

# ASYLUM AND THE CONCEALMENT OF SEXUAL ORIENTATION: WHERE NOT TO DRAW THE LINE

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## I. INTRODUCTION

The Supreme Court of the United Kingdom—in *HJ and HT v. SSHD* (2010)—issued a landmark judgment extending the scope of asylum protections for lesbian and gay refugees.<sup>1</sup> The court followed largely in the footsteps of an earlier decision by the High Court of Australia, *Appellant S395/2002 v. MIMA* (2003). The courts issued two rulings in common. First, they eliminated the so-called “discretion requirement” which had allowed adjudicators to impose an expectation or duty on gay and lesbian applicants to behave “discreetly”—to conceal their sexual orientation—to avoid persecution. Second, the courts ruled that lesbian and gay applicants who would, on their own accord, conceal their sexual orientation to avoid state repression can qualify for refugee status. To de-

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1. The U.K. decision is *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 Australian decision is *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473.

cide otherwise, these courts explained, would nullify core protections of the Refugee Convention. With these pronouncements, the two apex courts have aligned their laws in large part with the asylum law on sexual orientation in other jurisdictions—such as Canada,<sup>2</sup> the United States,<sup>3</sup> and New Zealand<sup>4</sup>—and with the UNHCR’s interpretive guidance.<sup>5</sup> The courts have also aligned the principles of sexual orientation cases with other areas of asylum law, most notably including persecution on the basis of religion, ethnicity, and political opinion.<sup>6</sup>

In an article in the pages of this Journal, *Queer Cases Make Bad Law*, James Hathaway and Jason Pobjoy (“H&P”) attempt to cast considerable doubt on the viability of the two judgments. First, they contest the basis for the second ruling. H&P argue that the courts erroneously extended asylum protection to lesbian and gay claimants who would choose to conceal their identity and thus *avoid* state persecution. Such applicants, H&P contend, do not actually have a well-grounded fear of adverse state reaction in so far as their identity remains hidden. H&P argue that the second ruling is thus not founded upon valid legal principles, and will undermine the

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2. See, e.g., *Okoli v. Canada* (Minister of Citizenship & Immigration), [2009] F.C.R. 332, para. 36–37; *Atta Fosu v. Canada* (Minister of Citizenship & Immigration), [2008] F.C.R. 1135, para. 17; *Sadeghi-Pari v. Canada* (Minister of Citizenship & Immigration), [2004] F.C.R. 282, paras. 28–29; *XMU (Re)*, [1995] C.R.D.D. 146, No. T94-06899, paras. 95–104 (Immigration and Refugee Board of Can.).

3. *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005); see also *Rojo v. Holder*, 408 F. App’x. 73, 75 (9th Cir. 2011); *Maldonado v. U.S. Att’y Gen.*, 188 F. App’x 101, 104 (3d Cir. 2006); cf. *Razkane v. Holder*, 562 F.3d 1283, 1288 n.3 (10th Cir. 2009).

4. Cf. *Refugee Appeal No. 74665/03* [2005] INLR 68, at para [124] (N.Z.) (explaining different rationale from one arguably implicit in a majority opinion in *S395* but noting “[n]one of this is to deny that in a broad sense the majority decision in *Appellant S395/2002* and the decision of this Authority converge on the same point, namely that refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right”).

5. U.N. High Comm’r for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 8 (Nov. 21, 2008), available at <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf> (“Being compelled to forsake or conceal one’s sexual . . . identity, where this is instigated or condoned by the State, may amount to persecution.”).

6. See *infra* Part I.

political support of state parties to the Refugee Convention. Second, H&P provide qualified support for the first ruling. They laud the courts' general rejection of the discretion requirement and the core principles upon which that holding was based. However, they also argue that the judgments went too far in protecting lesbian and gay asylum seekers. H&P propose that such applicants should receive protection only if the behaviors for which they are singled out for harsh punishment are "inherent in, and an integral part of" their sexual identity.

In this relatively brief commentary, I have space to address only some aspects of H&P's article and to expound on my own interpretation of the UK and Australian decisions. At the outset, I should note my (long-standing<sup>7</sup>) agreement with several propositions in H&P's article. First, asylum law is necessarily restrictive. It does not provide protections for all individuals facing extreme hardship that threatens their life or freedom. Refugee law must be narrowly construed to offer protection only to individuals who have a well-founded fear of persecution on the basis of their membership in a set of protected groups. Second, international human rights law can be valuable in accomplishing some tasks in refugee law such as defining the meaning of persecution.<sup>8</sup> Third, national laws against homosexual conduct (and, I would argue, even unenforced laws<sup>9</sup>) can subject lesbian and gay individuals to psychological forms of persecution. Fourth, the decision of the U.K. and Australian courts to vitiate the discretion requirement in sexual orientation asylum claims is a welcome development. To the extent that H&P agree with that latter proposition, our views coincide. We part company, however, on the assessment of the apex courts' second ruling and on what test, if any, should replace the first ruling.

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7. Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643 (2001) [hereinafter Goodman, *Beyond the Enforcement Principle*]; Ryan Goodman, *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims*, 105 YALE L.J. 255 (1995) [hereinafter Goodman, *Incorporation of International Human Rights Standards*].

8. See generally Goodman, *Incorporation of International Human Rights Standards*, supra note 7.

9. See generally Goodman, *Beyond the Enforcement Principle*, supra note 7 (examining the social effects of unenforced sodomy statutes in South Africa).

There are a number of reasons to examine H&P's claims closely. First, their article will gain a significant audience due in part to Hathaway's important standing in the field of refugee law and the influence of some of his writings. Second, H&P's article does not stand alone. Previous scholarship and judges have made some of H&P's points.<sup>10</sup> And the discretion requirement continues to operate in various forms in several jurisdictions.<sup>11</sup> Third, the stakes are high. Indeed, H&P's effort to rollback significant aspects of international jurisprudence that protects lesbian and gay asylum seekers must satisfy a strong burden to demonstrate that it is compelling. For all these reasons, H&P's claims deserve close scrutiny. Following the same organizational structure as their article, I consider the UK and Australian judgments' second ruling before examining the first.

## II. PERSECUTION AND ENFORCED CONCEALMENT OF SEXUAL ORIENTATION

According to the U.K. and Australian decisions, two categories of individuals can qualify for refugee status:

Category 1: lesbian and gay individuals who would be open about their sexual orientation and thus likely to be subject to severe state repression (per the first ruling);

Category 2: lesbian and gay individuals who would conceal their sexual orientation due to a fear of severe state repression (per the second ruling).

H&P largely agree with the first ruling, as formulated above. They contend, however, that the courts' justification for the second category is absent, unclear, or invalid. They harshly<sup>12</sup> criticize the opinions for providing protection when

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10. See, e.g., Rodger P.G. Haines, James C. Hathaway & Michelle Foster, *Claims to Refugee Status Based on Voluntary but Protected Actions*, 15 INT'L J. REFUGEE L. 430, 439 (2003); *Refugee Appeal No. 74665/03* [2005] INLR 68 (Rodger P.G. Haines) (N.Z.); *Applicant LSLs v Minister for Immigration & Multicultural Affairs* (2000) FCA 211 (Austl.).

11. SABINE JANSEN & THOMAS SPIJKERBOER, *FLEEING HOMOPHOBIA: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE* 33–39 (2011).

12. James C. Hathaway & Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT'L L. & POL. 315, 332 (“[T]he two courts ran roughshod over their responsibility to identify the persecutory harm that the claimants in

there is no prospect that individuals who are closeted will suffer injury (e.g., criminal prosecution, harassment, violence) by the state. And they assert that the judgments diverge sharply from existing doctrine. I argue that the justifications presented by the two courts for the second ruling were sufficiently clear and well-founded.

#### A. *First Justification: The Mirror Image of the First Ruling*

First, the rationales for the two rulings are connected, such that the reasons for abolishing the discretion requirement also support upholding the second ruling. In the analysis of the majority opinions, the rejection of the discretion requirement is analytically tied to the rationale for protecting individuals who will conceal their identity to avoid state repression. Indeed, the twin rulings may be understood as two sides of the same coin.<sup>13</sup> In vitiating the discretion requirement, the courts explained that maintaining that an individual has a responsibility to conceal her identity—in a religious, racial, or social group—to avoid persecution would nullify the purpose of the Refugee Convention as a protection regime. And that rationale extended, in the courts' analysis, to the second ruling. The forced concealment of sexual identity—whether required by an asylum adjudicator or compelled by the state of nationality—violates the protection regime at the heart of the Convention.

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*S395* and *HJ* and *HT* would *in fact* face by virtue of their entirely understandable preference for concealment over persecution." (citations omitted)); *id.* at 338 (contending that both judgments are "flatly contradictory to the jurisprudence of all leading courts").

13. See, e.g., *HJ* (Iran) v. Sec'y of State for the Home Dep't (*HJ* and *HT*), [2010] UKSC 31, [123], [2011] 1 A.C. 596, 660 (Sir Dyson) (appeal taken from Eng. & Wales C.A.) ("[T]he Secretary of State seeks to draw a distinction between the decision-maker (i) 'requiring' the asylum-seeker to act discreetly on return and (ii) making a finding that the asylum-seeker will in fact act discreetly on return. It is said that the former is impermissible and irrelevant to whether the asylum-seeker has a well-founded fear of persecution, whereas the latter is not only permissible but highly relevant. But as Lord Rodger JSC points out, this is an unrealistic distinction. Most asylum-seekers will opt for the life of discretion in preference to persecution. This is no real choice. If they are returned, they will, in effect, be required to act discreetly.").

Consider the explanation of the rationale for eliminating the discretion requirement by Lord Rodger, who authored the majority opinion for the UK Supreme Court:

No-one would proceed on the basis that . . . a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable. Most significantly, it is unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution.<sup>14</sup>

Lord Rodger's Australian counterparts issued similar statements.<sup>15</sup> And in their respective judgments, the two courts further explained that the receiving state should afford the applicant "surrogate protection" to substitute for the protection that her country of nationality failed to afford her.<sup>16</sup>

The courts, in turn, explained that the same rationale applies to individuals in the second category of cases. That is, the rationale for retiring the discretion requirement is based on the principle that the purpose of the Convention is to protect the rights of protected classes of individuals to live openly without fear of persecution. That same principle would accord refugee status to individuals who would decide to bury their identity to avoid severe state repression. Lord Rodger explained:

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which

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14. *Id.* [76], [2011] 1 A.C. at 645 (Lord Rodger of Earlsferry).

15. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473, 489–90 (McHugh & Kirby JJ) (Austl.) ("The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention.").

16. *HJ and HT*, [2010] UKSC 31, [53], [2011] 1 A.C. at 638 (Lord Rodger); *S395* (2003) 216 CLR at 490 (McHugh & Kirby JJ).

would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect—his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.<sup>17</sup>

Sir Dyson also made the connection explicit.<sup>18</sup> Justices McHugh and Kirby, for their court, stated (albeit somewhat obliquely),

[i]n the present case, . . . it seems highly likely that [the applicants] acted discreetly in the past because they feared they would suffer harm unless they did. If it is an error of law to reject a Convention claim because the applicant can avoid harm by acting discreetly,<sup>19</sup>

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17. *HJ and HT*, [2010] UKSC 31, [82], [2011] 1 A.C. at 648 (Lord Rodger); see also *id.* [53], [65], [67], [2011] 1 A.C. at 637–38, 640–42.

18. *Id.* [113], [2011] 1 A.C. at 657 (Sir Dyson) (“On this analysis, which is expounded very fully in the leading case of [*Refugee Appeal No 74665/03*], the emphasis is on the fact that refugee status cannot be denied to a person who on return would forfeit a fundamental human right in order to avoid persecution. Like Lord Rodger JSC, I see the attractions of this approach. . . . An interpretation of article 1A(2) of the Convention which denies refugee status to gay men who can only avoid persecution in their home country by behaving discreetly (and who say that on return this is what they will do) would frustrate the humanitarian objective of the Convention and deny them the enjoyment of their fundamental rights and freedoms without discrimination.”); *id.* [110], [2011] 1 A.C. at 656 (“If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man *in order to avoid persecution* on return to his home country.”).

19. S395 (2003) 216 CLR at 489 (McHugh & Kirby JJ).

and, they added,

[t]he Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps—reasonable or otherwise—to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a ‘particular social group’ if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution.<sup>20</sup>

In sum, the Convention is a protection regime for particular groups. If individuals establish that they would face severe state repression for membership in a protected class unless they forego or hide their membership, the Convention requires the receiving state to protect them.

Notably, this linkage between the two rulings suggests another weakness in H&P’s argument. They object to the second ruling on the ground that it allows refugee status for individuals who do not have a well-founded fear of actual harm (because their concealment will avoid such harm). The first ruling, however, arguably has the same or similar effect. That is, the discretion requirement was based in part on concerns similar to H&P’s objection. According to the logic of the discretion requirement, if an individual could take reasonably tolerable steps to avoid persecution, they are not actually at risk of future harm.<sup>21</sup> It is not clear how H&P generally laud the first ruling given their objections to the second.

### B. *Second Justification: Concealment as a Form of Persecution*

Second, a state’s compelling an individual to conceal her sexual orientation is itself a form of persecution. The various

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20. *Id.* at 489.

21. The apex courts rejected the discretion requirement not simply because it is not reasonably tolerable for lesbian and gay individuals to resort to concealment, but because an individual “will be entitled to asylum however unreasonable his refusal to resort to concealment may be.” *HJ and HT*, [2010] UKSC 31, [35], [2011] 1 A.C. at 630 (Lord Hope of Craighead); see also *infra* text accompanying notes 185–87 (discussing apex courts’ endorsement of principle in *Sec’y of State for the Home Dep’t v. Ahmed*, [1999] EWCA (Civ) 3003, [2000] INLR 1 (appeal taken from *Asylum & Immigr. Trib.*) (U.K.)).



judicial opinions pursued different logics in reaching that conclusion. Some, for example, suggested that significant violations of human rights constitute persecution and that the denial of an individual's ability to express her sexual orientation is thus itself persecutory. In this regard, H&P miss the point. They criticize the opinions for providing protection when there is no prospect that individuals who are closeted will suffer (direct) injury at the hand of the state. H&P fail to recognize that, according to judges on both courts, the injury suffered is in the act of concealment as the (indirect) result of state repression.

Although the opinions, especially those issued by the Australian High Court, could have been clearer on this matter, there is ample exposition of this argument throughout. Consider, for example, the U.K. Supreme Court justices who, in explicating their rationale for retiring the discretion requirement, include as an element of their analysis that an individual being forced to conceal her sexual orientation is itself a form of persecution. Lord Hope, in surveying comparative case law, explained that cases in New Zealand and South Africa expressed the proposition that "to require an applicant to engage in self-denial was to require him to live in a *state of self-induced oppression*."<sup>22</sup> And Lord Hope found persuasive a U.S. federal court opinion explaining that an asylum applicant "should not be required to change his sexual identity, as it was a fundamental characteristic and *an integral part of human freedom*."<sup>23</sup> In other words, a predicate for the reason to reject the discretion requirement is that the act of enforced concealment is a form of persecution. Lord Rodger considered this point straightforward: "the obvious point [is] that the Court of Appeal's test seems to require the applicant to establish a form of secondary persecution brought on by his own actions in response to the primary persecution."<sup>24</sup> Notably, the "likelihood" or "risk" of such persecution will obviously be high enough to satisfy the well-founded fear test. That is, the inquiry at that stage of analysis is based on the premise that the

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22. *HJ and HT*, [2010] UKSC 31, [32], [2011] 1 A.C. at 629 (Lord Hope) (emphasis added).

23. *Id.* [33], [2011] 1 A.C. at 629 (emphasis added) (citing *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005)).

24. *Id.* [75], [2011] 1 A.C. at 645 (Lord Rodger).

individual will engage in (complete and successful) concealment.<sup>25</sup> The remaining judicial question is whether the individual has taken such actions due to the threat of state repression.

The judgments also articulated the second ruling independent of the rationale for retiring the discretion requirement. In adopting this approach, the courts did not diverge from other areas of asylum law, as H&P contend. On the contrary, the judgments joined the sexual orientation cases to existing doctrines concerning other protected classes of refugees (such as political opinion and religion). Indeed, the apex courts borrowed directly from precedents in their own and other jurisdictions. Those cases establish the principle that the denial of a fundamental right or protected status—whereby individuals are unable to express or practice their religion or express or act upon their political beliefs—can in itself constitute persecution.

In this regard, the leading opinion across the two countries is *Win v Minister for Immigration and Multicultural Affairs*.<sup>26</sup> In *Win*, the Australian Federal Court firmly established the

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25. If the individual will not engage in complete and successful concealment, then the other test applies—and the risk of direct state repression will be engaged.

26. *Win v Minister for Immigration & Multicultural Affairs* [2001] FCA 132 (Austl.). For *Win*'s direct progeny, see, for example, *NAFA Applicant v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 844, [35] (Austl.) (applying the test in *Win* in upholding “an assessment of the prejudice to this particular applicant if his freedom of speech on human rights and political issues was constrained by the need to be careful before expressing his views”); cf. *S449 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1765, [15] (Austl.) (relying on *Win* to reject a claim where petitioner had not established that the State had prevented him from expressing his political and religious views); cf. also *Islam v Minister for Immigration and Multicultural Affairs* [2001] FCA 525, [16] (Austl.) (“It seems to me that the kind of approach I took in [*Win*] is also relevant here because of the factual findings of the Tribunal. It was implicit in the applicant’s claim that he is the sort of person who would want to continue to express his political opinion and the Tribunal’s findings do not negate this.”), overruled by *Minister for Immigration and Multicultural Affairs v Islam* [2001] FCA 1681, [15] (Austl.) (“There is nothing in the facts as found by the Tribunal to suggest that the respondent had claimed (expressly or by implication) non-attendance at political rallies would involve such an infringement of his right to express his political opinions as to constitute persecution or be capable of constituting persecution or cause the kind of suffering contemplated in *Win*.”).

principle that the effective denial of the freedom to express one's political opinion in public may, of itself, constitute persecution. Notably, H&P recognize that the example of Anne Frank served as an important reference point in *S395* and *HJ and HT*. The Anne Frank analogy derives from the *Win* opinion, which used it to explain that removing an individual's ability to express and practice her religion in public could constitute persecution. In *Win*, the Burmese couple was not confined to an attic or any other physical place; the case did not involve a deprivation of liberty due to unlawful confinement (as H&P's analysis might suggest). The applicants were unable to be open about their political opinions, and a restriction of that fundamental freedom can constitute persecution.<sup>27</sup> The Anne Frank example was meant to illustrate (just) that point.<sup>28</sup>

In *S395*, Justices McHugh and Kirby faulted lower Australian tribunals, in several sexual orientation asylum cases, for failing to follow *Win*'s "recogni[tion] that taking steps to hide political opinions and activities is no answer to a claim for refugee status where the applicant claims he or she will be persecuted for those opinions or activities."<sup>29</sup> Notably, McHugh and Kirby also faulted the tribunal in the instant case for a failure to "discuss whether the infliction of harm can constitute persecution where an applicant must act discreetly to avoid that harm."<sup>30</sup>

In *HJ and HT*, Lord Collins discussed *Win* in the context of U.S. cases that involved similar rulings with regard to the notion that individuals could hide their religion to avoid per-

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27. *Win* [2001] FCA 132, [18], [26].

28. See also *HJ (Iran) v. Sec'y of State for the Home Dep't*, [2009] EWCA (Civ) 172, [10], [2009] Imm. A.R. 600 (appeal taken from Asylum & Immigr. Trib.) (U.K.) ("That illustrates what [the appellant's attorney] has described as the Anne Frank principle, the validity of which is not disputed in this appeal. It would have been no defence to a claim that Anne Frank faced well-founded fear of persecution in 1942 to say that she was safe in a comfortable attic. Had she left the attic, a human activity she could reasonably be expected to enjoy, her Jewish identity would have led to her persecution. Refugee status cannot be denied by expecting a person to conceal aspects of identity or suppress behaviour the person should be allowed to express.").

29. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473, 491-92 (McHugh & Kirby JJ) (Austl.).

30. *Id.* at 487.

secution.<sup>31</sup> In the precursor to this series of cases, the U.S. Immigration Judge had concluded that the applicant failed to establish a well-founded fear of persecution because she was not an “active, visible” Jehovah’s Witness and that she would not “come to the attention of the authorities.”<sup>32</sup> Writing for the Court of Appeals for the Eleventh Circuit in *Muhur v. Ashcroft*, Judge Richard Posner rebuked that line of reasoning:

[T]he fatal flaw in the immigration judge’s opinion lies . . . in the assumption—a clear error of law—that one is not entitled to claim asylum on the basis of religious persecution if . . . one can escape the notice of the persecutors by concealing one’s religion. Christians living in the Roman Empire before Constantine made Christianity the empire’s official religion faced little risk of being thrown to the lions if they practiced their religion in secret; it doesn’t follow that Rome did not persecute Christians . . . . One aim of persecuting a religion is to drive its adherents underground in the hope that their beliefs will not infect the remaining population.<sup>33</sup>

In a subsequent case, *Iao v. Gonzales*, Judge Posner, citing to the precedent set by *Muhur*, reiterated the same principle:

[The applicant] might be able to conceal her adherence to Falun Gong from the authorities, but the fact that a person might avoid persecution through concealment of the activity that places her at risk of being persecuted is in no wise inconsistent with her having a well-founded fear of persecution. On the contrary, it is the existence of such a fear that motivates the concealment.<sup>34</sup>

In *Zhang v. Ashcroft*, the Ninth Circuit joined this series of cases.<sup>35</sup> The court

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31. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [105]–[106], [2011] 1 A.C. 596, 655 (Lord Collins of Mapesbury) (appeal taken from Eng. & Wales C.A.).

32. *Muhur v. Ashcroft*, 355 F.3d 958, 959–60 (7th Cir. 2004) (internal quotation marks omitted).

33. *Id.* at 960–61 (citations omitted).

34. *Iao v. Gonzales*, 400 F.3d 530, 532 (7th Cir. 2005) (citations omitted).

35. *Zhang v. Ashcroft*, 388 F.3d 713 (9th Cir. 2004).

reject[ed] the [Immigration Judge's] finding that Zhang could avoid persecution in China by practicing Falun Gong in the privacy of his own home. . . . [T]o require Zhang to practice his beliefs in secret is contrary to our basic principles of religious freedom and the protection of religious refugees.<sup>36</sup>

In a subsequent decision by the Eighth Circuit, *Woldemichael v. Ashcroft*, the court found against the applicant but, in doing so, issued a statement that coincided with these other cases.<sup>37</sup> The Eighth Circuit stated: "Absent physical harm, subjecting members of an unpopular faith to hostility, harassment, discrimination, and even economic deprivation is not persecution *unless those persons are prevented from practicing their religion* or deprived of their freedom."<sup>38</sup>

Finally and most importantly, the Eleventh Circuit decided a case that relied heavily on the prior decisions by the Seventh, Eighth, and Ninth Circuits. According to the Eleventh Circuit in *Kazemzadeh v. U.S. Atty. Gen.*, the Immigration Board and the Immigration Judge concluded that the applicant failed to establish that he had a well-founded fear of persecution on account of his religion "because he did not prove that anyone in Iran is aware of his conversion to Christianity. . . . [and the] Board did not discuss [the applicant's] testimony that Iranians who convert from Islam to Christianity practice underground. . . ."<sup>39</sup> The court of appeals stated: "We agree with the decision of the Seventh Circuit that having to practice religion underground to avoid punishment is itself a form of persecution."<sup>40</sup> Most significantly for understanding Lord Collins' opinion, Judge Marcus issued a special concurrence "join[ing] fully the majority's opinion" and "to underscore" the principles reached therein. Judge Marcus's opinion squarely raised the other side's argument (which closely resembles H&P's analysis of well-founded fear) and rejected it:

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36. *Id.* at 719.

37. *Woldemichael v. Ashcroft*, 448 F.3d 1000 (8th Cir. 2006).

38. *Id.* at 1003 (emphasis added).

39. *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1350 (11th Cir. 2009); see also *id.* at 1356 (Marcus, J., specially concurring) (explaining that BIA and IJ relied on the "the fact that no one in Iran, including [petitioner's] parents, was yet aware of the petitioner's conversion").

40. *Id.* at 1354 (citing *Muhur v. Ashcroft*, 355 F.3d 958, 960–61 (7th Cir. 2004) (Posner, J.)).

[I]n light of [the Immigration Board's] conclusion and the government's argument, it appears that the reasoning goes something like this: while Kazemzadeh is a genuine convert to Christianity, and, while apostasy is a capital offense in Iran, no one in Iran yet knows of his conversion, and, since Kazemzadeh may either cease to practice or, like other Muslim converts to Christianity, practice "secretly" and "underground," the likelihood of discovery is small, and, therefore, the record allows the inference that his fear of persecution is not well-founded. This reasoning turns on the assumption that Kazemzadeh may abandon his faith or practice it underground and thereby elude discovery. The pivotal legal problem with the argument is that it erroneously assumes Kazemzadeh is not entitled to claim asylum on the basis of religious persecution because he can practice his faith in hiding in order to avoid discovery and the possible penalty of death. In my view, any requirement that Kazemzadeh abandon his faith or practice in secret in order to conceal his conversion amounts to religious persecution under our asylum laws.<sup>41</sup>

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41. *Id.* at 1356–57 (Marcus, J., specially concurring). Judge Marcus also explained:

At oral argument and in their appellate brief, the government said that Kazemzadeh had not shown "that his commitment to the religion" indicated he would practice in a way that would come to the attention of the authorities. To the extent the BIA's decision turns in any way on the idea that Kazemzadeh could avoid persecution by abandoning his faith, that is not an acceptable consideration. And, to the extent that its decision turns on the suggestion that Kazemzadeh could practice his Christian faith "underground," and thereby elude discovery, that too may not be factored into the calculus of risk associated with a well-founded fear analysis. As I see it, the requirement that an asylum petitioner abandon his faith, or practice only in the dead of night, amounts to religious persecution.

. . . [I]t is legal error to deny asylum on the basis of well-founded fear of religious persecution on the theory that an individual may escape discovery by abandoning his faith or hiding it and practicing his religion underground.

*Id.* at 1356; *id.* at 1357 ("forcing Kazemzadeh to either renounce his faith or practice it clandestinely, on pain of death, is an "extreme"

In reaching this set of conclusions, Judge Marcus explicitly followed the decisions in *Iao*, *Zhang*, and *Woldemichael*. And, it is important to note that Lord Collins referred specifically to Judge Marcus's concurrence for the fact that it followed these other cases. Accordingly, Lord Collins' opinion is best viewed as another step in this line of cases. It is also a clear indication how he understood the conclusions reached in *HJ and HT*. Finally, this series of cases demonstrates a fundamental flaw with H&P's logic with respect to the well-founded fear inquiry.

### C. *Third Justification: Residual Risk of State Repression*

Another justification for the second ruling is that a lesbian or gay individual who opts to conceal her identity can still have a well-founded fear of persecution due to the residual risk of state repression. And, living under that regime of fear can itself be persecutory. The Australian court pursued this line of analysis. For example, Justices McHugh and Kirby, in what is perhaps the keynote paragraph of their opinion, stated:

In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many—perhaps the majority of—cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified

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concept that far exceeds “mere harassment.” Indeed, it is a notion that is at war with our case law”).

conduct was influenced by the threat of harm is to fail to consider that issue properly.<sup>42</sup>

This line of analysis might suggest a distinct and potentially viable approach to obtaining refugee status. The inquiry focuses on the element of *fear* itself—which can be subjectively felt and objectively well-founded even though the individual successfully acts to avoid persecution.<sup>43</sup> Nevertheless, the Australian court made these statements in the context of a case in which discovery of an individual's identity could not be assured and the risk of direct state repression remained.

In contrast, H&P suggest several times that living a discreet lifestyle forecloses any real risk of state repression. Accordingly, H&P contend that the fear of persecution on the part of a closeted lesbian or gay applicant is manifestly unfounded. Their claim is based either on an implausible empirical assumption—that there is generally no reasonable likelihood of state repression once an individual has decided to act discreetly—or a misreading of at least one of the two courts' judgments. In terms of the former, H&P do seem to work with this empirical assumption in several parts of their analysis. They write, for example, that “the reality is precisely the opposite since the modification of behavior will, in most cases, obviate the risk;”<sup>44</sup> “the exogenous consequences of being openly gay are remote in cases of enforced discretion;”<sup>45</sup> and “No, there is no well-founded fear of exogenous harms, such as prosecution or beatings, where a gay man would in fact opt for seclusion to escape such threats.”<sup>46</sup> At one point they acknowledge that an individual could find it impossible to remain dis-

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42. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473, 490–91 (McHugh & Kirby JJ) (Austl.). Notably, Lord Rodger quoted this passage almost in full. *HJ (Iran) v. Sec'y of State for the Home Dep't (HJ and HT)*, [2010] UKSC 31, [66], [2011] 1 A.C. 596, 641 (Lord Rodger) (appeal taken from Eng. & Wales C.A.); see also *id.* [21], [2011] 1 A.C. at 625 (Lord Hope) (making analogy to cases in which individuals “liv[e] in continuing fear that the truth would be discovered”).

43. Cf. 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, 396 (2009) (“[T]he High Court of Australia by majority held in *S395 and S396* that living in a state of fearful concealment could *itself* be found to be so oppressive as to constitute persecution”).

44. Hathaway & Pobjoy, *supra* note 12, at 343.

45. *Id.* at 347.

46. *Id.* at 388.



creet. That admission is confusing, however, because of these other inconsistent statements. And, it is confusing because, in the same passage in which they admit to such cases, they also state that the applicants in the Australian and U.K. cases both show that “the risk of exogenous harm for a person who would opt for self-repression is no more than ‘remote,’ ‘insubstantial,’ or a ‘far-fetched possibility.’”<sup>47</sup> And they subsequently state that the Australian and U.K. judgments were “based on the risk of a form of (exogenous) harm that was not, in fact, plausible.” Alternatively, rather than holding this empirical belief themselves, H&P may believe that the courts accepted the empirical proposition that choosing to be discreet would essentially guarantee safety from repression.

The Australian court flatly rejected such a factual predicate. The U.K. justices, for the most part,<sup>48</sup> however, accepted the lower tribunal’s finding that the particular individuals were not at risk of being discovered or suffering state violence as long as they opted for concealment. (Hence, the U.K. justices relied on the other two rationales discussed above.) The two judgments should, therefore, not be conflated. Indeed, the Australian High Court concluded that the lower tribunal in its case committed a reversible error for failing to consider what might happen to individuals who tried to act discreetly.<sup>49</sup>

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47. *Id.* at 346 (citations omitted).

48. *Cf. HJ and HT*, [2010] UKSC 31, [21], [2011] 1 A.C. at 625 (Lord Hope) (“In [*Hysi v. Sec’y of State for the Home Dep’t*, [2005] EWCA (Civ) 711, [2005] INLR 602 (appeal taken from Immigr. Appeal Trib.) (U.K.)] the Court of Appeal held that the tribunal had not assessed the consequences of expecting the applicant to lie and dissemble in the place of relocation about his ethnic origins. He would have to be a party to the long-term deliberate concealment of the truth, living in continuing fear that the truth would be discovered. There is no place, in countries such as Iran and Cameroon, to which a gay applicant could safely relocate without making fundamental changes to his behaviour which he cannot make simply because he is gay.” (citations omitted)).

49. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473, 495 (McHugh & Kirby JJ) (Austl.) (“Conversely, by placing the appellants in the discreet group, the Tribunal automatically assumed that they would not suffer persecution. But to attempt to resolve the case by this kind of classification was erroneous. It diverted the Tribunal from examining and answering the factual questions that were central to the persecution issues. Even if the Tribunal had classified the appellants as non-discreet homosexual men, it did not necessarily follow that they would suffer persecution. Conversely, it did not follow that discreet homosexual men

And, the court also faulted the tribunal for failing to inquire whether the government was purposefully instilling a regime of fear, which would support the conclusion that living in fear of persecution was well-founded.<sup>50</sup> Indeed, sexual orientation, as a part of an individual's identity, may not be as easy to submerge as the expression of one's political opinion. And, the closet is, as H&P note, never fully open or closed.<sup>51</sup> Furthermore, as the Australian Justices McHugh and Kirby recognized in their majority opinion, despite being discreet, lesbian and gay individuals could still have a reasonable risk of being discovered; the Justices faulted the lower tribunal for "fail[ure] to consider whether the appellants might suffer harm if for one reason or another police, hustlers, employers or other persons became aware of their homosexual identity. The perils faced by the appellants were not necessarily confined to their own conduct, discreet or otherwise."<sup>52</sup> And the Justices stated that the tribunal should have considered "whether, if the appellants . . . inadvertently disclosed[ ] their sexuality or relationship to other people, they were at risk of suffering serious harm constituting persecution."<sup>53</sup> Finally, in contrast with

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would not suffer persecution. . . . History is a guide, not a determinant."); *id.* at 493.

50. *Id.* at 487 ("[The tribunal] did not consider whether persons for whom the government of Bangladesh is responsible condone or inculcate a fear of harm in those living openly as homosexuals . . ."); *id.* at 502 (Gummow & Hayne JJ).

51. Hathaway & Pobjoy, *supra* note 12, at 326 ("[T]he assumption that it is in fact possible for every gay applicant to be discreet—that there is, in effect, some universal on/off switch—is empirically unsound. As Dauvergne and Millbank have observed, '[t]he question of being 'out' is never answered once and for all, it is a decision made over and over, each day and in each new social situation . . . the state of 'closeted-ness' [is] always a potentially permeable one.'") (quoting Catherine Dauvergne & Jenni Millbank, *Before the High Court: Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh*, 25 SYDNEY L. REV. 97 (2003)).

52. S395 (2003) 216 CLR at 494 (McHugh & Kirby JJ).

53. *Id.* at 487. H&P correctly state that the High Court of Australia "adopted" the lower tribunal's factual finding that the individuals would conceal their sexual orientation if returned to Bangladesh. The High Court, however, did not accept any factual finding that these individuals would not be at risk of harm if they decided to conceal their identity. H&P excerpt Justice Gleeson's quotation of the lower tribunal's conclusions that might suggest he accepted there would be no risk of harm in such a situation. Hathaway & Pobjoy, *supra* note 12, at 341. Justice Gleeson, however, went on to explain that the tribunal's statements with respect to this issue involved a

H&P's assertions of the general absence of risk to individuals who choose to act discreetly, the Australian Justices emphasized that decision makers should not engage in such generalities, but rather assess the likelihood of risk for each individual claimant.<sup>54</sup>

### III. REVIVING THE DISCRETION REQUIREMENT

H&P argue that the U.K. and Australian judgments went too far in protecting lesbian and gay asylum applicants. They contend that the first ruling—removal of a discretion requirement—should be narrowed to apply only to a subset of protected activities. Accordingly they propose a more restrictive test: “where risk is the product not of identity per se but rather of having engaged in a particular activity, the nexus requirement can . . . be met . . . only when the activity engendering the risk is fairly deemed to be intrinsic to the protected identity.”<sup>55</sup> Based on case law involving the definition of “membership in a social group,” H&P argue that the Refugee Convention covers only those aspects of sexual orientation that are protected by international human rights law. They contend that protection is thereby afforded only to “activity reasonably required to reveal or express an individual’s sexual identity.”<sup>56</sup> In short, H&P’s analysis involves a partial resurrection of the discretion requirement. Indeed, they would leave in place a requirement for lesbian and gay individuals to take avoiding action. They state: “it does not necessarily follow that a grant of asylum is owed where risk follows only from a relatively trivial activity *that could be avoided* without significant human rights cost.”<sup>57</sup> And they argue that sexual orientation cases should

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credibility determination and did not involve a determination of the risk of harm that might result if the applicants’ behaved discreetly. For example, Justice Gleeson stated: “In this Court, the appellants fasten onto the Tribunal’s reference to discreet behaviour as indicating that the Tribunal fell into the error of concluding, or assuming, that persecution does not exist if a person, by concealing opinions or behaviour likely to attract retribution and serious harm, can avoid such retribution. In truth, a fair reading of the reasons of the Tribunal shows that it made no such assumption, and reached no such conclusion.” *S395* (2003) 216 CLR at 481 (Gleeson CJ).

54. *S395* (2003) 216 CLR at 495 (McHugh & Kirby JJ); *id.* at 499–500 (Gummow & Hayne JJ).

55. Hathaway & Pobjoy, *supra* note 12, at 388–89.

56. *Id.* at 382.

57. *Id.* at 335 (emphasis added).

be harmonized with other areas of asylum law that *purportedly* suggest there is a duty to curb some forms of provocative conduct.

### A. *Foundation of H&P's Nexus Test*

Asylum law, across multiple leading jurisdictions, provides the following framework:

- (1) Social group requirement:
  - (a) the definition of "social group" should be informed by the Convention's commitment to international human rights and antidiscrimination principles such that social group accords—per the principle of *ejusdem generis*—with other categories of protected classes (e.g., religion and political opinion);<sup>58</sup>
  - (b) sexual orientation meets the definition of social group in 1(a);
- (2) Nexus requirement:
  - (a) membership in the social group must be "a contributing factor" to the risk of being harmed;<sup>59</sup>
  - (b) sexual orientation constitutes a "contributing factor" when lesbian and gay individuals are specifically threatened with physical violence for attending particular cultural institutions (e.g., musical concerts) or for engaging in particular forms of social interaction;

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58. *Islam v. Sec'y of State for the Home Dep't (Shah)*, [1999] UKHL 20, [1999] 2 A.C. 629, 643 (Lord Steyn) (appeal taken from Eng. & Wales C.A.); *Canada (Att'y Gen.) v. Ward*, [1993] 2 S.C.R. 689, 723–724; *in re Acosta*, 19 I. & N. 211, 233 (B.I.A. 1985), *overruled in part on other grounds by in re Mogharabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

59. *See, e.g., Univ. of Mich. Law School, International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT'L L. 211, 217 (2002) ("In view of the unique objects and purposes of refugee status determination, and taking account of the practical challenges of refugee status determination, the Convention ground need not be shown to be the sole, or even the dominant, cause of the risk of being persecuted. It need only be a contributing factor to the risk of being persecuted. If, however, the Convention ground is remote to the point of irrelevance, refugee status need not be recognized.").

- (3) Persecution requirement:
- (a) the relevant injury must involve a severe harm or serious violation of international human rights;
  - (b) whether the actions meet the standard in 3(a) depends on the facts in the case.

H&P attempt to stretch the judicial decisions that establish the social group requirement (#1(a) above) for a purpose that is not readily found in those opinions.<sup>60</sup> And H&P do not perform the analytic work to make a persuasive case for extrapolating to the principles that they espouse. Indeed, their test appears strained and artificial. The relevant cases simply employ human rights and antidiscrimination law to define the parameters of a social group. Theoretically, those cases might address a question whether gay men who want to participate in particular cultural events or engage in specific social relations constitute a social group. However, that is not the proper question. Instead, sexual orientation is already an accepted and valid social group (which H&P recognize and endorse). The relevant question is therefore whether being lesbian or gay is a “contributing factor” to a risk of violence resulting from participation in various cultural and social institutions. That inquiry alone satisfies the nexus requirement. Indeed, the contributing factor inquiry—as the key to the nexus test—is taken directly from the University of Michigan Guidelines organized by Professor Hathaway.<sup>61</sup> And there is no suggestion that a contributing factor based on a Convention ground would fail to satisfy the requirement if other factors involve conduct that is not protected by antidiscrimination law or that is not inherently related to the core identity of the group. Consider, as an example, violence directed against a social group consisting of women of a particular clan. An applicant would not fail to meet the nexus test, for example, if attackers physically assault such women when the women gossip about individuals in the dominant clan, or when the women attend particular music concerts or consume particular food especially popular among members of their social group. The law would also not inquire whether conduct of the victims involves “rela-

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60. Hathaway & Pobjoy, *supra* note 12, at 376-77 (discussing Shah; Ward; Acosta).

61. *Id.*

tively trivial activity that could be avoided without significant human rights cost.<sup>62</sup> Indeed, it is for this reason that the Australian, Canadian, New Zealand, United Kingdom, and United States courts and tribunals rejected the discretion requirement in sexual orientation cases—because it would place an unfair demand on lesbian and gay applicants that does not exist for other cognate groups.<sup>63</sup>

In addition to the lack of support from the landmark social group decisions, H&P invoke religious persecution cases that are either far more equivocal than H&P's analysis suggests or that, properly considered, conflict with their approach. H&P, for example, contend that antidiscrimination law limits the protection of religious freedoms in a way that sexual orientation should be similarly circumscribed. Their most powerful analogy is drawn from an asylum case involving the right to manifest religion. Relying directly on the English Court of Appeal case, *Ahmad v. Secretary of State for the Home Department* (1990), H&P state the following:

[A]t least in religion . . . cases, courts have been quite prepared to engage in line-drawing to separate protected from unprotected forms of activity. . . . We have seen this approach adopted—at times, with particular vigor—by the English Court of Appeal. In a case involving an Ahmadi from Pakistan determined to propagate his version of Islam despite its official prohibition and a clear risk of physical injury, the Court of Appeal held that an applicant may be required to curb religious activity in a country where it would attract hostility. . . .

Drawing a line between protected and unprotected activities beyond the fairly clear area of actions that infringe the rights of others is not an easy task. . . . Why was proselytizing not found to be protected religious activity?<sup>64</sup>

There are several problems with this analysis, including that it misconstrues *Ahmad's* holding and mishandles directly contrary subsequent authority. First, H&P's description of

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62. *Id.* at 335.

63. The same reasoning would apply even if one employed a more stringent test than the "contributing factor" analysis.

64. Hathaway & Pobjoy, *supra* note 12, at 379.

*Ahmad's* holding is inaccurate. The proposition was, at best, *dicta*. And, only one judge— Lord Justice Farquharson—suggested the proposition that H&P present. Indeed, these observations are so obvious that even the headnotes to the case designate the relevant passage as *obiter* and note that Lord Justice Farquharson's opinion stood alone on the subject.<sup>65</sup> The second judge simply stated that he agreed that the appeal should be dismissed.<sup>66</sup> And the third judge decided “to say nothing” about this question of law, “which, on the facts of this case, do not seem to me to arise.”<sup>67</sup>

Second, it is inaccurate to describe the facts of the case as “an Ahmadi from Pakistan determined to propagate his version of Islam despite its official prohibition and a clear risk of physical injury.” The *Ahmad* case involved two Ahmadis from Pakistan, and Lord Justice Farquharson found that “there is no evidence from the appellants either that they have, or that the [sic] intended to, seek converts, or so to practise their religion as to invite the sanctions provided by the ordinance.”<sup>68</sup> The second judge, again, stated only that he agreed the appeal should be dismissed. The third judge explained her agreement with Lord Justice Farquharson on these important facts.<sup>69</sup> Moreover, as I discuss in detail below, in a subsequent case that did involve “an Ahmadi from Pakistan determined to propagate his version of Islam despite its official prohibition and a clear risk of physical injury,” the Court of Appeal

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65. *Ahmad v. Sec'y of State for the Home Dep't*, [1990] Imm. A.R. 61 (appeal taken from Immigr. Appeal Trib.) (U.K.) (“The Court, on the facts, found it unnecessary to decide that question in this case but *obiter*, per Farquharson LJ, recorded some views on that issue within the context of religious persecution.”).

66. *Id.* (Balcombe J.).

67. *Id.* (Slade L.J.). In an earlier article, Professor Hathaway recognized that the relevant text is only from “a judge of the English Court of Appeal”—rather than a decision of the Court. Haines, Hathaway, & Foster, *supra* note 10, at 442.

68. *Ahmad*, [1990] Imm. A.R. 61.

69. *Id.* (Slade L.J.). (“As Farquharson LJ has explained, it seems clear that, though many other grounds for the appellants' alleged fear were put forward to the immigration officer or the Secretary of State, no submissions at all on the lines now relied on were made. It was not suggested that the appellants, on returning to Pakistan, would feel morally bound, or indeed would intend, to disobey the Ordinance; and it has once again to be emphasised that it would only be conduct in disobedience to the Ordinance which would in fact expose them to potential loss of liberty.”).

reached the opposite legal conclusion—and held that the applicant cannot be required to curb religious activity in a country where it would attract hostility.

In line with their broader analytic framework, H&P also state that “[t]he Court of Appeal [in *Ahmad*] was careful to acknowledge that there could be no such constraint on an activity ‘widely regarded as [a] fundamental human right.’”<sup>70</sup> First, as already discussed, the passage they rely upon is from Lord Justice Farquharson’s singular opinion. Not a decision of the Court. Second, Lord Justice Farquharson was less than careful to safeguard activities protected by human rights. Indeed, his statement on the subject is equivocal and suggests that some exercises of human rights would not receive protection:

I would agree that a person cannot obtain refugee status on the basis that he has a fear of persecution if he returns to his national country and proceeds to break its laws. At the same time *I do not consider that there are no circumstances* in which a person could claim to be a refugee if he proposes to exercise what are widely regarded as fundamental human rights in the knowledge that persecution will result. . . . It would depend to a very large extent on where, in the spectrum of religious observance, a particular applicant proposed to be active . . . .<sup>71</sup>

Third, H&P credit Lord Justice Farquharson’s argument as careful to protect human rights at the same time that they imply that his opinion allows for curbs on proselytism. H&P thus elide a clear tension that exists between these two points. That is, they never grapple with the relevant human rights law, which would arguably consider efforts to curb non-coercive proselytism by a minority group an affront to fundamental religious freedom—both as a general principle<sup>72</sup> and in the

70. Hathaway & Pobjoy, *supra* note 12, at 379 n.235.

71. *Ahmad*, [1990] Imm. A.R. 61 (Farquharson L.J.) (emphasis added).

72. See, e.g., PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 63–70 (2006); NATAN LERNER, RELIGION, SECULAR BELIEFS AND HUMAN RIGHTS: 25 YEARS AFTER THE 1981 DECLARATION 143 (2006); Special Rapporteur for Freedom of Religion and Belief, *Report on Elimination of All Forms of Religious Intolerance*, ¶¶ 59–68, U.N. Doc. A/60/399 (Sept. 30, 2005); Special Rapporteur for Freedom of Religion and Belief, *Implementation of the Declaration on the Elimination of All Forms of Intolerance*



specific case of the Pakistani Ahmadis.<sup>73</sup>

Additionally, in an attempt to bolster the authority for their position, H&P state that *Ahmad* “affirm[ed] the Court of Appeal’s earlier decision in *Mendis v. Sec’y of State for the Home Dep’t.*”<sup>74</sup> However, *Mendis* did not reach a decision on this question of law. Only one judge (Lord Justice Balcombe) reached the conclusion suggested by H&P that an individual could not claim persecution for certain future political activity. Lord Justice Balcombe also explicitly recognized that an element of his analysis was inconsistent with refugee law expressed in the UNHCR *Handbook*.<sup>75</sup> The second judge, Lord Justice Neill, declined to address the question.<sup>76</sup> And the third judge suggested that he would have reached a conclusion contrary to Lord Justice Balcombe if the legal question had been presented.<sup>77</sup> Notably, in *Ahmad* itself, Lord Justice Farquhar-

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*and of Discrimination Based on Religion or Belief, Addendum*, ¶¶ 12, 134, U.N. Doc. A/51/542/Add.1 (Nov. 7, 1996). Notably, H&P also describe the proselytism cases as examples of limitations on activities that are not based on the infringement of the rights of others. Hathaway & Pobjoy, *supra* note 12, at 378-79. This classification is important to their argument because they need to show other types of activities that have also been limited by the courts—without this broader category, H&P would not have persuasive analogs to sexual orientation asylum claims. However, under international human rights law, the possible exception that would allow for regulating certain forms of proselytism (e.g., coercive proselytism involving an abuse of power) is generally based on the protection of the rights and freedoms of others. See, e.g., TAYLOR, *supra*, at 69-70 (discussing the European Court of Human Rights’ decision in *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (ser. A) (1993)).

73. See, e.g., Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT’L L.J. 349, 408 (1996) (“The one million member Ahmadi of Pakistan perhaps represent the most persecuted Muslim religious group today.”); Amjad Mahmood Khan, *Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations*, 16 HARV. HUM. RTS. J. 217 (2003); *Pakistan: Persecution of Ahmadis Continues*, AMNESTY INTERNATIONAL, July 24, 1997, <http://www.amnesty.org/en/library/info/ASA33/025/1997/en>.

74. Hathaway & Pobjoy, *supra* note 12, at 379 n.235 (citing *Mendis v. Sec’y of State for the Home Dep’t*, [1989] Imm. A.R. 6 (appeal taken from Immigr. Appeal Trib.) (U.K.)).

75. *Mendis*, [1989] Imm. A.R. 6 (Balcombe L.J.).

76. *Id.*

77. *Id.* (Staughton L.J.) (“If a person has such strong convictions, whether on religious or other grounds, that he will inevitably speak out against the regime in his country of origin, and will inevitably suffer persecution in consequence, it may be that he should properly be treated as a refu-

son stated: “The [*Mendis*] court did not come to a concluded view in that case, Neill LJ in particular preferring to leave the question open.”<sup>78</sup> And, in earlier writing, Professor Hathaway recognized that Lord Justice Balcombe’s analysis represented only “one member of the English Court of Appeal in *Mendis*,” criticized Lord Justice Balcombe for contradicting well-settled international refugee law as reflected in the UNHCR *Handbook*, and applauded the reasoning of the third judge.<sup>79</sup>

Finally and more fundamentally, H&P mishandle directly contrary subsequent authority. The contradictory precedent—*SSHD v. Iftikhar Ahmed* (1999)—is buried at the end of a footnote and with scant explanation.<sup>80</sup> Also, readers might mistakenly believe, from the authors’ brief description of the decision, that it was somehow limited to internal flight.<sup>81</sup> However, as mentioned above, the case involved the very fact pattern that H&P identify as relevant: in their words, “an

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gee. In such a case it could be questioned whether his future conduct would be voluntary in any real sense.”). Notably, Judge Neill’s description of the question suggests that he might also oppose Judge Balcombe’s view if the legal question had to be addressed. Judge Neill wrote: “I propose to leave for decision on another occasion the question whether there may not be cases where a man of settled political conviction may be able to claim refugee status because it would be quite unrealistic to expect him, if he were returned to a foreign country, to refrain from expressing his political views for ever.” *Id.*

78. *Ahmad v. Sec’y of State for the Home Dep’t*, [1990] Imm. A.R. 61 (Farquharson L.J.) (appeal taken from Immigr. Appeal Trib.) (U.K.); see also *Danian v. Sec’y of State for the Home Dep’t*, [1999] EWCA (Civ) 3000, [12], [2000] Imm. A.R. 96 (appeal taken from Immigr. Appeal Trib.) (U.K.) (noting that “the other members of the court in *Mendis* reserved the point”).

79. Haines, Hathaway, & Foster, *supra* note 10, at 433.

80. Hathaway & Pobjoy, *supra* note 12, at 379 n.235 (citing *Sec’y of State for the Home Dep’t v. Ahmed*, [1999] EWCA (Civ) 3003, [2000] INLR 1 (appeal taken from Asylum & Immigr. Trib.) (U.K.)).

81. H&P state only: “The *Ahmad* decision was distinguished in part in a later case interpreting the internal protection alternative.” Hathaway & Pobjoy, *supra* note 12, at 379 n.235. The fact that the case involved an internal flight inquiry, if anything, broadens its holding. That is, the court considered whether the applicant could safely relocate anywhere in Pakistan as long as he curbed his religious activity. Furthermore, judges who have since relied on *Iftikhar Ahmed*, for the purposes I describe, do not even note that the case involved a question of an internal protection alternative. See *infra* note 84. And, Hathaway in his earlier writing also did not consider the internal flight question relevant to an examination of the *Iftikhar Ahmed* holding. See Haines, Hathaway, & Foster, *supra* note 10, at 439, 442 (making no mention of the internal protection alternative).

Ahmadi from Pakistan determined to propagate his version of Islam despite its official prohibition and a clear risk of physical injury.”<sup>82</sup> The Court of Appeal also described the question presented to focus directly on the issue whether an applicant may be required to curb religious activity in a country where it would attract hostility. The court firmly repudiated the notion that any such requirement existed. It held that to whatever extent the opinions in *Ahmad* and *Mendis* were incongruous with this holding, they were not good law.<sup>83</sup> And, as a result, not only did the Court of Appeal decide that proselytizing was a protected activity; the court also held that it was irrelevant if the applicant’s decision to engage in his religious activity was unreasonable. That is, the court held that refugee status could not be denied “if in fact it appears that the asylum seeker on return would not refrain from such activities—if, in other words, it is established that he would in fact act *unreasonably*.”<sup>84</sup>

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82. Hathaway & Pobjoy, *supra* note 12, at 379.

83. See *infra* note 84.

84. Sec’y of State for the Home Dep’t v. Ahmed, [1999] EWCA (Civ) 3003, [2000] INLR 1 (appeal taken from Asylum & Immigr. Trib.) (U.K.) (emphasis added). The preceding sentence by the Court of Appeal appears to include some equivocation. The longer statement by the Court reads: “It is one thing to say, as these said (and as, indeed, certain passages in the judgments in *Mendis* and *Ahmad* say) that it may well be reasonable to require asylum seekers to refrain from certain political or even religious activities to avoid persecution on return. It is quite another thing to say that, if in fact it appears that the asylum seeker on return would not refrain from such activities—if, in other words, it is established that he would in fact act unreasonably—he is not entitled to refugee status. In my judgment the cases do not support the latter proposition and, indeed, were they to do so, they would clearly be inconsistent with the very recent decision of this court.” *Id.* (citing *Danian v. Sec’y of State for the Home Dep’t*, [1999] EWCA (Civ) 3000, [2000] Imm. A.R. 96 (appeal taken from Immigr. Appeal Trib.) (U.K.)). As that final sentence suggests, to the extent that the statements of Lord Justice Balcombe in *Mendis* and Lord Justice Farquharson in *Ahmad* deviated from the central proposition in *Ifkhar Ahmed*, those statements are not good law. In any case, the actions that Lord Justices Balcombe and Farquharson thought individuals should refrain from adopting are potentially very limited. In *Mendis*, no action had been taken in the home or forum state to create a risk of persecution. *Cf.* *R v. Immigration Appeal Tribunal ex parte B*, [1989] Imm. A.R. 166 (appeal taken from Immigr. Appeal Trib.) (U.K.) (explaining that the “passage [by Balcombe LJ in *Mendis*] was concerned with the rather different situation arising when nothing has yet been said or done to create the relevant risk of persecution”). Lord Justice Balcombe was thus primarily concerned with the ability of an applicant, without anything more, to assert that she would engage in future conduct that

This holding and its status as a major precedent are well understood by others who have studied the ruling. For example, Lord Justice Buxton in *Z v. SSHD* recognized:

“It has been English law at least since that case [*Iftikhar Ahmed*], and the case that preceded it, *Danian v SSHD* [1999] INLR 533, that, in the words of the leading judgment of Simon Brown LJ [in *Iftikhar Ahmed*]: ‘in all asylum cases there is ultimately a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason. . . . the critical question: if returned, would the asylum-seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum.’”<sup>85</sup>

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would result in persecution. *Cf. Danian*, [1999] EWCA (Civ) 3000, [15], [2000] Imm. A.R. 96 (Buxton L.J.) (explaining that Lord Justice Balcombe raised the proposition that “mere assertion of an intention to engage in unwelcome (to the native country) activities . . . will suffice to ground a successful claim”). Taken to its logical conclusion, Lord Justice Balcombe reasoned, an applicant could cynically “invite persecution” for the purpose of obtaining refugee status, and he wanted to foreclose that potential. *See Mendis v. Sec’y of State for the Home Dep’t*, [1989] Imm. A.R. 6 (Balcombe L.J.) (appeal taken from Immigr. Appeal Trib.) (U.K.) (“[A] person could become a refugee as a matter of his own choice; all he would have to do would be to establish the following two propositions: (1) If, when I return to my native country, I speak out, I will be persecuted; (2) I will speak out. This is tantamount to saying that a person who says he proposes to invite persecution is entitled to claim refugee status. That I do not accept.”). As discussed above, in *Ahmad* the applicants had also taken no actions yet to attract persecution. In that situation, Lord Justice Farquharson referenced Lord Justice Balcombe’s opinion for the same proposition: “In [*Mendis*] the court considered the proposition that a person who asserted that if he returned to his home country he would be obliged to speak up and give voice to unpopular opinions which would lead to persecution, could *on that basis alone* claim refugee status. Taken to its logical conclusion, that would enable a person, as Balcombe LJ point out in his judgment, to claim refugee status by *deliberately inviting* persecution.” *Ahmad v. Sec’y of State for the Home Dep’t*, [1990] Imm. A.R. 61 (Farquharson L.J.) (appeal taken from Immigr. Appeal Trib.) (U.K.) (emphasis added).

85. *Z v. Sec’y of State for the Home Dep’t*, [2004] EWCA (Civ) 1578, [16], [2005] Imm. A.R. 75 (appeal taken from Immigr. Appeal Trib.) (U.K.). *See also J v Sec’y of State for the Home Dep’t*, [2006] EWCA Civ 1238, [10],

Notably, Hathaway, in writing with Rodger Haines and Michelle Foster, previously highlighted the judgment in *Iftikhar Ahmed* and correctly described its holding in the following terms: “the court was not prepared to accept the view that an Ahmadi citizen of Pakistan should ‘curb his proselytizing zeal, to make some allowance for the situation in Pakistan.’”<sup>86</sup> Finally, the *Iftikhar Ahmed* opinion addressed, as an aside, whether the applicant’s conduct would be protected by international human rights law. Writing for the court, Lord Justice Brown expressed “sympathy” with the lower tribunal’s view that the state action involved a valid limitation on the right to manifest religion—in other words, that the applicant’s activities were not protected by human rights law. Nevertheless, he stated, “that still does not defeat [the applicant’s] claim to asylum.”<sup>87</sup> In sum, *Iftikhar Ahmed* is inconsistent with H&P’s specific test as well as their more general claims about the role and effect of international human rights and antidiscrimination law in nexus determinations.

Finally, consider *NABD*, a case involving proselytism decided by the Australian High Court soon after *S395*.<sup>88</sup> H&P

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[2007] Imm. A.R. 73 (appeal taken from Asylum & Immigr. Trib.) (U.K.). Additionally, with one exception, several of the judges in *S395* and *HJ and HT* refer to *Iftikhar Ahmed* for this principle and with explicit and strong approval. See *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [47]–[48], [54], [56], [2011] 1 A.C. 596, 635–36, 638–39 (Lord Rodger) (appeal taken from Eng. & Wales C.A.); *id.* [18], [28]–[29], [2011] 1 A.C. at 623–24, 628 (Lord Hope); *cf. id.* [87], [2011] 1 A.C. at 648–49 (Lord Walker of Gestingthorpe) (citing to Simon Brown L.J. in *Ahmed*, [1999] EWCA (Civ) 3003, [2000] INLR 1, but omitting the “however unreasonable” language); *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473, 490 (McHugh & Kirby JJ) (Austl.). *But cf. HJ and HT*, [2010] UKSC 31, [58], [2011] 1 A.C. at 639 (Lord Rodger) (referencing more equivocal sentence by Court of Appeal discussed *supra* note 84).

86. Haines, Hathaway & Foster, *supra* note 10, at 439.

87. *Ahmed*, [1999] EWCA (Civ) 3003, [2000] INLR 1 (“Even assuming, therefore, that it would be unreasonable for this appellant on return to Pakistan to carry on where he left off, the IAT’s view and one with which I myself have some sympathy—see, for example, article 9(2) of ECHR, which allows limitations on the freedom to manifest (albeit not, be it noted, the freedom to hold) one’s religions or beliefs if that is necessary, among other things, for the protection of the rights and freedoms of others—that still does not defeat his claim to asylum.”).

88. *Applicant NABD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (Applicant NABD)* (2005) 216 ALR 1 (Austl.).

suggest that the Justices in *NABD* had difficulty reconciling the issue of proselytism with *S395*. And they invoke the dissenting opinion by Justice Kirby for support of their overall framework. The two majority decisions, however, are easily harmonized, and H&P's use of Justice Kirby's analysis is highly selective. First, the majority in *NABD* held that an individual who chooses for essentially personal reasons unrelated to state action not to proselytize cannot qualify for refugee status on the ground that the state represses proselytism.<sup>89</sup> Implicit in the court's analysis is that individuals who refrain from proselytizing due to fear of state repression are protected. (At the very least, that avenue is not foreclosed.) The *NABD* ruling thus comports with the holdings in *S395* and *HJ and HT*.<sup>90</sup> According to the latter two judgments, if a gay man refrains from activities for personal reasons that do not relate to state repression, he could not obtain refugee status. If he refrains due to state repression, he could receive protection. Accordingly, the apex courts in *S395* and *HJ and HT* emphasized that lower tribunals in their legal systems had erred in failing to inquire why applicants would conceal their sexual orientation.

Second, in H&P's effort to show that the Refugee Convention does not protect certain forms of religious expression, they quote Justice Kirby's statement in *NABD* that the freedom of religion does not permit infringements on the rights of others,<sup>91</sup> and they note that Justice Kirby grounded his analysis in article 18 of the ICCPR which includes limitations on the right to manifest religion.<sup>92</sup> It should be noted that Justice Kirby was writing in dissent and that these statements were brief asides (essentially as valuable as *dictum* in a dissent). More fundamentally, Justice Kirby, in the same paragraph

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89. See, e.g., *id.* [156], [166], [168].

90. Indeed, Lord Rodger's majority opinion in *HJ and HT* explicated these connections between *NABD* and *S395*, and relied on that synthesis to support the framework for his opinion. *HJ and HT*, [2010] UKSC 31, [61], [70], [2011] 1 A.C. at 639, 643 (Lord Rodger). The straight line that Lord Rodger's drew from *S395* through *NABD* thus contrasts with H&P's presentation of *NABD* as an example of a case in which "[c]ourts attempting to apply the decisions in *S395* and *HJ and HT* have struggled to understand just how to justify recognizing refugee status on the basis of a risk that will not, in fact, accrue." Hathaway & Pobjoy, *supra* note 12, at 379 n.235.

91. Hathaway & Pobjoy, *supra* note 12, at 378 (quoting *Applicant NABD* (2005) 216 ALR 1, [113] (Kirby J)).

92. *Id.* at 378 (citing *Applicant NABD* (2005) 216 ALR 1, [116] (Kirby J)).

describing infringements on others' rights, extolled a framework that is more directly relevant and inconsistent with H&P's narrow interpretation of religion-based asylum cases. Justice Kirby stated:

Reading the [Refugee] Convention in the context of international human rights law, specifically as that law defends freedom of religion, helps to demonstrate why the imposition of a requirement that a person must be 'discreet', 'quiet', 'low profile' and not 'conspicuous' is incompatible with the objects of the Convention, properly understood.<sup>93</sup>

And, in the paragraph immediately following his reference to article 18, Justice Kirby explained that the UN Human Rights Committee has broadly interpreted article 18's protection of the right to manifest religion, and he listed several examples.<sup>94</sup> Indeed, a faithful application of the *ejusdem generis* principle would grapple with the analog in sexual orientation cases to the examples that Justice Kirby provided:

Such manifestation extends to . . . ritual and ceremonial acts; customs; the wearing of distinctive clothing; use of particular languages; . . . and 'the freedom to prepare and distribute religious texts or publications'. . . . [T]he display of symbols, the conduct of public worship and other observances are included in the concept of 'religion.'<sup>95</sup>

In sum, *S395* and *HJ and HT* are consistent with these cases of religious persecution. The proselytizing cases are, at the very least, far more equivocal than H&P suggest. More fundamentally, the judicial precedents in these jurisdictions, properly considered, challenge both the specific test and the general conceptual framework that H&P proffer.

### B. Application of H&P's Nexus Test

H&P's proposed test is vague and risks reintroducing the types of administrability problems and judicial errors that plagued the application of the discretion requirement. H&P suggest that judges should determine whether particular con-

93. *Applicant NABD* (2005) 216 ALR 1, [113] (Kirby J).

94. *Id.* [117].

95. *Id.*

duct is “inherent in, and an integral part of” an individual’s sexual identity and whether the relevant “activity [is] reasonably required to reveal or express an individual’s sexual identity.”<sup>96</sup> As Sir Dyson noted, judges are poorly equipped to engage in those types of inquiries.<sup>97</sup> Indeed, the history of the discretion test shows the hazards of relying upon judges’ conceptions of appropriate and important social interactions of lesbian and gay individuals. In *HJ and HT*, Lord Walker quoted a leading academic study on the discretion requirement which showed that judges had effectively “posited the principle that human rights protection available to sexual orientation was limited to private consensual sex and did not extend to any other manifestation of sexual identity (which has

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96. Hathaway & Pobjoy, *supra* note 12, at 382.

97. Sir Dyson used the decision below to analyze such tests:

The AIT comprised three very experienced immigration judges who endeavoured faithfully to apply the reasonable tolerability test prescribed for them by the Court of Appeal. They found at para 44 of their Determination that for 16 years HJ had been able to conduct his homosexual activities in Iran “without *serious* detriment to his private life and without that causing him to suppress *many* aspects of his sexual identity” (my emphasis). They concluded at para 45 that he would behave in the same way on his return to Iran and that it was “difficult to see on the evidence that a return to that way of living can properly be characterised as likely to result in an abandonment of the appellant’s sexual identity.” They said that he had been able to “express his sexuality albeit in a more limited way than he can do elsewhere.” Finally, they said at para 46: “To live a private life discreetly will not cause significant detriment to his right to respect for private life, nor will it involve suppression of many aspects of his sexual identity.” I do not understand by what yardstick the AIT measured the tolerability of these limitations and concluded that they were reasonably tolerable. . . . [T]here was no basis on which the tribunal could properly conclude that the fact that HJ had to conceal his identity as a gay man was reasonably tolerable to him. I wish to make it clear that I am not seeking to criticise the tribunal, but rather to show the nature of the task that they were asked to perform.

HJ (Iran) v. Sec’y of State for the Home Dep’t (*HJ and HT*), [2010] UKSC 31, [122], [2011] 1 A.C. 596, 659–60 (Sir Dyson) (appeal taken from Eng. & Wales C.A.); *cf. id.* [80], [2011] 1 A.C. at 646–47 (Lord Rodger) (“[A] tribunal has no legitimate way of deciding whether an applicant could reasonably be expected to tolerate living discreetly and concealing his homosexuality indefinitely for fear of persecution. Where would the tribunal find the yardstick to measure the level of suffering which a gay man—far less, the particular applicant—would find reasonably tolerable?”).



been variously characterised as ‘flaunting’ ‘displaying’ and ‘advertising’ homosexuality. . .).”<sup>98</sup> H&P’s test provides considerable opportunity for such conceptions—and prejudices—to shape future judicial determinations of sexual orientation asylum claims. Indeed, the most explicit guidance from H&P for conduct that would be unprotected is their reliance on an odd, and regrettable, statement by Lord Rodger, in which he referred to “stereotypical” gay male conduct such as “enjoy[ing] themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates.”<sup>99</sup> H&P actually link their test to those examples.<sup>100</sup> They suggest that such conduct exemplifies the types of activity that should not receive asylum protection. In drawing this link, their analysis betrays a remarkable similarity to the conception that an applicant should not receive refugee status for “flaunting,” “displaying,” “advertising,” or publicly manifesting her homosexuality.<sup>101</sup>

Although H&P do not note it, a modified version of their test has already been tried—and its application evinced the problems identified above. In *SLS v MIMA* (2000),<sup>102</sup> the Australian Federal Court endorsed a form of the discretion requirement that a lower tribunal had developed across multiple cases. Recall H&P’s “reasonably required” standard. Similarly, the *SLS* court applied the following test: “whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in Sri Lanka, disclosing his sexual

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98. *Id.* [92], [2011] 1 A.C. at 650 (Lord Walker) (quoting Millbank, *supra* note 43, at 393) (internal quotation marks omitted).

99. *Id.* [78], [2011] 1 A.C. at 646 (Lord Rodger).

100. Hathaway & Pobjoy, *supra* note 12, at 382 (“Where risk accrues only by virtue of an applicant having engaged in an activity no more than 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 reasonably be said to be a risk that arises ‘for reasons of’ sexual orientation. In our view, this is likely to include attending Kylie concerts, drinking multicolored cocktails and engaging in ‘boy talk.’”).

101. On the tendency of asylum adjudicators to import stereotypes and other misconceptions of LGBT experiences into such legal frameworks, see Millbank, *supra* note 43, and Mathew Schutzer, *Bringing the Asylum Process out of the Closet: Promoting the Acknowledgement of LGB Refugees*, 13 *GEO. J. GENDER & L.* (forthcoming 2012).

102. *Applicant SLS v Minister for Immigration & Multicultural Affairs* [2000] FCA 211 (Austl.).

orientation *to the extent reasonably necessary* to identify and attract sexual partners and maintain any relationship established as a result.”<sup>103</sup> And just like H&P, the *LSLS* court emphasized that the test would not require the applicant to forego activities that were protected by fundamental human rights.<sup>104</sup> What was the result of the test? The Federal Court and lower tribunal denied the asylum application based on reasoning that echoes the errors described above. As a factual matter, the court approved the tribunal’s finding: “Public manifestation of homosexuality is not an essential part of being homosexual.”<sup>105</sup> And the Court approved the tribunal’s legal conclusion:

While it may indeed . . . be an infringement of a fundamental human right to be obliged to suppress one’s sexuality, it does not follow that it is an infringement of a fundamental human right if one is required, for safety’s sake, simply not to proclaim that sexuality openly.<sup>106</sup>

The court concluded that the Refugee Convention would not protect an individual from harsh punishment that results from

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103. *Id.* [24].

104. *Id.* [19] (“The nature of the restriction on homosexual activity which the Tribunal was inclined to regard as not unreasonable, was also illustrated by these quotations from earlier decisions of the Tribunal, constituted by the same member: ‘It is all a question of what one means by being ‘discreet.’ If this is taken to mean giving up a fundamental human right, then clearly the expectation or requirement is not reasonable. If, on the other hand, it means giving up something less, then it may well be reasonable.’”); *id.* [26]. The ambit of human rights protection applied, in the court’s view, not only to conducting sexual relations, but also to identifying as gay. It thus closely tracked H&P’s test. See, e.g., *id.* at [27] (“That the Tribunal considered that the ‘fundamental human rights’ of the applicant included those necessary to engage in a homosexual lifestyle is made clear by the reliance the Tribunal Member placed on an earlier decision of his own, the relevant part of which is set out in the reasons as follows: . . . ‘If a person is unable safely to *reveal his or her sexual preferences*, and the consequence is that he or she is unable safely to engage in private consensual sexual activity, then it seems to me that we have a violation of a fundamental human right such that the protection of the Convention is legitimately attracted.’” (emphasis added)).

105. *Id.* [20].

106. *Id.*

“gratuitous and indiscriminate forms of disclosure”<sup>107</sup> or from “parad[ing] his sexual preferences in public.”<sup>108</sup>

Notably, although H&P never mention *LSLS*, it is not an obscure decision. In earlier writing, Hathaway and his colleagues Haines and Foster discuss *LSLS* at length.<sup>109</sup> And, in *S395*, Justices Gummow and Hayne’s opinion and Justices McHugh and Kirby’s opinion both used the test in *LSLS* to illustrate how the discretion requirement in its various forms “leads to error” or “inevitably invited error.”<sup>110</sup> Indeed, Hathaway, Haines, and Foster also disproved of *LSLS*. And in describing their concerns with the decision, they quoted from another Australian Federal Court opinion explaining that “the concept of ‘discretion’ in relation to engaging in homosexual activity” has been used time and again by judges to justify a preferred outcome.<sup>111</sup>

To counteract some of these concerns, H&P place great faith in international human rights and anti-discrimination law pertaining to LGBT rights to constrain decision-makers’ reliance on their own subjective understandings of sexuality.<sup>112</sup> However, it is unclear that international law can bear such a weight in this particular context. First, it is unclear what theory of judicial decision-making would place such trust in positive international law to cure the particular problems identified. Second, H&P admit that the body of international law specifically concerning sexual orientation discrimination is both limited and evolving. Thus adjudicators in refugee determinations will retain considerable leeway to develop their interpretations of the law. Third, *LSLS* demonstrates the feeble-

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107. *Id.* [22].

108. *Id.* [19]; *see also id.* [22], [26].

109. Haines, Hathaway & Foster, *supra* note 10, at 435.

110. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473, 494, 501 (McHugh & Kirby JJ) (Austl.).

111. Haines, Hathaway & Foster, *supra* note 10, at 436 (quoting *Nezhadian v Minister for Immigration & Multicultural Affairs* [2001] FCA 1415 (Austl.)) (internal quotation marks omitted).

112. Hathaway & Pobjoy, *supra* note 12, at 383 (“First, by relying on external standards of reference of ‘universal applicability,’ the connection between Refugee Convention grounds and international human rights law promotes objective and consistent decision-making. This objective framework . . . limits the scope for decision-makers to import their own subjective understandings of sexuality into their consideration of what might fall within the protected interest of ‘sexual orientation.’”).

ness of international human rights law to overcome the plasticity of a legal standard like the one that H&P propose. Fourth, H&P apparently place a high threshold on the range of human rights protections that would even be applicable. That is, throughout their article, they employ the term "human rights" with qualifications suggesting only a subset of human rights would count. For example, H&P state that their test would require lesbian and gay applicants to establish that their behavior is protected by "*core* internationally recognized human rights;" they suggest that acts of concealment must involve a "*significant* human rights cost;" they refer to "the violation of a *core* human right and hence a sufficiently serious form of harm to give rise to a risk of being persecuted;" they reject privacy rights, in part, because the ICCPR does not guarantee the right to privacy "in any *absolute* sense;" and they approve cruel, inhuman, or degrading treatment or punishment under article 7 of the ICCPR because that article entails "one of the few *absolute* rights in that treaty" (even though some authorities suggest that the content of cruel, inhuman, and degrading treatment is not absolute but instead turns on the context and public purpose of state action).

Finally, in explicating how their test would operate, H&P's designation of conduct that should not be protected lacks legal foundation and overlooks important social realities. First, they contend that state repression of behaviors that are "vaguely or stereotypically associated with homosexuality" would not suffice for protection. However, it is unclear why a regime of state control of such micro-level human behavior would not amount to an infringement on basic human dignity and a significant violation of human rights. Indeed, the specific targeting of lesbian and gay citizens in those domains of life would deny them the right to equality including participation, on an equal footing, in cultural and social life.<sup>113</sup> Moreover, if the reason for state action or omission (e.g., failure of state protection against private violence) is based on plain prejudice or animus against lesbian and gay individuals, those state practices would not satisfy the limitation clause under

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113. See, e.g., U.N. Human Rights Comm., General Comment No. 18: Non-discrimination (1989), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.7, at 146 (May 12, 2004).

human rights law. Additionally, such state practices would presumably involve discrimination on the basis of status as the core motive: individuals in these scenarios are attacked for being lesbian or gay. The violence perpetrated in response to their incidental conduct or marginal activities is presumptively due to their status, that is, their socially deviant sexual orientation.<sup>114</sup> Furthermore, H&P's analysis does not sufficiently consider how states may use (incidental) conduct as a proxy, or indicator, for sexual orientation. That is, in some circumstances, state repression of incidental conduct is, at bottom, an effort to identify and locate lesbian and gay individuals for punishment. Finally, H&P's analysis also overlooks how behaviors that might initially appear inconsequential or incidental to identity can instead constitute important forms of communication among members of a repressed group. Indeed, George Chauncey's award-winning history of gay male behavior in public shows how various presentations of self are important to identifying, socially signaling, and forming relations among members of a group living in a highly repressive society.<sup>115</sup> It would be ill advised to enlist asylum adjudicators to determine when such behaviors are socially important for lesbian and gay individuals or sufficiently connected to membership in their social group; asylum law has, indeed, otherwise refrained from rejecting applicants on such a basis.<sup>116</sup>

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114. *Cf. Maldonado v. U.S. Att'y Gen.*, 188 F. App'x 101, 104 (3d Cir. 2006) ("Even assuming that Maldonado is a member of a particular social group, however, the government alleges that the persecution was not 'on account' of that membership, but occurred instead because he engaged in an activity (leaving gay discos late at night) that he was free to modify. This is a distinction without a difference. The fact that Maldonado was targeted by the police only while engaged in an elective activity does not foreclose the possibility that he was persecuted on account of his membership in a particular social group. . . . It is clear that the police were motivated by Maldonado's sexuality.").

115. See generally GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940* (1994).

116. See, e.g., *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1354 (11th Cir. 2009) (quoting *Antipova v. U.S. Att'y Gen.*, 392 F.3d 1259, 1264-65 (11th Cir.2004)) (citing *Muhur v. Ashcroft*, 355 F.3d 958, 960-61 (7th Cir.2004)) ("We have recognized that 'the [Immigration and Nationality Act] and related regulations . . . do not require applicants [who have faced persecution on account of race, religion, nationality, membership in a particular social group, or political opinion] to avoid signaling to others that they are indeed members of a particular race, or adherents of a certain relig-

## IV. THE ROLE OF POLITICAL PRUDENCE

As a final note, consider the role of political prudence in H&P's analysis. The authors suggest that the prospective political reception of a judgment should constrain the judicial articulation of refugee protections. And they assert that the U.K. and Australian court rulings "risk fracturing the normative consensus upon which the Refugee Convention is based."<sup>117</sup> This type of prudential reasoning can obviously be taken too far. And H&P do not suggest where they would draw the line. Furthermore, their assertion about the *ex post* political support for such rulings amounts to an empirical claim lacking in evidence. Whose political acceptance is necessary and how would negative reactions be expressed—or, instead, absorbed—within the regime? What forces set in motion by such rulings might, on the contrary, lead to institutionalization of the judicial interpretation over time? Under what conditions can courts ever successfully step out in front of existing political preferences to articulate more progressive interpretive understandings? Are particular courts, due to their greater authoritative position in international society, especially able to forge new transnational understandings? Consider, for example, the work of sociologist David John Frank (including his accompanying article in this Issue) and other social scientists who document the global spread of new ideas and new conceptions of rights.<sup>118</sup> Their research shows that states are frequently willing to join internationally legitimated models of behav-

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ion, etc.'" (internal quotation marks omitted)); *cf.* *HJ (Iran) v. Sec'y of State for the Home Dep't (HJ and HT)*, [2010] UKSC 31, [79], [2011] 1 A.C. 596, 646 (Lord Rodger) (appeal taken from Eng. & Wales C.A.) ("As the Nazi period showed all too clearly, a secular Jew, who rejected every tenet of the religion and did not even think of himself as Jewish, was ultimately in as much need as any Orthodox rabbi of protection from persecution as a Jew. Similarly, an applicant for asylum does not need to show that his homosexuality plays a particularly prominent part in his life.").

117. Hathaway & Pobjoy, *supra* note 12, at 335 (18).

118. See, e.g., John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997); David John Frank, Ann Hironaka & Evan Schofer, *The Nation-State and the Natural Environment over the Twentieth Century*, 65 AM. SOC. REV. 96 (2000); RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (forthcoming 2012); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

ior—including in the domain of LGBT rights<sup>119</sup>—before their nation’s own cultural, political, and social conditions would otherwise suggest possible. And state institutions are more willing to follow global opinion leaders (such as the U.K. and Australian high courts). We thus need greater empirical evidence before accepting H&P’s concerns about the transnational political effects of the two judicial decisions. Indeed, the existing empirical research suggests a more complicated, if not contrary, picture than the one H&P postulate.

In addition to those empirical issues, consider the normative implications of H&P’s strong defense of political prudence. First, if Professor Frank and others’ research is correct, H&P’s approach would unnecessarily foreclose asylum protections in important cases. For example, if their argument were accepted at face value, courts might have never classified lesbian and gay applicants as a protected social group in the first place. Indeed, theirs is a high stakes political calculation that, if incorrect, unduly undercuts humanitarian developments. A presumption should perhaps be set against accepting such political constraints. Second, H&P’s argument is in tension with the design of the international refugee regime, which allows national bodies considerable autonomy to make eligibility determinations. The regime delegates to individual states, and their judiciaries, an important role in guiding asylum law’s evolution. Admittedly, that design feature allows national political bias to enter such decisions. However, it has also become the impetus for courts to develop interpretations of the Refugee Convention that extend the scope of protections in a principled manner.

Finally, it is far from clear that H&P are correct about which position in this debate aligns or collides with the existing legal regime and the purported normative consensus underpinning it. There is a strong argument, as I discuss in Part III, that H&P’s rendition of existing case law includes sig-

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119. David John Frank & Elizabeth H. McEaney, *The Individualization of Society and the Liberalization of State Policies on Same-Sex Sexual Relations, 1984-1995*, 77 SOC. FORCES 911 (1999); David John Frank, Steven A. Boutcher, & Bayliss Camp, *The Reform of Sodomy Laws from a World-Society Perspective*, in QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 123 (Scott Barclay, Mary Bernstein, & Anna-Maria Marshall eds., 2009); David John Frank, Bayliss J. Camp, & Steven A. Boutcher, *Worldwide Trends in the Criminal Regulation of Sex, 1945 to 2005*, 75 AM. SOC. REV. 867 (2010).

nificant flaws. And, there is at least a strong argument, as I discuss in Part II, that the judgments of the U.K. and Australian courts were embedded sufficiently in existing doctrine and the core purposes of the Refugee Convention. In contrast, prominent refugee scholars publishing an article that contends that these courts “ran roughshod over their responsibility to identify the persecutory harm” and “flatly contradict[ed] the jurisprudence of all leading courts” might, on its own steam, weaken the normative consensus that supposedly holds the regime together.