

A FRIENDLY ACT OF SOCIO-CULTURAL CONTESTATION: ASYLUM AND THE BIG CULTURAL DIVIDE

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Few areas of the law lend themselves to political contestation more than refugee law. The reason is simple: implicit in any grant of asylum is a censure of the country of origin of the refugee. Refugee law tries to exorcise the potential for political conflict by characterizing the grant of asylum as a “humanitarian” act.¹ It is a useful trick when it comes to inter-state political conflict; by obliging states *not* to regard foreign asylum practice as unfriendly, it limits the use they can make of this practice in open exchanges with other states.

But what about cultural contestation? Can it also be so easily defused? To begin with, it should be clear that refugee law does not pertain exclusively to the political sphere. Religious belief, as ancient a ground for asylum as political opinion, straddles the divide between the political and cultural/social spheres. Furthermore, the open texture of the refugee definition, enriched and deepened through the link with human rights, has allowed changes in the structure of the family and personal identity to find recognition in the practice of some states.

When refugee status is granted in relation to forms of persecution that have a broader socio-cultural dimension, the censure that is implicit in the grant of asylum also acquires a social-cultural significance. The recognition of a political dissident as a refugee may expose the wrongdoing of a government, but the grant of refugee status to women fleeing gender-based persecution or gay men escaping homophobia will often

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1. For example, article 2(2) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa provides, “The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.” Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 2, ¶ 2, Sept. 10, 1969, 1001 U.N.T.S. 45.

also expose the wrongdoing of a society. Indeed, it is rare to find a society that is more progressive than its government when it comes to questions of gender equality and sexual orientation. In the vast majority of countries where persecution on these grounds exists, it takes place with the approval or, at best, the acquiescence of the majority of the population. In these forms of persecution, a persecuting state and a persecuting society often coexist and reinforce each other.²

The possibility for refugee law to provide the ideal terrain for a clash of social and cultural values therefore exists; and there is little the law can do about it. Indeed, the juridical characterization of asylum as humanitarian, peaceful, or friendly does not address the perception that a cultural divide exists, or the notion that certain interpretations of refugee law constitute an attempt of some societies to impose their values on others.

The importance of these questions is confirmed by the decision of the U.K. Supreme Court in *HJ (Iran) and HT (Came-*

2. The historian R. I. Moore used the expression “persecuting society” in relation to the certain developments in eighteenth century Europe. His thesis, which has spawned an intense debate among medievalists, is “that in the twelfth and thirteenth centuries—well into the second half of the middle ages as they are commonly defined—Europe *became* a persecuting society, *and that it has remained one.*” R. I. MOORE, *THE FORMATION OF A PERSECUTING SOCIETY* 190 (2d ed. 2007). The groups that were singled out for persecution were heretics, Jews, lepers and male homosexuals. The persecution of these groups “cannot be considered or explained independently of one another, as they almost always had been hitherto.” *Id.* at 144. Furthermore, it generated “a rhetoric and a set of assumptions and procedures which made persecution both more likely to happen than it would have been otherwise, and when it happened likely to be more severe and sustained for longer.” *Id.* at 145. This thesis has enjoyed great popularity, not in small part due to its seductively Foucaultian appeal, but is dismissed by most medievalists, as Moore’s own “Bibliographic Excursus,” added to the second edition of his book, indicates. *Id.* at 172–96. For examples of the many histories that have instead credited the Middle Ages with a series of fundamental intellectual breakthroughs in the history of the West (and of liberalism), see 1 HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983) (describing the roots and development of secular legalism); 1 & 2 R. W. SOUTHERN, *SCHOLASTIC HUMANISM AND THE UNIFICATION OF EUROPE* (1995 & 2001) (examining the intellectual enterprise of scholars from circa 1090 to 1212 to create a complete body of knowledge); BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW, AND CHURCH LAW* (1997) (exploring the relationship between the law and religion between 1150 and 1625).

roon) v. Secretary of State for the Home Department.³ The cultural clash is mentioned at the outset in one of the main judgments in the case, Lord Hope's. It also provides the opening to James Hathaway's and Jason Pobjoy's article. To unpack the significance of the cultural question, let us first consider how the Supreme Court addresses it.

Lord Hope begins with an interesting take on the political history of homosexuality. He says, rightly, that "[p]ersecution for reasons of homosexuality was not perceived as a problem by the High Contracting Parties when the Convention was being drafted," but then adds that "[f]or many years the risk of persecution in countries where it now exists seemed remote. It was the practice of leaders in these countries simply to insist that homosexuality did not exist. This was manifest nonsense, but at least it avoided the evil of persecution."⁴

Of the vast amounts of historical and historiographic evidence that one could produce to contradict this account, let one simple fact speak for itself: if the default position in the past was denial of the existence of homosexuality accompanied by an absence of persecution, what was the point of all the criminal legislation on homosexuality? Why were individuals arrested, prosecuted, and sometimes incarcerated under those laws? And why was homosexuality defined as a psychiatric illness as late as 1973?⁵ Contrary to what Lord Hope suggests, there was no systematic and ultimately benign denial of the existence of homosexuality. Homosexuality was sin, illness, and crime; and homosexuals could be persecuted in a variety of ways *lawfully*. Victims of this persecution included some well-known figures, for example John Gielgud and Alan Turing in post-war Britain,⁶ but doubtless many more were affected.

3. *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.).

4. *Id.* [2], [2011] 1 A.C. at 618 (Lord Hope of Craighead).

5. This was when the American Psychiatric Association removed homosexuality from its diagnostic manual. *Sexual Orientation*, AM. PSYCHIATRIC ASS'N, <http://www.healthyminds.org/More-Info-For/GayLesbianBisexuals.aspx> (last visited Nov. 10, 2011).

6. See DAVID KYNASTON, *FAMILY BRITAIN: 1951–57* 332, 393 (2009). Kynaston observes, "One life rule that almost every gay person in 1953 Britain did understand was the advisability of keeping secret their sexual orientation." *Id.* at 331. He adds, "Historians have differed as to whether there was

Let us return to Lord Hope's account. In his view, the denial of the existence of homosexuality has been replaced with an outwardly hostile attitude "fanned by misguided but vigorous religious doctrine,"⁷ such as "the ultra-conservative interpretation of Islamic law that prevails in Iran"⁸ and "[t]he rampant homophobic teaching that right-wing evangelical Christian churches indulge in throughout much of Sub-Saharan Africa."⁹ He illustrates these changes by reference to the now oft-cited Ugandan Anti-Homosexuality Bill, and the imprisonment of two gay men in Malawi. The present situation—Lord Hope concludes—is that "a huge gulf has opened up in attitudes to and understanding of gay persons between societies on either side of the divide."¹⁰

At the beginning of their piece, Hathaway and Pobjoy elaborate on the "huge gulf" theme. For them, the gulf is "an ever-increasing divide between states of the developed and less developed world."¹¹

The divide, as mentioned, does exist, but it is not a North-South one. The record of the landmark June 2011 resolution of the Human Rights Council on sexual orientation and gender identity does not bear out the idea of a division along this line.¹² For example, all Latin American countries, which are normally considered part of the developing world, voted in favor of the resolution; among them there was also Cuba, which until not so long ago was renowned for its persecution of gay men.¹³ The "no" block comprised all the member states

a systematic, McCarthy-style witch-hunt in operation at this time against homosexuals, but certainly 1953–4 did mark a peak of prosecutions, with key men at the top . . . all actively hostile towards what Dunn [Sir Lawrence Dunn, Chief Metropolitan Magistrate] called 'male harpies' or 'the lowest of the low'." *Id.* at 332.

7. *Hj and HT*, [2010] UKSC [2], [2011] 1 A.C. at 618 (Lord Hope).

8. *Id.*

9. *Id.*

10. *Id.* [3], [2011] 1 A.C. at 618.

11. James C. Hathaway & James Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 315, 316 (2011).

12. U.N. Human Rights Council, Follow-up and Implementation of the Vienna Declaration and Programme of Action, U.N. Doc A/HRC/17/L.9/Rev.1 (June 15, 2011).

13. For example, see Reinaldo Arenas's harrowing autobiography, REINALDO ARENAS, *BEFORE NIGHT FALLS: A MEMOIR* (1993). In some respects Latin American countries have a better record than their European counter-

of the Organization of Islamic Cooperation with a seat in the Human Rights Council at the time of the vote, and most countries in Africa. The exceptions in Africa were: Mauritius, which supported the resolution; Burkina Faso and Zambia, which abstained; and South Africa, which introduced it.

So what to make of the “huge gulf” then? Rather than a North-South (or developed versus developing world) question, the social and cultural divide over the criminalization of homosexuality and, more generally, over discrimination on the grounds of sexual orientation is best seen, in my view, as the product of two different strands of argument.

The first one is religious belief. Here one may choose to follow Lord Hope’s analysis of an “unholy” alliance between Christian and Islamic extremists on this issue. But, although some may find comfort in the political correctness of apportioning blame equally between the world’s two main religions (based on the number of followers), it is an analysis that bears little relation to reality. Within the main Christian denominations, homosexuality remains a divisive question, but this division concerns two sets of issues: civil unions and gay marriage, and the ordaining of gay clergy. It is these two questions, for example, that have split Anglicans. Criminalization is not an issue in these debates and, indeed, even the Holy See opposes the criminalization of homosexuality.¹⁴ As for the role played by American evangelicals in Uganda’s Anti-Homosexuality Bill,

parts. For example, homosexual acts have been legal in Brazil since 1831 and in Argentina since 1887. DANIEL OTTOSSON, INT’L LESBIAN, GAY, BISEXUAL, TRANS, & INTERSEX ASS’N [ILGA], STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 44 (2010), available at http://old.ilga.org/State_homophobia/ILGA_State_Sponsored_Homophobia_2010.pdf. Argentina legalised gay marriage in July 2010. Juan Forero, *Argentina Becomes Second Nation in Americas to Legalise Gay Marriage*, SEATTLE TIMES (July 15, 2010), http://seattletimes.nwsourc.com/html/nationworld/2012368514_argentina16.html.

14. Statement of the Holy See Delegation at the 63d Sess. of the Gen. Assembly of the U.N. on the Declaration on Human Rights, Sexual Orientation & Gender Identity (Dec. 18, 2008), available at http://www.vatican.va/roman_curia/secretariat_state/2008/documents/rc_seg-st_20081218_statement-sexual-orientation_en.html. To Europeans, nowadays accustomed to seeing the world through the prism of an often coarse anti-clericalism, the Vatican position—that homosexuality is a moral sin but should not attract criminalization—makes little sense. Yet, it is a distinction that anyone with a basic grounding in the history of Western philosophy will not fail to grasp.

The New Yorker investigated these allegations, which seem to have captured the political imagination of many, but actually found evidence that the evangelical group believed to be the driving force behind the Bill had, in fact, used its connections to the Ugandan establishment to stop it.¹⁵

It is, of course, true that in the Western world Christian churches are often openly opposed to or ambiguous about the elimination of discrimination against gay men and women. But their position on the one form of persecution most likely to give rise to refugee cases, i.e. criminalization, is quite clear and consistent across the wide spectrum of Christian denominations. Crucially, it is a position antithetical to the one which remains prevalent in the Muslim world. *Pace* the attempts to dress the “huge gulf” in more reassuring terms, it seems to me incontrovertible that the divide is neither religious against secular, nor the West against the Rest.

The second strand of argument, which is prominent in the African context, is localism, normally articulated as the idea that homosexuality is irreconcilable with a set of traditional values. Over the years, this strand of argument has acquired an extraordinary political versatility. Arguments about tradition used to be the preserve of conservatives and reactionaries, but they have now entered the vocabulary of the political left and feature prominently in the human rights theories of scholars of the so-called Third World Approaches to International Law movement.¹⁶

As Anthony Appiah has observed, there is probably “a connection between the thinning of the cultural content of identities and the rising stridency of their claims.”¹⁷ As a result of both the consolidation of the state in the twentieth century and the process of social and economic globalization, cultural identities have come under pressure to redefine themselves in

15. Peter J. Boyer, *Frat House for Jesus*, *THE NEW YORKER*, Dec. 13, 2010, at 52, 60; see also Timothy Shah, *The Uganda Conspiracy Theory*, *CHRISTIANITY TODAY* (Mar. 15, 2011, 9:49 AM), <http://www.christianitytoday.com/ct/2011/marchweb-only/ugandaconspiracytheory.html?start=1> (“There are . . . many reasons to doubt a causal or conspiratorial relationship between Bahati and American Bible-thumpers.”).

16. See, e.g., MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE*, 72–74 (2002) (discussing the African notions of human rights and insisting that such arguments do not necessarily lead to cultural relativism).

17. KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 117 (2005).

order to fit in with these bigger trends and changes. Cultures have indeed often adapted with the result that cultural differences are, in many ways, less marked nowadays than they were half a century ago. However, these developments offer cause for concern about, for example, the loss of valued aspects of one's heritage and the risk of homogenization. Furthermore, while the removal of the shackles of culture is, in many ways, emancipatory for the individual, there is at least some merit in the argument that the despotism of local custom¹⁸ is being replaced with new forms of despotism that, precisely because they are abstracted from any local context, are even more difficult to challenge.

But why is homosexuality so central to these discourses on culture? In this new idiosyncratic dialectic between the local and the global, the defense of local values on sexuality is seen by some as a last bastion of resistance against the perceived intrusion of foreign values and customs. Key to this defense is the re-invention and re-imagination of sexual identity and of the history of sexual relations in particular cultures so as to exclude homosexuality from it; the most effective argumentative strategy against localism has been to challenge this very premise.¹⁹

These two strands of argument—religious belief and local values—that have shaped the socio-cultural divide on the ques-

18. The expression "despotism of custom" was coined by John Stuart Mill in his 1859 essay *On Liberty*. For a modern reproduction and passages on despotism of custom, see J. S. MILL, *ON LIBERTY IN FOCUS* 86–87 (John Gray & G.W. Smith, eds., Oxford Univ. Press, 1991).

19. The following passages from the Memorandum that accompanied the Ugandan Anti-Homosexuality Bill illustrate the centrality of localism to the argument against homosexuality:

This Bill aims at strengthening the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family.

This legislation further recognizes the fact that same sex attraction is not an innate and immutable characteristic.

The Bill further aims at providing a comprehensive and enhanced legislation to protect the cherished culture of the people of Uganda, legal, religious, and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda.

The Anti-Homosexuality Bill, 2009, Bill [18] cl. 1.1 (Uganda), available at <http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/uganda-bill-september-09.pdf>.

tion of homosexuality are not mutually exclusive. On the contrary, the cultural protectionism that fuels homophobic discourse is at its strongest when it rests on both religious belief and localism.

On the other side of the divide (including Europe, North America, and, increasingly, Latin America and some parts of Asia), the argument against homosexuality is far from over, but as mentioned, the crucial difference is that criminalization is no longer an issue. This is so principally because the idea of moral and legal equality has been extended to gay men and women. It is most unlikely that there will be a turn-around. The logic of equality is powerful: once asserted, as Kant wrote of moral progress in general, it "may at times be interrupted but never broken off."²⁰ It is moral progress that made a return to ancient slavery or to gladiatorial fights unthinkable in the Middle Ages; the re-introduction of modern slavery²¹ unacceptable by the end of the nineteenth century; and the removal of the right to vote from women or the re-instatement of judicial torture unimaginable today. Similarly, while there may be setbacks, the offense to the conscience caused by the execution or imprisonment of two adult men for sexual intercourse to which they both freely consented is here to stay.

The progress of the idea of equality is sometimes painfully slow. But once the first crucial step is taken—i.e., the acceptance of a particular group as morally equal—there are a series of inferences that will almost inevitably flow from it: if they are equal, why should they be criminalized? If they are equal, why should they be treated differently from others by the state and even by other individuals? In many countries that have relegated the criminalization of homosexuality firmly to the past, the further inferences that follow from equality have not yet been drawn. This is why the question of discrimination against gay men and women is still an open one virtually everywhere in the world. But, in important parts of the world, the idea of equality has already asserted itself so far as to ensure the pro-

20. Immanuel Kant, *On the Common Saying: "This May be True in Theory but it Does not Apply in Practice"*, in IMMANUEL KANT: PRACTICAL PHILOSOPHY 273, 306 (Mary J. Gregor ed. & trans., Cambridge Univ. Press, 1996).

21. Ancient and modern slavery were different institutions, the former even more brutal and abominable than the latter.

tection of the life and personal liberty of gay men and women. It is no small conquest.

This moral revolution has gone hand in hand with changes in the nature of the family and sexuality, a process which Anthony Giddens has called “the transformation of intimacy.”²² It has also been buttressed by modern individualism and, in particular, by that commitment to self-fulfillment, or authenticity, that is central to it.²³ So many gay men welcome the notion of the “homosexual gene,”²⁴ probably because it deepens the claim to authenticity: for there is no greater affront to authenticity than to force someone to act in any way that contradicts his innate nature.

So where should refugee law be positioned vis-à-vis this cultural divide? The lodestar for navigating the divide is, in my view, a combination of two ideas: clarity on principle and analytical rigor. While they may not have put their point in quite the same terms, I think the critical analysis of *HJ and HT* developed by Hathaway and Pobjoy advances a similar position.

By clarity on principle, I mean that no ground should be given on the fundamental idea of moral equality of gay men and women. Two arguments central to the Hathaway/Pobjoy piece align with this approach. The first argument is that the decision of the U.K. Supreme Court, as well as Australian jurisprudence on this point,²⁵ fails to identify the persecutory harm properly by insisting on the “exogenous consequences” of being openly gay and omitting to consider the “endogenous harms” that would follow from concealment of one’s sexual preferences even where such concealment was effective in protecting the individual from exogenous harm. Their view—and

22. ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES* (1992); see also THEODORE ZELDIN, *AN INTIMATE HISTORY OF HUMANITY* (1994) (tracing the development of various concepts, including sexual and family relations, over time).

23. CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1991) (discussing the development and nature of the modern cultivation of an authentic self).

24. See, e.g., Neil Swidey, *What Makes People Gay*, THE BOSTON GLOBE (Aug. 14, 2005), http://www.boston.com/news/globe/magazine/articles/2005/08/14/what_makes_people_gay/ (summarizing gay rights advocates who argue that proof people are born gay will provide wider acceptance and protection against discrimination).

25. *Appellant S395/2002 v Minister of Immigration & Multicultural Affairs* (S395) (2003) 216 CLR 473 (Austl.).

I agree—is that concealment or self-repression are cognizable forms of persecutory harm. To put the argument in terms of the primary principle of moral equality, concealment is an offense to individuality and to the aspiration to self-fulfillment or authenticity that defines it. The key is, after all, in the very word “self-repression” that is used as synonymous with concealment: these are subtle forms of persecution that rely on the internalization of the persecution, and make one part of the self the agent of persecution of another. There clearly, and perhaps inevitably, will be persecutory harm in these cases.

The other argument advanced by Hathaway and Pobjoy which accords with the fundamental idea of moral equality of gay men and women is that the legal principle of non-discrimination should help us in the difficult task of distinguishing between “protected and unprotected activities beyond the fairly clear area of actions that infringe the rights of others.”²⁶ I agree with this approach, although, as I suggest below, I think it needs to be integrated with a further criterion. For present purposes, suffice it to point out that it accords with my red line on the moral equality of gay men and women.

Clarity on the principle of moral and legal equality can also help us defend refugee law, and human rights more generally, from a rather insidious argument that has been advanced in so-called critical circles. The argument goes as follows: earlier tolerant attitudes towards sexuality, typical for example of the Muslim world in the Middle Ages, have been undermined by modern Western concepts of homosexuality and gay rights. Such earlier tolerance survives in places, but is threatened by the post-colonial “encounter” with these Western concepts. Rather than accepting the imposition of “gay rights” and “gay equality,” these societies should re-discover their earlier type of tolerance.²⁷ According to this view, there is probably no persecuting society and, to the extent that the state is persecuting, either it relies on colonial models of legal regulation of sexual conduct or, prompted by the colonial and

26. Hathaway & Pobjoy, *supra* note 11, at 379.

27. See KHALED EL-ROUAYHEB, BEFORE HOMOSEXUALITY IN THE ARAB-ISLAMIC WORLD, 1500–1800 (2005) (describing earlier approaches to tolerance and arguing that individuals need not fit neatly within conceptual distinctions). The main proponent of the thesis that the modern concept of homosexuality is part of the colonial and post-colonial “encounters” and must be resisted is JOSEPH A. MASSAD, DESIRING ARABS (2007).

post-colonial “encounters,” it has decided to enforce legal and religious prescriptions that had been ignored for many centuries. Although, as far as I am aware, proponents of these views have not written on refugee law, it would be consistent with their views to argue that a refugee claim would have to fail where there is evidence that, in a particular society, it is still possible to engage in a wide range of sexual conduct without incurring risk so long as one avoids adopting a modern Western gay identity.

The notion that homophobia is a Western export is sometimes accepted even by “gay rights” campaigners.²⁸ On an issue where the West is so clearly on the right side today, some derive comfort from the ability to point to past blame of the West and to past moral achievement in non-Western societies. It is indeed true that, by the standards of the Middle Ages, there was generally greater tolerance of homoerotic practices in the Muslim world than in the West. But there is a difference between medieval tolerance (whether Islamic or Western) and modern tolerance of gay men and women: then, the practice of homosexuality was tolerated in the same way in which a range of other habits contrary to religious prescription are tolerated (from adultery to masturbation); what is now being accepted is instead a claim of moral equality on which legal equality ultimately rests. It is one thing to tolerate particular conduct simply because it happens, and another to tolerate it because the author of that conduct has established a moral and legal entitlement to it.²⁹ As a final comment on these postmodernist views on homosexuality, let me say, paraphrasing Catharine MacKinnon, that “I do know this: we cannot have this postmodernism and still have a meaningful practice” of human rights for gay men and women.³⁰

28. *E.g.* Peter Tatchell, *A Watershed for Gay Rights*, THE GUARDIAN (Dec. 8, 2008), <http://www.guardian.co.uk/commentisfree/2008/dec/08/gayrights-unitednations> (explaining that the European powers imposed anti-gay laws in many Asian and African countries during colonialism).

29. Various accounts seem to confirm this distinction. *See, e.g.*, WILLEM FLOOR, *A SOCIAL HISTORY OF SEXUAL RELATIONS IN IRAN* (2008) (describing homosexual relations in Iran throughout written history despite prohibitions under Islamic law).

30. CATHARINE A. MACKINNON, *ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES* 62 (2006). The original quotation is: “I do know this: we cannot have this postmodernism and still have a meaningful practice of women’s human rights, far less a women’s movement.” *Id.*

And now let us move to the second idea which can help refugee law handle an area of adjudication that has become so culturally laden: analytical rigor. In the words of Hathaway and Pobjoy: "Legal accuracy is important. Taxonomy matters."³¹ A legal argument that is analytically unsound risks undermining the very principle it seeks to promote. The legitimacy, coherence, and, more broadly, the credibility of the refugee system will also suffer if poor analysis prevails. And this is why the question of the interpretation of the "for reasons of" clause in this context is so important.

Hathaway and Pobjoy are right to insist that, difficult though this exercise is, we must articulate a proper test for this clause in relation to claims for refugee status brought by gay men and women, and distinguish between protected and unprotected activities. Their proposal is, as mentioned, to draw this distinction by reference to the principle of non-discrimination. However, there is a gap between non-discrimination in the international sense and non-discrimination in the constitutional sense which is likely to widen as more states enact legislation that offers gay men and women a level of protection from discrimination that international law is nowhere near accepting. If non-discrimination is the benchmark, national adjudicators will understandably be drawn to its scope and meaning in constitutional law.

Another way of conceptualizing the distinction between protected and non-protected activities is by reference to notions of dignity, self-fulfillment, or authenticity. Protected activities should be those without which a man cannot fulfill his sexual and sentimental aspirations. Some compromises may sometimes be acceptable, but they should never be undignified. These two approaches—non-discrimination and dignity—are not mutually exclusive and, even if applied independently of each other, would probably often lead to the same outcome. The non-discrimination model has the advantage of being based on a principle enshrined in positive law, although the advantages of having a normative reference point are somewhat offset by both the fluid nature of the principle of non-discrimination and its different scope in international and constitutional law. The dignity model has the advantage of al-

31. Hathaway & Pobjoy, *supra* note 11, at 337.

lowing greater contextualization of the activities in order to determine whether they should be protected or not.

Under neither approach would the spectrum of protected activity be as wide as Lord Rodger's "trivial stereotypical examples" would have it.³² I am not even sure in fact if Lord Rodger's "most basic level" would be entirely captured under either or both of these approaches. In the paragraph just before the one with the well-known "trivial examples," Lord Rodger wrote:

At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.³³

This passage pertains to both the question of concealment (and the nature of persecutory harm) and that of the activities, that is to the interpretation of the terms "persecution" and "for reasons of" in the refugee definition. I do not believe that deprivation of any of the activities detailed in the

32. *HJ (Iran) v. Sec'y of State for the Home Dep't (HJ and HT)*, [2010] UKSC 31, [78], [2011] 1 A.C. 596, 646 (Lord Rodger of Earlsferry) (appeal taken from Eng. & Wales C.A.).

33. *Id.* [77], [2011] 1 A.C. at 645.

passage above would either cause endogenous harm in the average person or preclude self-fulfillment in a dignified manner. Save for those living in the West End of London or Manhattan, open expressions of “affection for another man which went beyond what would be acceptable behaviour on the part of a straight man”³⁴ remain rare in the public sphere even in Western countries. These are not harm-inducing or authenticity-threatening modifications to social conduct, but reasonably tolerable inconveniences.³⁵ Life in society requires one to negotiate one’s way with society’s prejudices, customs, and beliefs. There are, of course, boundaries, but Hathaway and Pobjoy in their article (and, to a far lesser extent, I, in my comment) have tried to show that it is possible to draw these boundaries in a principled and analytically coherent way that accords with the legal framework of refugee law.

With decisions like *HJ and HT*, refugee law has entered one of the most culturally contested areas of our times. It is also inevitable that the split between countries that still practice homophobia and those that have rejected it will be reflected in the interpretation and application of refugee law. To defend the field from the minefield of cultural discourse, one has to maintain both adherence to principle and analytical rigor. Judged on these criteria, *HJ and HT* does not do very well, but the soundness of its moral inspiration deserves recognition.

34. *Id.*

35. I am not using the locution ‘reasonably tolerable’ to make a plea for the “reasonably tolerable” test in the context of persecution. *See id.* [102], [2011] 1 A.C. at 654 (Lord Collins of Mapesbury) (rejecting the test of reasonable tolerability adopted in *Z v. Sec’y of State of the Home Dep’t*, [2004] EWCA (Civ) 1578, [2005] Imm. A.R. 75) (appeal taken from Asylum & Immigr. Trib.) (U.K.).