & PUBLIC LAW UPDATE (9 July 2010) http://www.1cor.com/1315/?form_1155.replyids=1264 (expressing concern at the Supreme Court’s ruling for stretching the European Convention on Human Rights to accommodate the competing goals of recognizing additional rights at the core of individual identity and State Parties’ rights not to reform the prevailing levels of rights).

62. *HJ and HT*, [2010] UKSC 31, [22], [2011] 1 A.C. at 625 (Lord Rodger).

63. Hathaway & Pobjoy, *supra* note 1, at 379.

64. *Id.* at 382.

to address what they perceive as the over inclusiveness of the U.K. Supreme Court's approach to the question of what activities are protected, may actually be misplaced. There is also a risk that the second limb of their approach amounts to a modified duty to be discreet—the kind of duty that the U.K. Supreme Court had banished and for which Hathaway and Pobjoy had offered their applause in the early part of their paper.

A. *The Limits in Using International Law to Determine the Limits*

Hathaway and Pobjoy are motivated to ensure that there are limits to the activities that will satisfy the “for reasons of” inquiry when assessing refugee claims based on sexual orientation. But they are also concerned to ensure that the determination of these limits are not subject to the whims and subjective preferences of a decision maker. Thus, their appeal to international law can be seen as an attempt to use accepted standards to inform the decision-making process. It is an understandable response because, like the issue of persecution, it seeks to pursue external systems of coherence or harmonization within the broader system of international law. It is also consistent with the principle of global context sensitivity in the sense that receiving states are likely to disengage with international refugee law if they are going to be held responsible for a failure to protect against persecution in circumstances where international human rights law does not impose an obligation on the state of origin to address the activity that is alleged to constitute the persecution.⁶⁵ By way of example, Hathaway and Pobjoy cite the denial of same sex marriage and same sex adoption as examples of practices which, although they might cause severe psychological harm to a GLBTI refugee applicant, would not warrant refugee status because there is no right to same sex marriage or adoption under international law.⁶⁶ As such, the risk of psychological harm being suffered by a gay

65. Tobin, *supra* note 25, at 43–48 (discussing the reality that states may “disengage from the interpretive dialogue on the scope of a right if they perceive that the interpretation of that right is discordant with their expectations”).

66. Hathaway & Pobjoy, *supra* note 1, at 381.

man because he would be denied the right to adopt or marry could not be said to be “for reasons of his sexual orientation.”

The basic premise underlying their argument is attractive. It would, after all, make no sense to make a finding of refugee status in circumstances where the state of origin had been acting consistently with its obligations under international human rights law. But the approach they adopt conceals some fundamental dilemmas, which require some further consideration. First, they are effectively using an inquiry about whether there is a violation of the rights to equality and non-discrimination to determine whether the “for reasons of” requirement is satisfied. This is problematic because it seeks to hive off and quarantine the rights to equality and non-discrimination from the persecution assessment, despite the fact that their test for persecution is based on an assessment as to the existence of sustained and systemic human rights violations. Moreover, in GLBTI refugee cases, a violation of the rights to non-discrimination and equality will facilitate the violation of other rights such as privacy within the state of origin. This point was stressed by Justice Sachs in *National Coalition for Gay and Lesbian Equality v. Minister of Justice* when he declared that “it would be as artificial in law as it would be in life to treat the categories as alternative rather than interactive.”⁶⁷

The implications of Hathaway and Pobjoy’s approach can be illustrated by considering their example of a prohibition on gay marriage, which is presently tolerated under international human rights law.⁶⁸ They would presumably argue that the risk of psychological distress being caused by such a ban for a gay man might reach the threshold for cruel and inhuman treatment, but it would not satisfy the “for reasons of” nexus because international law does not demand equality for GLBTI persons with respect to marriage. But when viewed

67. *Nat’l Coal. for Gay and Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at para. [114] (1998) (S. Afr.); see also *id.* at [112] (“[E]quality and privacy cannot be separated, because they are both violated simultaneously by anti-sodomy laws.”).

68. See *Joslin v. New Zealand*, Commc’n No. 902/1999, ¶ 8.3, U.N. Doc. CCPR/C/75/D/902/1999 (July 17, 2002) (Human Rights Comm.) (finding that refusal to legalize same-sex marriage did not violate the ICCPR); *Schalk v. Austria*, App. No. 30141/04, Eur. Ct. H.R. (2010) (holding that refusal to recognize same-sex marriage did not violate the Convention for the Protection of Human Rights and Fundamental Freedoms).

from the perspective of international human rights law, although the prohibition may cause psychological harm, it would not be cruel, inhuman, or degrading discrimination. This is because the failure to allow for gay marriages is not a violation of international law and there is no obligation on a state to protect a person against the harm that is incidental to a lawful action. Thus, given the absence of a human rights violation, there would be no well-founded fear of being persecuted and no requirement to even consider the “for reasons” nexus inquiry.

The second dilemma associated with their approach is the question of who decides when a state will be under an obligation to provide protection in relation to a particular activity under international human rights law. Human rights standards are in a constant state of flux. To take their other example of same-sex adoption, regional and domestic courts are increasingly recognizing that denial of same-sex adoption is contrary to a child’s best interests (a right which is explicitly recognized under international law) *and* that also violates the non-discrimination and equality rights of same-sex applicants. Moreover, a strong argument can be made that same-sex adoption is consistent with the provisions of international law.⁶⁹ But the Committee on the Rights of the Child has yet to specifically address this issue. In such circumstances, how should a domestic refugee body determine whether access to same-sex adoption must be permitted within a state? Does it have to wait until the CRC Committee makes a pronouncement on this issue or must it be expressly addressed by states in a protocol to the CRC? Or can a domestic court simply draw upon interpretative developments in various forums at the international, regional, and comparative domestic level with respect to the status of same sex adoption under international law?

The third dilemma is, assuming that a determination can be made as to whether an activity is protected under international human rights law, will every failure of a state to protect that activity (or every violation of a human right) be a basis for

69. See, e.g., John Tobin & Ruth McNair, *Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States To Allow Gay and Lesbian Couples To Adopt?* 23 INT’L J. OF L. POL’Y & FAM. 110, 112 (2009) (rejecting the argument that international law grants children the right to be adopted by heterosexual couples).

refugee status. In other words, if international law supports adoption by same sex parents, could a gay couple, for example, seek refugee status on the basis that the law in their state prohibits them from adopting a child? Such laws violate the rights to non-discrimination, equality and privacy and could therefore contribute to a finding of a well-founded fear of persecution. (They would also satisfy the “for reasons of” inquiry under Hathaway and Pobjoy’s model). But would the impact of the violation of these rights in such circumstances be sufficiently serious or severe so as to constitute persecution? There is likely to be a strong inclination in courts to say no, but on what basis is this inclination formed? For the sake of argument, is it an underlying assumption that having children is not as important as, for example, avoiding the threat of criminal prosecution and detention because you are gay? Or that it is not “natural” for gay men to have children and thus outside the scope of the immutable characteristics of what it means to be a gay man? Or that the emotional consequences of not having a child are not as significant for men as they are for women? And would, or indeed should, the answer change if there were *evidence* that a gay man was experiencing significant psychological harm and distress because of his inability to have a child with his partner (remembering here that a violation of the prohibition against cruel and inhuman treatment will require *evidence* that the applicant has experienced the requisite level of suffering)?

This leads to the final dilemma associated with seeking to impose limits on the scope of protected activities that are considered immutable to GLBTI applicants. If it is accepted that some violations of human rights will not be sufficient to establish the requisite level of severity for a finding of persecution, does this mean that GLBTI applicants must tolerate a reasonable level of human rights abuses because they are GLBTI?⁷⁰ The U.K. Supreme Court in *HJ and HT* emphatically rejected the principle that GLBTI applicants should tolerate a reason-

70. I have assumed here that there is a violation of, for example, the right to privacy that will be accompanied by a violation of the prohibition against non-discrimination where the protected attribute is sexual orientation. Thus the other requirement to satisfy the definition of a refugee under the Refugee Convention, that the persecution must be “for reasons of” membership of a particular social group, will be satisfied. Refugee Convention, *supra* note 11, art. 1, ¶ (A)(2).

ble level of abuse within their state of origin. But its members also suggested that not every violation of a human right warrants refugee status.⁷¹ If this is the case, it must necessarily follow by implication that GLBTI applicants must tolerate violations of their human rights that are not considered to be sufficiently serious by the courts. And if so, does this not effectively equate to a principle of reasonable tolerance? Perhaps this dilemma is inevitable if the view is taken that the Refugee Convention was not designed to provide for the protection of all human rights. Certainly, within the refugee law interpretative community, the role of the Refugee Convention is generally seen as being restricted to acting as a “surrogate” state for a GLBTI applicant in circumstances where the state of origin has failed in its *duty to provide protection*.⁷² At first instance, this principle appears persuasive and coherent within refugee law but as soon as this discourse starts to draw on human rights law to resolve its interpretative dilemmas, it begins to look unstable. This is because human rights law imposes an obligation on states to protect *all the rights* under the treaties to which they are a party and makes no distinction between serious and non-serious human rights violations.⁷³ I will return to this issue later.

B. *Activities Reasonably Required to Reveal or Express Sexual Identity—a Harmful or Helpful Test?*

The second approach advanced by Hathaway and Pobjoy to determine the scope of activities protected under the status of sexual orientation is to assess whether the activity in question is reasonably required to reveal or express an individual’s

71. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [14]–[15], [2011] 1 A.C. 596, 622 (Lord Hope) (appeal taken from Eng. & Wales C.A.).

72. *Id.* [53], [2010] 1 A.C. at 637–38 (Lord Rodger).

73. Indeed this gives rise to another dilemma, which is outside the scope of this paper. Under international human rights law, a state party to a human rights treaty must take measures to protect the rights of all persons within the jurisdiction of a state party without discrimination. This protection extends to GLBTI refugee applicants within a state. Thus there is an issue as to how refugee law can maintain that the position that the Refugee Convention is not to protect the human rights of a refugee applicant when, at the same time, international human rights law demands that a state must provide equal protection unless it can justify differential treatment of such persons as being necessary to achieve a legitimate and pressing social aim.

sexual identity. It is a test that is somewhat confusing on a number of levels. First, it is sandwiched between paragraphs that appeal to the accepted standards of international law as the means by which to determine the limits of protected activities. But the test they offer is unknown to human rights law. It may well be that this test could be derived from the jurisprudence on discrimination law concerning sexual orientation but Hathaway and Pobjoy do not provide such an explanation. Second, after appealing to the need for reliance on accepted standards, they then concede that “there can be no single universally acceptable definition” of the activities required to reveal sexual identity and advocate a “culturally sensitive and inclusive approach.”⁷⁴ A question therefore arises as to whether such an approach runs contrary to their previously stated insistence that accepted standards of international human rights law must inform the scope of protected activities. Thus, it is not entirely clear how their test would offer the certainty or clarity they are seeking. Indeed, if adopted by courts, there is the risk that it could potentially provide a vehicle for the subjective preferences and whims of decision makers to seep back into the assessment of those activities reasonably required to reveal sexual orientation.⁷⁵

Ultimately the real agenda of Hathaway and Pobjoy is to restrict what they perceive as the over inclusiveness of the approach adopted by the U.K. Supreme Court to the scope of protected activities based on an applicant’s sexual orientation.⁷⁶ This is clear when they suggest that “attending Kylie concerts, drinking multicolored cocktails and engaging in ‘boy talk’—all activities that were affirmed by Lord Roger—would fall outside their test.”⁷⁷ But have Hathaway and Pobjoy misin-

74. Hathaway & Pobjoy, *supra* note 1, at 382.

75. I should point out that Jamie Gardiner, a longtime advocate of GLBTI equality rights, once impressed on me the need to use the term “sexual orientation” in preference to “sexual identity” because the identity of a person ought not be defined by their sexual orientation. Thus I have substituted the phrase sexual orientation in preference to Hathaway and Pobjoy’s reliance on sexual identity.

76. Hathaway & Pobjoy, *supra* note 1, at 335–36 (“[The U.K. Supreme Court’s reasoning] is too liberal, in that it fails to interrogate the extant scope of ‘sexual orientation’ as a protected interest to determine when there is a duty to protect on the basis of the associated activities rather than simply as a function of identity per se.”).

77. *Id.* at 382.

terpreted what the U.K. Supreme Court was doing when it proclaimed the right of a gay man to attend Kylie concerts and drink cocktails?

The Court was not saying that exclusion from these activities alone would necessarily provide the basis for a well-founded fear of persecution for reasons of the applicant's sexual orientation. Lord Roger assiduously avoided this issue because the facts of the case did not require that it be addressed. Instead his pronouncement, and those of the other members of the Court, could simply be seen as offering a generous interpretation as to the *scope* of the rights of a gay man. The consequence of this approach is to shift the onus back on a state to justify any threat of an interference with any aspect of these rights. True, the members of the court did not articulate their views in terms of any recognized human rights but they could easily have done so had they developed their analysis a little further by engaging more rigorously with internationally recognized human rights such as privacy and equality. This generous approach to the interpretation of the scope of a human right is actually consistent with the approach increasingly advocated by bodies adjudicating human rights matters.⁷⁸ It demands that, after outlining the broad scope of a right, the real issue will become whether any interference or limitation with right in question can be justified.

Hathaway and Pobjoy, however, appear to be collapsing the issue of interference with a human right and justification of the interference into the same question. This sometimes occurs in cases concerning religion or political opinion where a court will find that the activity in question is not within the scope of the right. Indeed Hathaway and Pobjoy refer to these

78. See e.g., U.N. Human Rights Comm., General Comment No. 22: The Right To Freedom of Thought, Conscience and Religion (Art. 18), ¶ 2, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993) ("The terms 'belief' and 'religion' are to be broadly construed."); U.N. Human Rights Comm., General Comment No. 6: The Right to Life (Art. 6), ¶ 1, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) at 176 (Apr. 30, 1982) ("It is a right which should not be interpreted narrowly."). See also *Re Application Under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (Unreported, Warren CJ, Sept. 7, 2009) 25 (Austl.) ("[H]uman rights should be interpreted in the broadest possible way."); *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646 (Unreported, Bell J, P, Apr. 23, 2009, revised May 21, 2009) 31 (Austl.) ("The scope of the human right is identified broadly and not legalistically, focusing on its purpose and the interests it protects.").

cases as the basis of their concern about the potential effects of the perceived over inclusiveness of the Supreme Court's approach.⁷⁹ However, there are two problems with their use of these cases to illustrate their concerns. First, the rights they refer to, which are associated with freedom of political opinion and religious expression, are not without limits, and if the limitation in question is reasonable, there will be no violation of the right. Thus, there is no persecution, which means that there is no need to consider whether the nexus requirement is satisfied. Second, the types of cases to which they refer often focus on restricting the scope of the right when they should focus on providing a generous interpretation as to its scope and then assessing whether the limitation upon the right can be justified.

In a similar way, Hathaway and Pobjoy appear to seeking to constrain the scope of protected activities that fall within the scope of the social group "sexual orientation" by excluding those activities that they consider are not reasonably necessary to disclose a GLBTI applicant's sexual orientation. The effect of such an approach places an additional and arguably unnecessary evidentiary burden on a GLBTI applicant who, under their test, must not only establish a well-founded fear of persecution for reasons of their sexual orientation, but also that the activity that creates the risk of the persecution is for reasons that are reasonably required to reveal or express their sexual orientation. Thus, the question must be asked—would it be possible to accommodate Hathaway and Pobjoy's desire to exclude GLBTI applicants from claiming refugee status because they are unable to participate in what they describe as relatively trivial matters,⁸⁰ like attending a Kylie concert or drinking cocktails, via a much simpler line of inquiry (assuming one considered this to be a desirable goal)?

Let's take this example. If *all* men were to be excluded from attending Kylie concerts and drinking cocktails (it must be added that many straight men no doubt enjoy these activities) or indeed faced a risk of being bashed with impunity if they did so, there would be a violation of various human rights. And assuming for the purposes of this hypothetical that the violation was sufficient to amount to a well-founded

79. Hathaway & Pobjoy, *supra* note 1, at 374–82.

80. *Id.* at 335.

fear of persecution, it would not, however, be for reasons of sexual orientation because all men faced the same risk. Thus, a gay applicant would be unsuccessful in his claim for refugee status. But if the risk only applied to gay men, the persecution would be for reasons of sexual orientation. Fanciful as this scenario might be, it serves to illustrate that perhaps the key issue in determining whether the well-founded fear of persecution is for reasons of a person's sexual orientation will be whether there is the risk of differential treatment on the basis of sexual orientation (as defined and identified by the potential persecutor) that cannot be reasonably justified. So rather than looking at activities that are reasonably necessary to reveal an applicant's sexual orientation—as Hathaway and Pobjoy would have courts do despite the fact that the potential persecutors may use activities that fall outside their test to identify a gay man—an easier approach to the nexus requirement may simply be to undertake a comparison of the treatment of GLBTI persons relative to straight men and women within the state of origin. Where there is well-founded fear that a differential treatment exists that cannot be justified under international law, the nexus question will be satisfied.

In response to this position, Hathaway and Pobjoy might seek to explain that their concern is that,

Where risk accrues only by virtue of an applicant having engaged in an activity no more than is peripherally associated with sexual identity—including where risk arises from an imputation of sexual identity derived solely from having engaged in such activity—it cannot be said to be a risk that arises “for reasons of sexual orientation.”⁸¹

But this proposition, at least to a human rights academic, is somewhat confusing and potentially quite troubling. First, to what risk are they referring and what is the significance of this risk to the refugee status determination? Are they saying that the risk of being outed will lead to a risk of what they would call exogenous harm? Or are they saying that the risk is the risk of endogenous harm associated with the self-concealment that is manifest by the reluctance of a gay man to attend a Kylie concert or sip cocktails for fear of being outed? In which

81. *Id.* at 382.

case it seems difficult, if not impossible, to conceive of a scenario where a claim for refugee status by a gay man would be based on the example that Hathaway and Pobjoy use. Or are they saying that a gay man who attends a Kylie concert, in the knowledge that there is a risk that his attendance will lead to exogenous harm, should refrain from doing so because this activity is not within the scope of what is reasonably required to reveal his sexual orientation?

This last scenario is the most troubling interpretation of Hathaway and Pobjoy's test. It suggests that attendance at a particular type of concert would not be a protected activity. So even though the man may be exposed to the real risk of exogenous harm for attending the concert because his attendance is likely to out him, this may constitute a well-founded fear of persecution, but it *would not* be "for reasons of" his sexual orientation. This is because the activity that precipitated the risk would be outside those activities that Hathaway and Pobjoy consider necessary to reveal a gay man's sexual orientation.

It is worth reflecting on the consequences of this approach. It would mean that a gay man could have confidence that if cohabiting with his partner, holding his hand or kissing him in public were to give rise to the risk of exogenous harm, he would satisfy the "for reasons of" nexus inquiry. This is because all of these activities would be considered by Hathaway and Pobjoy as reasonably required to reveal his sexual orientation. But if he went to see Kylie and sipped a cocktail, which would create a real risk that he would be outed and suffer the same kind of exogenous harm because of assumptions about his sexual orientation, he would have no claim to refugee status.

If this analysis of their test is correct, then Hathaway and Pobjoy are effectively saying that GLBTI refugee applicants have a duty to refrain from undertaking activities that are unnecessary to reveal their sexual orientation. This is despite the fact that such activities may be lawful under international human rights law (like seeing Kylie or sipping a cocktail) and despite the fact that involvement in these activities will be associated with a well-founded fear of persecution. As a consequence, their analysis resembles a modified version of the duty to be discreet that was so emphatically rejected by the U.K. Supreme Court. True, the scope of their duty may be less demanding—the original duty to be discreet required GLBTI ap-

plicants to refrain from *any* activity that would disclose their sexual orientation so as to avoid the risk of persecution. In contrast, Hathaway and Pobjoy are prepared to allow GLBTI applicants to participate in activities that are reasonably necessary to reveal their sexual orientation. But if an activity falls outside this test, even though it may be perfectly permissible under international human rights law, the effect of Hathaway and Pobjoy's test is to require an applicant to refrain from the activity so as to avoid the risk of persecution that would arise because of participation in the activity.⁸²

If this is how their test is intended to operate then it is deeply troubling. Not only does it seek to unravel, albeit partially, the work of the U.K. Supreme Court in rejecting the duty to be discreet, it also opens up the potential for decision makers to make highly subjective decisions about what activities are reasonably required to reveal sexual orientation. The irony is that this is the very concern that Hathaway and Pobjoy were seeking to overcome. In fairness to Hathaway and Pobjoy, it may be that they need to further clarify how their test is to operate in practice. It does, after all, only receive one paragraph in a paper of some sixty pages, which seems insufficient given the significance of the issues at stake.

But from the perspective of this analysis at least, there is a sense that they have made the task of assessing the claims of GLBTI refugee applicants much harder than is necessary. Indeed, there is an inclination to suggest that it would be far easier and more appropriate to address their desire to set limits on the protection afforded by the Refugee Convention within the persecution stage of the inquiry. In which case the real dilemma is not with the nexus inquiry, but whether the risk to gay men associated with attending Kylie concerts and drinking cocktails or indeed undertaking any of the other activities that Lord Roger said gay men were entitled to enjoy, would ever amount to *persecution*. Hathaway and Pobjoy would not be alone in their concern to set limits on the scope of protection to be accorded to gay men under the Refugee Con-

82. The potential for such a scenario under this test is difficult to reconcile with the first technique advanced by Hathaway and Pobjoy to set limits on the scope of protected activities, namely, an appeal to the "understandings of non-discrimination law, and international human rights law more generally." See *id.* at 379.

vention. This is because, although the denial of the right to participate in such activities may represent a violation of a human right, the orthodox position within refugee law is that persecution must be evidenced by a *serious* human rights violation.

C. *Restating the Dilemma and the Search for a Solution*

Within refugee law, a serious human rights violation is invariably considered to be one that represents a violation of a core, fundamental or basic human right. But these tests do not appear to be sufficient to impose limits on the type of activity protected given that any violation of the right to equality and non-discrimination is arguably a violation of a core, fundamental or basic human right. Refugee lawyers have been aware of this dilemma for some time and academics and courts have sought to construct ways to rank the seriousness of a human rights violation for the purposes of establishing persecution. Hathaway originally enlisted the non-derogable rights under the ICCPR to justify his list of core human rights standards. But in the twenty years since he formulated this test, there have been rapid developments in human rights law and few scholars would be prepared to argue that the right to non-discrimination and equality, or indeed the rights to health, education and housing, are less important than the right not to be imprisoned for failure to pay a civil debt, which is one of the non-derogable rights under the ICCPR.

In his attempt to make a contribution to the debate, Haines in *RSAA No 74665/03* became entwined in a discussion about the core of human rights standards and the need to assess whether the activity in question was at the core of the right in question or its margins.⁸³ If it were only at the margins, the violation of the right would not constitute persecution.⁸⁴ But his analysis raised more questions than answers (principally, what is the test to determine whether an activity lies at the core of the margins of a human right?) and failed to engage with any of the literature within human rights discourse that deals with the deeply contested idea of core human rights stan-

83. *Refugee Appeal No. 74665/03* [2005] INLR 68, at paras [82], [99]–[103] (N.Z.).

84. *Id.*

dards.⁸⁵ So while Haines' inclination to preclude some human rights violations from grounding persecution seems justified, his methodology was unconvincing.

So where does this leave us? It seems reasonably non-contentious to conclude that persecution will invariably involve a human rights violation⁸⁶ (of potentially several discrete rights) but a human rights violation will not always amount to persecution. Attempts to classify rights as core, fundamental, or basic human rights, as the basis for determining which violations of human rights will be sufficiently serious to amount to persecution, are also problematic. As are attempts to link the seriousness of the violation of a human right to an assessment of whether the activity against which the state fails to provide protection lies at the core or the margins of a right. Human rights tend to lack the precision and determinacy being sought by refugee lawyers and academics when they draw upon them to resolve the interpretative dilemmas that arise under the Refugee Convention. So does this raise the prospect that their role is at best complementary rather than determinative within refugee law, or would such approach undervalue the role of human rights in the refugee context?

D. *Using Human Rights Law to Shift the Narrative of Persecution*

If persecution involves serious harm (whether this is defined as systemic, sustained, or substantially prejudicial) and a failure of state protection, we need a tool to determine the requisite level of harm *and* the scope of a state's obligation to provide protection against this risk of harm. Historically, harm was principally conceived of as physical harm as this was consistent with the narrative of persecution within the "general intellectual environment" in which judges and tribunal members made refugee status determinations.⁸⁷ Within this

85. See e.g., Katharine Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008) (discussing the concept of a minimum core which attempts to establish minimum legal content for economic and social rights claims).

86. See *supra* note 19 and accompanying text.

87. See DWORKIN, *supra* note 46, at 88 (explaining that the process of adjudication by a judge is informed not simply by the application of rules and principles but also the "general intellectual environment" of the broader community in which the judge is making a decision. As he explains, "Judges think about law . . . within society, not apart from it").

environment, death and torture were readily visible and objective indicators of a failure of state protection for the groups deemed worthy of protection under the Refugee Convention. In contrast, the idea that psychological harm caused by “self oppression” by a GLBTI person could be attributed to a failure of state protection was outside this accepted narrative.⁸⁸ This is despite the fact that psychological harm, like physical harm, can be measured in terms of its impact on an individual.

It is at this juncture in the analysis that Hathaway and Pobjoy’s recourse to the prohibition on cruel, inhuman, and degrading treatment is perhaps most salient. It is now widely accepted within the human rights interpretative community that a violation of this standard can involve physical *and/or* mental suffering. Thus, the validation of psychological harm within human rights discourse can be used to justify a shift and similar validation within the narrative of persecution under refugee law with respect to the harm that must be experienced by a GLBTI refugee applicant. In other words, persecution under refugee law need not be confined to the physical harm associated with the threat of criminal prosecution and physical assaults for persons who identify as GLBTI. It can also extend to the psychological harm that is caused as a result of such persons taking measures to conceal their sexual orientation to avoid exogenous harm. Significantly, this psychological harm, like physical harm, can, at least in theory, be objectively measured against accepted mental health indicators. The problem still remains, of course, as to how to determine when the level of psychological harm will be sufficiently serious so as to amount to persecution. For Hathaway and Pobjoy the answer may be: when the suffering reaches the threshold for cruel, inhuman, and degrading treatment. Such an approach has a strong appeal. This prohibition is, after all, a non-derogable norm under the ICCPR, which on any assessment would satisfy the test of being a core, fundamental, or basic right. However, upon a more careful inspection, the expanding scope of the activities prohibited under this norm may remain a cause for

88. See Toni A.M. Johnson, *On Silence, Sexuality and Skeletons: Reconceptualising Narrative in Asylum Hearings*, 20 SOC. & LEGAL STUD. 57, 62–63 (2011) (discussing the way in which a claim for persecution must fit within a Western judicial conceptualization of a persecuted LGBT identity).

concern when it comes to setting limits on the scope of protection under the Refugee Convention.

IV. CONCLUSION: THE NEED TO CONTINUE THE DISCUSSION

So do queer cases make bad law? Coming from strong supporters of progressive judicial approaches in this area, this suggestion seems out of place given the statements by members of the U.K. Supreme Court that gay men have “the right to be who they are”; the “right to live openly as a gay man” and the “right to dignity.” Surely anyone who supports equality rights for persons who identify as GLBTI could only have cause for celebration at such comments emanating from one of the world’s most influential courts? But Hathaway and Pobjoy are entitled to call for a pause in the celebrations. Slogans that may be fitting at a GLBTI equality rally are not necessarily appropriate in the context of determining an application for refugee status under the Refugee Convention. And this is their core concern. For them, the members of the U.K. Supreme Court failed to provide a persuasive justification of why “self oppression” by a GLBTI refugee applicant will amount to a well-founded fear of persecution. Nor in their view did the Court fulfill its responsibility to place any limitations on the scope of the activities that may be protected under norms that are as potentially all-inclusive as the “right to be who you are” or the “right to live openly as a gay man.”

Credit is therefore due to Hathaway and Pobjoy for seeking to develop a stronger jurisprudential foundation on which to base claims for refugee status for GLBTI applicants. And credit is also due to the Court for its determination to dismiss the “manifest nonsense”⁸⁹ and “rampant homophobic teaching”⁹⁰ that for too long condemned GLBTI persons to a life of “self oppression.” But it is not clear that either of these two approaches, especially when viewed from the perspective of international human rights law, is sufficiently compelling as a basis for deciding future cases. With respect to the issue of persecution, Hathaway and Pobjoy are too ready to dismiss, for reasons that are not persuasive, a threat to the right to privacy

89. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31 [2], [2011] 1 A.C. 596, 618 (Lord Hope) (appeal taken from Eng. & Wales C.A.).

90. *Id.*

as a potential basis for a well-founded fear of persecution. And the members of the Supreme Court were unable to link their concerns about the right to live life as a gay man to the principle of personal autonomy that underpins the right to privacy. Similarly, the Supreme Court also failed to tie its insistence that a gay man be able to live as freely as a straight man to the right to equality. In contrast, Hathaway and Pobjoy recognize that a threat to the principle of equality could provide a foundation for a well-founded fear of persecution, but dismiss this approach on the assumption that there is no normative consensus that the right to equality means a right to be different. Such reticence is curious given the commitment made by the U.K. Supreme Court to declare that a gay man should be able to live as freely as a straight man.

Instead, Hathaway and Pobjoy raise the prospect that the risk of endogenous harm that may be caused by a life of self-oppression for a GLBTI refugee applicant could be grounded in the risk of a violation to the prohibition against cruel, inhuman, and degrading treatment. Although there are a number of issues with this approach that require further consideration, it seems fair to say that their approach has the potential to contribute to a shift in the narrative of persecution within refugee law to include the risk of psychological harm in addition to the risk of physical harm that has for so long dominated the understanding of what amounts to persecution.

In relation to the other core issue at the heart of their paper—the limits of protection for GLBTI applicants—I have no quibble with their desire to set limits on the protection that can be afforded under the Refugee Convention. But they tend to use the nexus requirement—“for reasons of sexual orientation”—as a gatekeeper to protection in scenarios when an applicant will have already failed at the persecution stage of the inquiry. And they advance a test—activities reasonably required to reveal sexual orientation—which appears to represent a return, albeit in a slightly modified form, to the duty of a GLBTI applicant to be discreet, a duty that was so effectively discredited by the U.K. Supreme Court. Thus, this Article suggests an alternative nexus test which would be to inquire whether there is the risk of differential treatment on the basis of sexual orientation (as defined and identified by the potential persecutor) that cannot be reasonably justified.

Moreover, the other stage of the inquiry where the level of protection accorded under the Refugee Convention can be restricted is the determination of a well-founded fear of persecution. The dilemma here, of course, is that within refugee law it is accepted that a serious human rights violation will amount to persecution, but there is no effective test to determine when a human rights violation will be serious. This Article does not attempt to draw such a line. Instead, it seeks to highlight some of the issues associated with the tests that have been developed within refugee law for this purpose in the hope that it will stimulate further discussion among the human rights and refugee law interpretative communities.

Importantly, this discussion can now take place within a context where the lives of GLBTI persons are no longer invisible or concealed but celebrated, seen and treated with the same respect and dignity accorded to any straight person. The fact that this is possible is due in no small part to the decisions of the U.K. Supreme Court, along with those of a range of other courts and tribunals that have increasingly recognized the rights of GLBTI persons. Scholars such as Hathaway and Pobjoy have also contributed importantly by seeking to deepen the intellectual foundations upon which the work of the courts and tribunals can be developed in the future. Ultimately, however, most of the credit belongs to those GLBTI applicants and their advocates who have had the courage to stand up and claim rights in legal systems that have not always recognized their sexual orientation, let alone been receptive to the idea that their “self oppression” could provide the basis for a finding of persecution.