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Queer Cases Make Bad Law

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QUEER CASES MAKE BAD LAW

James C. Hathaway* and Jason Pobjoy**

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Introduction

Addressing the refugee claims of two gay men[1]—the first from Iran, facing the prospect of imprisonment and lashing under that country's extreme anti-sodomy laws; the second from Cameroon, terrorized by his neighbors and assaulted by police after he was seen kissing his partner—Lord Hope of the United Kingdom's new Supreme Court, observed that

> a huge gulf has opened up in attitudes to and understanding of gay persons between societies . . . . It is

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1. We refer to the two cases discussed in this article as "queer" cases to emphasize that these decisions confront the question of assimilationist assumptions in refugee law in a way that echoes the overtly political challenge of activist groups that embraced the term "queer" as a sign of resistance against assimilationist politics. While "queer theory" has since emerged as a form of critical theory drawing strength from the work of Michel Foucault (see, for example, Eve K. Sedgwick, Epistemology of the Closet (1990) and Judith Butler, Gender Trouble (1999)), this paper does not seek to engage the broader question of the validity of heteronormative discourse or other more theoretical concerns. Moreover, because the claimants in the cases under consideration did not themselves seek to challenge assimilationist assumptions (as, perhaps ironically, we believe that the courts did), we generally refer to them as individuals using more traditional labels such as "homosexual" or "gay." *See infra* note 27.

> one of the most demanding social issues of our time. Our own government has pledged to do what it can to resolve the problem, but it seems likely to grow and to remain with us for many years. In the meantime more and more gays and lesbians are likely to have to seek protection here, as protection is being denied to them by the state in their home countries. It is crucially important that they are provided with the protection that they are entitled to under the Convention—no more, if I may be permitted to coin a well-known phrase, but certainly no less.[2]

There is little doubt that the "huge gulf" referred to by Lord Hope is in fact an ever-increasing divide between states of the developed and less developed worlds.[3] While not so long ago institutionalized homophobia was common in developed countries,[4] most of the North has now moved to embrace

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2. HJ (Iran) v. Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [3], [2011] 1 A.C. 596, 619–20 (appeal taken from Eng. & Wales C.A.).

3. This divide was made particularly clear when the Third Committee of the United Nations General Assembly voted 79-70-17 in favor of a motion by Benin to delete a call for protection of sexual minorities against extrajudicial, summary, or arbitrary resolutions. Recorded Vote, U.N. GAOR, Third Comm., 65th Sess., 46th mtg., U.N. Doc. A/C.3/65/L.65 (Nov. 16, 2010), *available at* http://www.un.org/en/ga/third/65/docs/voting_sheets/L.65.pdf. The United States and other developed countries spearheaded a successful drive to reverse this decision, approved on December 21, 2010 by a vote of 93-55-27: U.N. GAOR, 65th Sess., 71st plen. mtg. at 20, U.N. Doc. A/65/PV.71 (Dec. 21, 2010). All OECD countries (other than Turkey, which did not vote), supported protection for sexual minorities. *Id.* at 19; *see also* Anita Snow, *Gay Rights Row Breaks Out over Amended U.N. Resolution*, THE GUARDIAN, Dec. 21, 2010, http://www.guardian.co.uk/world/2010/dec/21/gay-rights-row-un-resolution (highlighting that Western nations opposed the deletion of "sexual orientation" from the list of protected minorities). Furthermore, the Human Rights Council's recent resolution on "Human Rights, Sexual Orientation and Gender Identity" affirms the universality of human rights, and notes concern about violence and discrimination based on sexual orientation and gender identity. H.R.C. Res. 17/19, 17th Sess., 34th mtg., U.N. Doc.A/HRC/17/L/9/Rev.1 (15 June 2011) (passing the resolution with a vote of 23-19-3).

4. By the mid-twentieth century homosexual behavior was also seen as a subversion. Senator Joseph McCarthy and his homosexual assistant, Roy Cohn, searched out and exposed 'known homosexuals' in government service, some of whom lost their jobs while others took their own lives. In an America in which homosexuals had be-

gay rights. The anti-sodomy laws that existed in nearly a quarter of developed countries as late as the 1980s[5] have now all been eliminated.[6] And at the level of affirmative rights, laws mandating non-discrimination on the basis of sexual orientation in access to employment are in place in nearly all developed countries,[7] with full marriage rights[8] now recognized in Argentina, Belgium, Canada, the Federal District of Mexico, Iceland, Netherlands, Norway, Portugal, Spain, Sweden, and parts of the United States.[9]

With very few exceptions,[10] the same evolution has not taken place in the political South. In particular, anti-sodomy

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> come the target of state-sponsored persecution, homophobia was an absolutely acceptable prejudice. By the 1960s, 82 percent of American men and 58 percent of American women surveyed believed that only Communists and atheists were more dangerous than homosexuals.

BYRNE FONE, HOMOPHOBIA: A HISTORY 10 (2000).

5. For example, the following is a list of select countries and the years in which they decriminalized same-sex sodomy: Portugal (1983); New Zealand (1986); the United Kingdom (decriminalized in Scotland in 1981 and Northern Ireland in 1982); Israel (1988); Estonia (1992); Ireland (1993); Australia (Tasmania was the last state to decriminalize same-sex sodomy in 1997); the United States (decriminalized federally in 2003); Portugal (2010); Iceland (2010); and Argentina (2010). DANIEL OTTOSSON, INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS'N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS 46 (2010), *available at* http://ilga.org/ilga/en/article/1161; Timeline: Same-Sex Marriage Around the World, CBC NEWS (May 29, 2009), http://www.cbc.ca/news/world/story/2009/05/26/f-same-sex-timeline.html.

6. *Id.* at 46.

7. As of May 2010, 29 of the 34 OECD Member States expressly prohibited discrimination in employment based on sexual orientation. *Id.* at 47.

8. Same-sex couples are offered most of the rights of marriage, through a civil partnership or similar legal classification, in Austria, Denmark, Finland, Germany, Hungary, Israel, New Zealand, Switzerland, the United Kingdom, some states of Australia, and some states of the United States. *Id.* at 49.

9. *Id.* Resistance to the affirmation of gay rights in developed countries does remain, however, as the Italian Prime Minister has made clear in his response to allegations of a sex scandal, stating that "[i]t's better to be passionate about beautiful women than to be gay." Nicole Winefield, *Berlusconi: Better to Love Women than Gays*, WASH. TIMES, Nov. 2, 2010, http://www.washingtontimes.com/news/2010/nov/2/berlusconi-better-love-women-gays/.

10. Just as the Northern record of support for gay equality is not uniform, neither is it the case that the record of less developed states is uniformly inattentive to gay rights. For example, South Africa is one of the few

and similar laws remain in place in seventy-four less developed countries, and are regularly enforced in many of them.[11] It should therefore come as no surprise that members of sexual minorities in flight from both police and other state agents, as well as from vigilante and other private actors taking their cue from legislated homophobia, have increasingly sought the protection of Northern states that take a more sympathetic view of gay rights. Until and unless the rights of sexual minorities are comparably ensured in most Southern countries, Northern states can expect to receive asylum claims from those at risk, requiring them to strike precisely the balance posited by Lord Hope.

The Refugee Convention,[12] now adopted by 147 states,[13] is the primary instrument governing refugee status under international law. The Convention sets a binding and non-amendable definition of which persons are entitled to recognition as refugees, and thus to enjoy the surrogate or substitute national protection of an asylum state. The core of the article

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countries in the world that recognizes same-sex marriages. *Minister of Home Affairs v. Fourie* 2006 (1) SA 424 (CC). Nepal has announced its intention to do the same. *Nepal to Celebrate Becoming First Asian Nation to Recognise Gay Marriages with Same-Sex Unions on Mount Everest*, DAILY MAIL, Apr. 21, 2010, http://www.dailymail.co.uk/news/article-1267713/Nepal-celebrate-Asian-nation-recognise-gay-marriages-sex-unions-Mount-Everest.html.

11. "In 38 countries across the continent of Africa, same-sex activity is criminalized and one has only to look at the reports of human rights organizations to see evidence of the violence and discrimination unleashed on LGBT people because of their sexual orientation or gender identity." INT'L GAY AND LESBIAN HUMAN RIGHTS COMM'N, NOWHERE TO TURN: BLACKMAIL AND EXTORTION OF LGBT PEOPLE IN SUB-SAHARAN AFRICA 5 (Ryan Thoreson & Sam Cook, eds. 2011). For country specific examples, see HUMAN RIGHTS WATCH, "THEY WANT US EXTERMINATED": MURDER, TORTURE, SEXUAL ORIENTATION AND GENDER IN IRAQ (2009); HUMAN RIGHTS WATCH, CRIMINALIZING IDENTITIES: RIGHTS ABUSES IN CAMEROON BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY (2010); HUMAN RIGHTS WATCH, FEAR FOR LIFE: VIOLENCE AGAINST GAY MEN AND MEN PERCEIVED TO BE GAY IN SENEGAL (2010).

12. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 139 [hereinafter Convention or Refugee Convention]. The temporal and geographic reach of the Convention is extended by Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Protocol].

13. There are 147 state parties to either the Convention or the Protocol. Office of the High Commissioner for Refugees, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, http://www.unhcr.org/3b73b0d63.html (last visited Nov. 31, 2011).

1A(2) definition provides that a refugee is a person who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group." A person is thus a refugee, and entitled to the *non-refoulement* and other protections of the Refugee Convention, only if there is a risk of the applicant "being persecuted," meaning that a form of serious harm is threatened which bespeaks a failure of state protection. Moreover, that risk of being persecuted must be causally connected to one of the five enumerated forms of civil or political status. It must also be "well-founded" in the sense that there is a real chance that the risk of being persecuted for a Convention reason will, in fact, accrue if the applicant is sent home.[14]

In most respects, the Refugee Convention has effectively accommodated claims based on sexual orientation.[15]

A gay claimant will only be a refugee if he apprehends a form of harm that amounts to a risk of "being persecuted." The Convention's use of the passive voice "being persecuted," rather than simply "persecution," signals the need to demon-

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14. The individual must also be outside their country of origin and be in need of and deserving of protection. Convention, *supra* note 12, arts. 1(A)(2), 1(D)–1(F). These elements of the definition have been largely non-contentious in the context of sexual orientation claims.

15. Our article is focused on refugee law doctrine. We note, however, the difficulties that a gay claimant might have in establishing questions of fact (for example, that they in fact are gay). While we acknowledge the valid concerns raised by states in the context of sexual orientation refugee claims (for example, the difficulties in assessing sexuality; the potential for abuse), these are, at the end of the day, part and parcel of the refugee law system. Like every other case, these concerns must be addressed by recourse to rules of evidence and procedure. *Cf.* Paul Canning, *Czech Republic Uses 'Gay Tests' on Asylum Seekers*, PINK NEWS (Dec. 6, 2010, 3:13 PM), http://www.pinknews.co.uk/2010/12/06/czech-republic-uses-gay-tests-on-asylum-seekers (describing the Czech Republic's use of "phallometric testing" to determine if asylum seekers are truly gay). For a comprehensive analysis of some of the evidential obstacles faced by sexual minority applicants, see Catherine Dauvergne & Jenni Millbank, *Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers*, 31 FED. L. REV. 299 (2003) [hereinafter Dauvergne & Millbank, *Burdened by Proof*]; 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) [hereinafter Dauvergne & Millbank, *Before the High Court*]; 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 (2009).

strate a predicament of risk that cannot or will not be dependably rectified by the applicant's own country. As the Australian Federal Court held in *Kord*,[16] the "use of the passive voice conveys a compound notion, concerned both with the conduct of the persecutor and the effect that conduct has on the person being persecuted."[17] That is, because the Convention is concerned with protection against a condition or predicament—*being* persecuted—consideration must be given to both the nature of the risk *and* the nature of the state response (if any), since it is the combination of the two that gives rise to the predicament of "being persecuted." As senior courts have agreed, it is therefore necessary to show the "sustained or systemic violation of basic human rights demonstrative of a failure of state protection."[18]

Because the range of harms inflicted by reason of sexual orientation is far too often at the most brutal end of the

16. *Minister for Immigration & Multicultural & Indigenous Affairs v Kord* (2002) 125 FCR 68 (Austl.).

17. *Id.* [2].

18. James C. Hathaway, The Law of Refugee Status 112 (1991). This bifurcated approach was first endorsed by the Supreme Court of Canada in Canada (Att'y Gen.) v. Ward, [1993] 2 S.C.R. 689, 723–724. It has since been formally embraced by the United Kingdom's House of Lords, and since 2009, its Supreme Court in a series of cases. 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.); Horvath v. Sec'y of State for the Home Dep't, [2000] UKHL 37, [2001] 1 A.C. 489, 495 (Lord Hope of Craighead), 512 (Lord Clyde) (appeal taken from Eng. & Wales C.A.); Sepet v. Sec'y of State for the Home Dep't, [2003] UKHL 15, [7], [2003] 1 W.L.R. 856, 862–63 (Lord Bingham of Cornhill) (appeal taken from Eng. & Wales C.A.); R. v. Special Adjudicator (*Ullah*), [2004] UKHL 26, [32], [2004] 2 A.C. 323, 355 (Lord Steyn) (appeal taken from Eng. & Wales C.A.); HJ (Iran) v. Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [2011] 1 A.C. 596, 609 (Lord Hope) (appeal taken from Eng. & Wales C.A.). Although not yet uniformly embraced in Australia, this approach was also endorsed expressly by Justice Kirby and implicitly by Chief Justice Gleeson of the Australian High Court in *Minister for Immigration & Multicultural Affairs v Khawar* [2002] 210 CLR 1, [70], [111]. Although the United States approach to the interpretation of "being persecuted" is not grounded in any particular framework, in a 2007 decision the U.S. Court of Appeals for the Sixth Circuit stated: "Whether the treatment feared by a claimant violates recognized standards of basic human rights can determine whether persecution exists." Stenaj v. Gonzalez, 227 F. App'x 429, 433 (6th Cir. 2007) (citing James C. Hathaway, The Law of Refugee Status 104–05 (1991); Abay v. Ashcroft, 368 F.3d 634, 638–39 (6th Cir. 2004)).

human rights spectrum—arbitrary arrest and imprisonment,[19] kidnapping,[20] police beatings,[21] public lashing and stoning,[22] rape,[23] involuntary medical intervention,[24] "social cleansing,"[25] and even state-sanctioned execution[26]—it has not been difficult for courts to see the prospective harms facing many gay refugee claimants[27] as sufficiently serious to satisfy the "serious harm" limb of the "being persecuted" inquiry. Less violent and even more common responses to homosexuality—for example, denial of the right to work, education, medical treatment, or public housing—have also been appropriately recog-

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19. A Human Rights Watch Report quotes a victim of arbitrary arrest and imprisonment in Cameroon thus:

> Two men with SWAT [Special Weapons and Tactics] team uniforms barged into my house. . . . I asked why they were arresting me. . . . [T]hey said I was there for homosexuality and pushed me into a cell. I shared the cell with four other men. Police told me they were also there because they were faggots.

HUMAN RIGHTS WATCH, CRIMINALIZING IDENTITIES: RIGHTS ABUSES IN CAMEROON BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 16 (2010).

20. Shaun Walker, *Russian Gay Rights Activist 'Kidnapped by Police at Airport,'* THE INDEPENDENT, Sept. 21, 2010, at 22.

21. *Policías agredieron a gays que se besaban en el Centro de Lima* [Police Assault Gays Kissing in the Center of Lima], EL COMERCIO (Feb. 13, 2011), http://elcomercio.pe/lima/713170/noticia-policias-agredieron-gays-que-se-besaban-centro-lima.

22. Paul Canning, *Iranian Men to Be Stoned to Death over Gay Sex*, PINK NEWS (Jan. 18, 2011), http://www.pinknews.co.uk/2011/01/18/iranian-men-to-be-stoned-to-death-over-gay-sex.

23. Annie Kelly, *Raped and Killed for Being a Lesbian: South Africa Ignores 'Corrective' Attacks*, THE GUARDIAN (Mar. 12, 2009), http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa.

24. Ryan Goodman, *The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary 'Medical' Intervention*, 105 YALE L.J. 255 (1995).

25. HUMAN RIGHTS WATCH, "THEY WANT US EXTERMINATED": MURDER, TORTURE, SEXUAL ORIENTATION AND GENDER IN IRAQ 2 (2009).

26. Iran, Mauritania, Saudi Arabia, Sudan, Yemen, plus some parts of Somalia and Nigeria, presently maintain the death penalty for homosexual conduct. OTTOSSON, *supra* note 5, at 45.

27. We acknowledge that terminology here is difficult and the subject of personal preference. We have generally used the terms "sexual minority" or "gay" as convenient shorthand to refer to gay, lesbian, bisexual, transgender, and intersex persons. Pronouns are phrased in the masculine voice in recognition of the fact that the claimants in the two key cases considered in this paper are male.

nized as persecutory harms[28] in line with the more general evolution of refugee law to predicate such a finding on the existence of a risk to core, internationally recognized human rights.[29]

Nor has it been a challenge to satisfy the second half of the "being persecuted" inquiry, which requires a showing either that the state is itself the agent of harm, or alternatively that it is unable or unwilling effectively to counter threats emanating from non-state agents. Some forty percent of the world's nations still criminalize homosexual acts,[30] with a number of regimes still striving to make their laws and enforcement regimes even more repressive.[31] Where sexual minorities are threatened by non-state actors, gay applicants have benefitted from the recognition that the absence of a mean-

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28. *See* Kadri v. Mukasey, 543 F.3d 16, 21–22 (1st Cir. 2008) (finding that a gay applicant might be eligible for refugee status on the basis that he would be unable to earn a living as a medical doctor if he returned to Indonesia). *See generally* MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS: REFUGE FROM DEPRIVATION 156–235 (2007). It must be noted that despite substantial advances in international refugee jurisprudence in the recognition of socio-economic persecution, some decision makers have been reluctant to recognize violations of these rights as a form of harm in sexual orientation cases. *See* Paredes v. U.S. Att'y Gen., 219 F. App'x 879, 887 (11th Cir. 2007) (finding that the situation of HIV-infected homosexual men left without medical treatment in their home country was "regrettable" but did not rise to the level of persecution necessary for the grant of asylum). Similarly, an Australian Court found that familial rejection could not amount to being persecuted, even where that could lead to "utter penury," noting that the applicant "might *at worst* starve." *MMM v Minister for Immigration & Multicultural Affairs* (1998) 90 FCR 324, 326–27 (Austl.) (emphasis added).

29. *See supra* note 18.

30. OTTOSSON, *supra* note 5, at 45; *see also Gay Rights in Developing Countries: A Well-Locked Closet*, THE ECONOMIST (May 27, 2010), http://www.economist.com/node/16219402 (describing the discrimination gays face in developing countries).

31. For example, see Uganda's Anti-Homosexuality Bill, introduced into parliament on October 13, 2009, proposing, amongst other things, to introduce the death penalty for people with previous convictions, who are HIV-positive, or who engage in same sex acts with people under 18 years of age. The Anti-Homosexuality Bill, 2009, Bill [18] cl. 3 (Uganda), *available at* http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/uganda-bill-september-09.pdf.

ingful state response to the non-state threat is what is required to justify asylum.[32]

The Refugee Convention's nexus criterion—that is, the requirement that the risk of being persecuted must be "*for reasons of* race, religion, nationality, membership of a particular social group or political opinion"—is also rarely a bar to the recognition of gay claims.[33] At least since the landmark decision of the Supreme Court of Canada in *Ward*, which drew on non-discrimination norms to recognize "gender, linguistic background *and sexual orientation*" as the paradigmatic exam-

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32. [I]n the context of an allegation of persecution by non-state agents, the word "persecution" implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of the persecutors. In a case where the allegation is of persecution by the state or its own agents the problem does not, of course, arise. This is a clear case for the surrogate protection by the international community. But in the case of an allegation of persecution by non-state agents, the failure to provide the protection is nevertheless an essential element. It provides the bridge between persecution by the state and persecution by non-state agents which is necessary in the interest of the consistency of the whole scheme.

Horvath v. Sec'y of State for the Home Dep't, [2000] UKHL 37, [2001] 1 A.C. 489, 497 (Lord Hope) (appeal taken from Eng. & Wales C.A.).

33. We note, however, that this very question was recently slated for consideration by the European Court of Justice, after the German Administrative Court considered the question of whether "homosexuality is to be considered a sexual orientation within the meaning of the second sentence of Article 10(1)(d) of [Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304) 13 (EU) [hereinafter EU Qualification Directive], *available at* http://www.unhcr.org/refworld/docid/4157e75e4.html]." Reference for a Preliminary Ruling from the Oberverwaltungsgericht fuer das Land Nordrhein-Westfalen Lodged on 1 December 2010–Kashayar Khavand v Ger., 2011 O.J. (C38) 7. If answered in the affirmative, the Administrative Court raised three additional questions: "(a) To what extent is homosexual activity protected?; (b) Can a homosexual person be told to live with his or her sexual orientation in his or her home country in secret and not allow it to become known to others?; (c) Are specific prohibitions for the protection of public order and morals relevant when interpreting and applying Article 10(1)(d) of [the EU Qualification Directive] or should homosexual activity be protected in the same way as for heterosexual people?" *Id.* The reference was subsequently withdrawn after the applicant was granted refugee status.

ples of particular social groups,[34] the members of sexual minorities have had little difficulty bringing themselves within the scope of the Convention's beneficiary class.[35] And in line with the understanding that the Convention ground need not be the sole, or even the dominant, cause of the risk of being persecuted, a gay applicant will satisfy the nexus requirement so long as their sexual identity is a contributing element in the production of the risk.[36]

Despite these positive developments, refugee protection has often been denied to gay applicants over the past decade,

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34. Canada (Att'y Gen.) v. Ward, [1993] 2 S.C.R. 689, 739 (emphasis added). This approach was approved in *Shah*:

> In 1951 the draftsmen of article 1A(2) of the Convention explicitly listed the most apparent forms of discrimination then known, namely the large groups covered by race, religion, and political opinion. It would have been remarkable if the draftsmen had overlooked other forms of discrimination. After all, in 1948 the Universal Declaration had condemned discrimination on the grounds of colour and sex. Accordingly, the draftsmen of the Convention provided that membership of a particular social group would be a further category.

Islam v. Sec'y of State for the Home Dep't (*Shah*), [1999] UKHL 20, [1999] 2 A.C. 629, 643 (appeal taken from Eng. & Wales C.A.); *see also* HATHAWAY, *supra* note 18, at 136.

35. *See In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990) (rejecting as unpersuasive the Immigration and Naturalization Service's argument that the homosexual asylum seeker was not part of a "particular social group" in Cuba); *Refugee Appeal No. 1312/93* (*Re GJ*) [1998] INLR 387 (N.Z.) (applying the norms approach in *Ward* to find "the issue of sexual orientation presents little difficulty" in qualifying as a "particular social group" under the Convention); *Shah*, [1999] UKHL 20, 2 A.C. at 644–45 (Lord Steyn), 663 (Lord Millett) (U.K.) (using homosexual individuals as a paradigmatic class of protected individuals under the Convention for purposes of comparison to other classes); Decision of 13 May 2002 (Refugee Appeal Board 2002), *available at* http://www.unhcr.org/refworld/pdfid/4b0e98fc2.pdf (S. Afr.) (accepting *Shah*'s finding that homosexuals formed a "particular social group" under the Convention); EU Qualification Directive, *supra* note 33, art. 10(1)(d) (directly mentioning "sexual orientation" as a basis for forming a "particular social group"). In 1994, the U.S. Attorney General designated *Toboso-Alfonso* "as precedent in all proceedings involving the same issue or issues." Att'y Gen. Order No. 1895-94 (June 19, 1994).

36. *Cf.* Zhou v. Ashcroft, 85 F. App'x 566, 568 (9th Cir. 2003) (stating that the asylum statute covers persecution where the "protected ground" constitutes one of the motives for the persecution in question).

particularly in Australia and the United Kingdom,[37] on the grounds that the "well-founded fear" criterion of the refugee definition is not met where a member of a sexual minority can reasonably be expected "to be discreet" or otherwise "tolerate" a measure of internalized repression in order to avoid the risk of being persecuted in their home state. Because sexual minority status—like the protected grounds of political opinion and religion (and, to a lesser extent, race and nationality)—*can* be concealed or repressed, it has been asserted by some courts that there is therefore a *duty* to conceal one's sexual orientation in order to avert the prospect of being persecuted.[38] The tragedy is that courts advanced this obligation of behavior modification, in effect "postulating self-censorship,"[39] against gay applicants even as they vigorously (and appropriately) rejected any comparable duty to disguise one's political opinions or religious convictions in order to be safe.[40]

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37. Compare to the approach adopted in Canada in *XMU (Re)*, [1995] C.R.D.D. 146, No. T94-06899 (Immigration and Refugee Board of Can.); in the U.S. in *Karouni v.Gonzales*, 399 F.3d 1163, 1170 (9th Cir. 2005) and *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1099 (9th Cir. 2000), *overruled on other grounds by* Thomas v. Gonzales, 409 F.3d 1177, 1187 (9th Cir. 2005); and in New Zealand in *Re GJ* [1998] INLR 387. In each of these cases the court disavowed any attempt to impose a "duty of discretion," but did not go on to consider the additional question of whether an applicant who would in fact be "discreet" could qualify for Convention refugee status. This was the critical issue in the cases under consideration here. *See infra* text accompanying note 59. A recent report prepared by S. Jansen and T. Spijkerboer suggests that "discretion reasoning," in various guises, still occurs in a number of civil jurisdictions, including Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Malta, the Netherlands, Poland, Romania, Spain, Norway, and Switzerland. SABINE JANSEN &THOMAS SPIJKERBOER, FLEEING HOMOPHOBIA: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 33–39 (2011).

38. An overview of this foundational jurisprudence is provided in Dauvergne & Millbank, *Before the High Court*, *supra* note 15.

39. *Applicant NABD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (*Applicant NABD*) (2005) 216 ALR 1, [138] (Kirby J) (Austl.).

40. [I]n *all* asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable . . . . It is one thing to say . . . that 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

The very notion of a duty to be "discreet" about one's protected identity is, moreover, inherently problematic. As Lord Hope pointedly observed, it is more accurate to speak of an expectation of "concealment"[41]:

> I would prefer not to use the word "discretion," as this euphemistic expression does not tell the whole truth . . . . Behaviour which reveals one's sexual orientation, whether one is gay or straight, varies from individual to individual. It occupies a wide spectrum, from people who are naturally reticent and have no particular desire to establish a sexual relationship with anybody to those who wish, for various reasons, to proclaim in public their sexual identity.[42]

Indeed, the 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 . . . . [T]he state of 'closeted-ness' [is] always a potentially permeable one."[43]

This *sui generis* imposition of a "duty to be discreet" against gay applicants has now been expressly rejected on two separate occasions by ultimate appellate courts. In the decision of *Appellant S395/2002 and S396/2002 v Minister of Immigration & Multicultural Affairs*,[44] the High Court of Australia

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> 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.

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.); *see also* Hysi v. Sec'y State for the Home Dep't, [2005] EWCA (Civ) 711, [15], [2005] INLR 602 (appeal taken from Immigr. Appeal Trib.) (U.K.) ("To compel an individual to disown his origins interferes with a fundamental right. If the consequence of exercising the right to declare your race would lead others to subject you to severe ill-treatment, the consequence would be discrimination on the grounds of race, and persecution.").

41. HJ (Iran) v Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [22], [2011] 1 A.C. 596, 625 (appeal taken from Eng. & Wales C.A.). We have adopted the latter language throughout this article.

42. *Id.*

43. Dauvergne & Millbank, *Before the High Court*, *supra* note 15, at 122.

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

noted the dissonance between the treatment of gay and other refugee claimants, and determined that

> it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning.[45]

The High Court determined that no duty could be imposed on a gay applicant to modify his conduct in order to avoid the risk of being persecuted.[46] In the Court's view, the capacity of an individual to avoid persecutory harm is irrelevant to whether or not the applicant faces a real chance of being persecuted.[47] Justices Kirby and McHugh found that "persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality."[48] The point was also forcefully put by Justices Gummow and Hayne:

> Saying that an applicant for protection would live "discreetly" in the country of nationality may be an accurate description of the way in which that person would go about his or her daily life. To say that a decision-maker "expects" that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is "expected" to live discreetly is both wrong and irrelevant to the task to be

45. *Id.* at 500 (Gummow & Hayne JJ). *See generally* Dauvergne & Millbank, *Before the High Court*, *supra* note 15; Christopher N. Kendall, *Lesbian and Gay Refugees in Australia: Now that 'Acting Discreetly' Is no Longer an Option, Will Equality Be Forthcoming?* 15 INT'L J. REFUGEE L. 715 (2003); Millbank, *supra* note 15.

46. "In so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed." *S395* (2003) 216 CLR at 492 (McHugh & Kirby JJ).

47. *Id.* at 491–92 .

48. *Id.* at 489.

> undertaken by the Tribunal if it is indeed as a statement of what the applicant *must* do.[49]

The Court determined that any other interpretation would undermine the very object of the Convention.[50]

Drawing on this precedent, the United Kingdom's Supreme Court held more recently in *HJ (Iran) v. Secretary of State for the Home Department*[51] that "what is protected is the applicant's right to live freely and openly as a gay man. . . . [G]ay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution."[52] The Supreme Court stressed that no duty can be imposed on an applicant to modify his behavior in order to avoid a risk of being persecuted:

> The underlying rationale of the Convention is . . . that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the

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49. *Id.* at 501.

50. The 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. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality . . . . 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.

Id. [40]–[41] (McHugh & Kirby JJ).

51. 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.).

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

> protection which their home state should have afforded them.[53]

In the Court's view, a claimant is entitled to the protection of the Convention irrespective of the fact that "he could avoid suffering any actual harm by modifying his behavior (say, by conducting himself 'discreetly') on his return to his home state but would not in fact choose to do so."[54]

Each of these decisions has been justifiably regarded as cause for celebration. By explicitly rejecting the proposition that the refugee claim of a gay applicant can be denied on the grounds of failure to avoid risk through concealment of identity or behavioral modification,[55] the top courts in Australia and the United Kingdom have moved firmly to align access to refugee status for sexual minorities with the norms applicable to other claimant groups.[56] By so doing, they have reinforced

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53. *Id.* [53], [2011] 1 A.C. at 637–38 (Lord Rodger).

54. *Id.* [54], [2011] 1 A.C. at 638; *see also id.* [18], [2011] 1 A.C. at 638 (Lord Hope) ("[T]he fact that [the refugee] could take action to avoid persecution does not disentitle him from asylum if in fact he will not act in such a way as to avoid it.").

55. We have some concerns that the United Kingdom Supreme Court allowed through the back door the very duty to conceal sexual identity it had so firmly refused to allow through the front door. On one interpretation the Court appears to have legitimized a "de facto" duty of discretion by finding that "when faced with a real threat of persecution, the applicant would have no choice: he would be compelled to act discreetly." *Id.* [59], [2011] 1 A.C. at 639. As elaborated by Sir John Dyson, this position amounts to a general rule: "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." *Id.* [123], [2011] 1 A.C. at 630. As such, the Court appears to have determined that self-repression will be assumed in *every* case where a gay applicant is, absent concealment, at risk of physical harm in his home country. This is precisely what Justice Kirby warned against in his decision in *Applicant NABD*:

> Having accepted that a "quiet" (equivalent to "discreet") practice of religious beliefs was imperative for safety in Iran, the second Tribunal effectively imposed the requirement of 'quiet sharing of one's faith' on the appellant, were he to be returned to Iran. Its prediction of what he would do was necessarily dependent upon its assessment of what alone it would be safe for him to do in Iran.

Applicant NABD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (*Applicant NABD*) (2005) 216 ALR 1, [106] (Austl.).

56. The dissonance of the earlier position with cases involving other Convention grounds was noted repeatedly in both *S395* and *HJ and HT*. For example, see the decision of Gummow & Hayne JJ in *S395*:

the capacity of the Refugee Convention to "enable the person who no longer has the benefit of protection against persecution in his home country to turn for protection to the international community,"[57] to benefit from the international "back-up to the protection one expects from the State of which an individual is a national."[58]

In truth, however, the courts' rejection of the gay-specific "duty to be discreet" was *obiter dicta*. Based on the facts found,[59] the applicants in *S395* and *HJ and HT* would not be "out" in their home state, and therefore the question of imposing a duty of concealment did not arise. Both cases actually involved the far more common scenario in which a gay applicant would *opt* to modify his conduct to avoid the risk of being persecuted because to do so would be eminently rational in the circumstances.[60] In recognizing refugee status even where

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> If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question.

Appellant S395/2002 v Minister for Immigration & Multicultural & Indigenous Affairs (*S395*) (2003) 216 CLR 473, 500 (Austl.).

57. Horvath v. Sec'y of State for the Home Dep't, [2000] UKHL 37, [2001] 1 A.C. 489, 495 (appeal taken from Eng. & Wales C.A.).

58. Canada (Att'y Gen.) v. Ward, [1993] 2 S.C.R. 689, 709.

59. There may be reasons to doubt the factual findings made by the lower-level tribunals in the case of *HJ and HT*. We return to this at note 96 *infra*.

60. In *S395*, the Court adopted the Minister's submission that the Tribunal imposed no duty on the claimants, but rather found that the applicants would live discreetly in the future, as they had done in the past, because "there is no reason to suppose that they would not continue to do so if they returned home now." *S395* (2003) 216 CLR at 481; *see also id.* at 487 (Kirby & McHugh JJ) ("In our view, these contentions of the Minister are correct"); *id.* at 502 (Gummow & Hayne JJ) ("The better view is that that sentence records the Tribunal's conclusion about what the appellants were likely to do if they did return to Bangladesh"); *id.* at 481 (Gleeson CJ) ("When that passage is considered in the context of the claim advanced by the appellants, their evidence, the Tribunal's evaluation of the evidence, and the reasons given for rejecting that evidence, it is clear that the Tribunal was neither counselling nor requiring discretion on the part of the appellants."). Similarly, in *HJ and HT*, the Secretary of State from the outset accepted that no positive duty could be imposed on the applicants. HJ (Iran) v. Sec'y of State

risk would be averted by concealment, the Australian and British courts departed in critical ways from accepted refugee law doctrine.

The determination that none of the applicants would face the real risk of physical abuse—because they understandably decided that disguising their sexual identity and avoiding conduct associated with their sexuality was the safest course of action—raises a crucial challenge to satisfaction of the Convention's "well-founded fear" requirement. Only persons able to show a forward-looking risk of persecutory harm can establish a "well-founded fear," and hence qualify as refugees. But if prudence means that the risk would, in fact, never accrue, how can the fear of being persecuted be said to be "well-founded" in objective terms? This conundrum was pointed out by Sir John Dyson in *HJ and HT*:

> How can a gay man, who would have a well-founded fear of persecution if he were to live openly as a gay man on return to his country, be said to have a well-founded fear of persecution if on return he would in fact live discreetly, thereby probably escaping the attention of those who might harm him if they were aware of his sexual orientation? . . . [I]t might be thought that this should lead to the conclusion that, if a gay man would live discreetly on return and thereby avoid being harmed or persecuted on account of his sexual orientation, he could not have a well-founded fear of persecution within the meaning of article 1(A)(2) of the Convention.[61]

Both the High Court of Australia and Supreme Court of the United Kingdom rightly took umbrage at the unsavory implications of this analysis: effectively, a duty to grant refugee status to the openly gay claimant even as it was denied to a comparably situated but more cautious applicant. But in their

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for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [54], [2011] 1 A.C. 596, 638 (Lord Rodger); *id.* [18], [2011] 1 A.C. at 623–24 (Lord Hope); *see also* Case for the Respondent, [4], *HJ and HT*, [2010] UKSC 31, [2011] 1 A.C. 596 (on file with authors) ("It is accepted that applicants may not be refused asylum on the basis that they 'could' or 'should' or 'are expected to' or 'are required to' behave discreetly in order to avoid persecution. The issue is always to determine how they *will* behave upon return and whether on that basis there is a real risk of persecution.").

61. *HJ and HT*, [2010] UKSC 31, [109], [2011] 1 A.C. at 656.

determination to ensure that the "well-founded fear" requirement was not a bar to the rationally motivated gay applicant,[62] the two courts ran roughshod over their responsibility to identify the risk of persecutory harm that the claimants in *S395* and *HJ and HT* would *in fact* face by virtue of their entirely understandable[63] preference for concealment over persecution.

Specifically, the forms of harm on which the courts focused their attention—"physical abuse, discrimination in employment, expulsion from their communities or violence or blackmail at the hands of police and others,"[64] or the arbitrary and brutal enforcement of anti-sodomy laws[65]—were precisely the harms that the courts determined would not eventuate because of the claimants' "discretion." Yet, if there is no real chance, no serious possibility that the claimants in *S395* would be subjected to violence or blackmail or that the applicants in

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62. Following the decision in *Appellant S395*, it is necessary to rid this area of decisional discourse of the supposed dichotomy between applicants for protection visas who might be able to avoid or diminish the risks of persecution by conducting themselves 'discreetly' in denial of their fundamental human rights and those who assert those rights or who might deliberately or even accidentally manifest them, or be thought or alleged to have done so. The most effective way that this Court can ensure that this untextual, irrelevant and undesirable dichotomy is deleted from refugee decisions in Australia is by the insistence that, where it surfaces, the outcome is set aside and the matter remitted for reconsideration, freedom from error.

Applicant NABD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs (*Applicant NABD*) (2005) 216 ALR 1, [143] (Austl.). Justice Kirby considered that "[a] person successfully hiding from his persecution can scarcely be said to be experiencing no problems. Such a finding is perverse." *Id.* [132] (citing Sabaratnam v. Can. (Minister of Emp't & Immigration), 1992 CarswellNat 1182, [4] (Can. C.A.) (WL)).

63. It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or the wish to, exercise such rights, let alone that he or she exhibits a capacity for martyrdom. The Convention aims at the protection of those whose human dignity is imperiled, the timorous as well as the bold, the inarticulate as well as the outspoken, the followers as well as the leaders in religious, political or social causes, in a word, the ordinary person as well as the extraordinary one.

Win v Minister for Immigration & Multicultural Affairs, [2001] FCA 132, [20] (Austl.).

64. *S395* (2003) 216 CLR at 493 (McHugh & Kirby JJ).

65. *HJ and HT*, [2010] UKSC 31, [37], [2011] 1 A.C. at 631 (Lord Hope) (referring to the case of HJ).

HJ (Iran) would face imprisonment or lashing, then each court's analysis failed to identify a risk of some form of serious harm that can be said to be "well-founded." In our view, the Australian and British courts were correct to find that the gay claimant who avoids physical or other serious harm by concealing his identity or desisting from associated conduct nonetheless faces a risk of being persecuted. But what the decisions should have said is that it is the modification of behavior itself, or the impact that the modification has on the applicant, that is the relevant persecutory harm.[66] These cases present clear examples of a genuine risk of non-physical persecutory harms—which we refer to here as *endogenous* harms—as contrasted with more classic *exogenous* harms.

In addition to failing to identify the persecutory harm for which there is a "well-founded fear," the two courts also posited an extraordinarily broad definition of risk "*for reasons of*" sexual orientation. While risk that follows from actual or imputed sexual identity is readily encompassed by the non-discrimination norm that informs the nexus requirement,[67] more nuance is required to identify the circumstances in which protection is owed where risk follows from actions rather than from identity per se. In that context, for example, some politically motivated actions, such as treason or sedition, may not be protected because they encroach on the rights of others.[68] And in the context of religion, some religiously motivated actions—for example, refusal to pay taxes that support a war op-

66. With one potential exception in *S395* (2003) 216 CLR at 490 (McHugh & Kirby JJ). *See infra* text accompanying note 122.

67. *See infra* text accompanying notes 224–231.

68. The Human Rights Committee has explicitly addressed the scope of permissible limitations in its interpretation of the right to freedom of religion and political opinion, providing decision makers with a principled litmus test for identifying activities appropriately subject to restraint. *E.g.*, U.N. Human Rights Comm., General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), ¶¶ 7–8, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (July 30, 1993); U.N. Human Rights Comm., CCPR General Comment No. 10: Freedom of Expression (1983), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.7, at 133 (May 12, 2004) [hereinafter Compilation of General Comments]; U.N. Human Rights Comm., General Comment No. 34: Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34 (Sept. 11, 2011).

posed on religious grounds[69]—have been found not to fall within the scope of religious freedom because they are understood to be too remote to attract legal protection.[70]

So too sexual orientation. While there is less authoritative guidance on the scope of activities protected as inherent in sexual orientation than there is in relation to religion or political opinion, the question must nonetheless be addressed. Yet, while the High Court of Australia tells us that "sexual identity is not to be understood . . . as confined to particular sexual acts . . . . It may, and often will, extend to many aspects of human relationships and activit[ies],"[71] the Court does not identify which activity-based risks are beyond the scope of Convention protection. Is refugee status owed to gay claimants whose risk follows only from holding hands, or kissing in public? To those at risk because they cohabit, marry, or decide to raise children? Moreover, the court's implicit suggestion that there are least *some* limits on the range of protected activities is difficult to reconcile with its later assertion that "[t]he tribunal has *no* jurisdiction or power to require anyone to do anything in the country of nationality"[72] and that "the question of what an individual is *entitled* to do . . . distracts attention from the fundamental question."[73]

This apparently all-embracing position was taken to the extreme by the United Kingdom Supreme Court, which suggested that there really are *no* limits to the range of activity-based risks that are fairly said to be risks "for reasons of sexual orientation":

> In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with

69. Human Rights Comm., Decision of the Human Rights Comm. under the Optional Protocol to the Int'l Covenant on Civil and Political Rights Concerning Communication No. 446/1991, ¶ 4.2, U.N. Doc. CCPR/C/43/D/446/1991 (Nov. 8, 1991).

70. *See infra* text accompanying notes 232–233.

71. *S395* (2003) 216 CLR at 500–01 (Gummow & Hayne JJ).

72. *Id.* at 501 (Gummow & Hayne JJ) (emphasis added). This is perhaps technically true as the refugee decision maker's job is to assess risk, not to mandate conduct.

73. *Id.*

> trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates. Mutatis mutandis—and in many cases the adaptations would obviously be great—the same must apply to other societies. In other words, gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without fear of persecution.[74]

Clearly, going to concerts, drinking cocktails, or engaging in "boy talk" with female friends should not attract persecution. But 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. To have adopted such a far-reaching vision of the nexus clause, without interrogating the scope of the international non-discrimination law that informs it, risks fracturing the normative consensus upon which the Refugee Convention is based. Beyond identifying "sexual orientation" as a form of protected status, there was a duty on the courts to grapple with the scope of activities properly understood to be inherent in, and an integral part of, that status. As a branch of public international law grounded in the consent of states it is surely critical, as the English Court of Appeal has insisted, to search for "a common standard, or uniform approach . . . firmly based on some conception of objective principle which is recognised as a legitimate source of law."[75]

In the result, we are of the view that the decisions in *S395* and *HJ and HT* are both under-inclusive and over-inclusive. The reasoning is too conservative, in that it is insufficiently attentive to the endogenous harms that follow from having continually to mask one's true identity. It is also too liberal, in

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

75. Sepet v. Sec'y of State for the Home Dep't, [2001] EWCA (Civ) 681, [49], [66] (Laws L.J.) (appeal taken from Immigr. Appeal Trib.) (U.K.).

that it fails to interrogate the extant scope of "sexual orientation" as a protected interest to determine when there is a duty to protect on the basis of associated activities, rather than simply as a function of identity per se.

Does it matter? We believe that it does. Courts 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.[76] They have also understandably balked at the prospect of finding a nexus to a protected ground where risk appears to follow neither from status nor from a closely connected activity.[77]

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76. In some cases this has resulted in the outright rejection of a refugee claim. For example, *Applicant NABD* concerned an applicant who claimed to fear persecution if returned to Iran on account of his conversion to Christianity. On the basis of his prior behavior, the tribunal considered that the applicant would maintain a low profile if returned to Iran, and would "not choose to generally broadcast his practice of Christianity or conspicuously proselytize in Iran." *Applicant NABD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (*Applicant NABD*) (2005) 216 ALR 1, [103] (Hayne Heydon JJ) (Austl.). It concluded that if he were to practice his faith in this way, there was not a "real chance" of his being persecuted. A majority of the Australian High Court upheld the decision of the tribunal:

> The information available to the Tribunal about Iran was that apostasy was punishable by death. But the information suggested that there was no real chance of that or other punishment being exacted in any but exceptional cases . . . . Rather, . . . [t]he evidence is that those converts who go about their devotions quietly are generally not disturbed . . . .
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> . . . .
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> At no point in its chain of reasoning did the Tribunal divert from inquiring about whether the fears which the appellant had were well founded. It did not ask (as the Tribunal had asked in [*S395*]) whether the appellant could *avoid* persecution; it asked what may happen to the appellant if he returned to Iran. Based on the material the Tribunal had, including the material concerning what the appellant had done while in detention, it concluded that were he to practise his faith in the way *he* chose to do so, there was not a real risk of his being persecuted.

Id. [164], [168] (Hayne & Heydon JJ). If the harm is to be defined (as it was) as the exogenous harm that would follow from "proselytizing or actively seeking attention," this result is inevitable. *Id.* [167].

77. In the United Kingdom, for example, less than two months after the decision was handed down in *HJ and HT*, the English Court of Appeal expressed concerns about its potential scope, and sought to limit the implications of the decision:

In such an atmosphere, the "win" for gay applicants in *S395* and *HJ and HT* can hardly be thought secure. It would moreover be wrong to take no account of the collateral damage for applicants claiming status on grounds of religion and political opinion engendered by the confusing reasoning in these decisions.[78] Legal accuracy is important.[79] Taxonomy

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> [T]here is a good case for saying that where the activity which would create the risk of persecution is the need to deny disloyalty to a political party by someone whose political interests or activities are of marginal interest to their lives, this engages only the margins of their human rights and the AIT would be entitled to conclude that they would in fact be, and could be expected to be, less than frank with the Zimbabwean authorities. They would not be required to modify their beliefs or opinion in any real way. It is one thing for a person to be compelled to deny a crucial aspect of his identity affecting his whole way of life, as in [*HJ Iran*]. Furthermore, the individual is then forced into a permanent state of denial. The Supreme Court found it unacceptable that someone should have to live a lie in order to avoid persecution. It does not necessarily follow that in no circumstances can someone be expected to tell a lie to avoid that consequence.

TM (Zim.) v. Sec'y of State for the Home Dep't, [2010] EWCA (Civ) 916, [41] (appeal taken from Asylum & Immigr. Trib.) (U.K.). *Cf.* RT (Zim.) v. Sec'y of State for the Home Dep't, [2010] EWCA (Civ) 1285, [2011] Imm. A.R. 259 (appeal taken from Asylum & Immigr. Trib.) (U.K.) (rejecting a distinction between being forced to lie about "core" and "marginal" activities or beliefs). *See infra* text accompanying notes 253–55. For an example from Australia, see *NALZ v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 86 ALD 1, [50], [52] (Austl.) (holding that the tribunal did not err in denying asylum to a man who would only have to stop selling electrical goods to certain customers to end the persecution in his home country).

78. The broader implications of *S395* and *HJ and HT* have been expressly recognized in appellate decisions applying the respective cases. For example, in *NALZ*, Madgwick J states that "the reasoning of the majority judges [in *S395*] was clearly expressed in deliberately broader, conceptual terms" and that "the potential impact of this reasoning [in *S395*] is, no doubt, far reaching." *NALZ* (2004) 86 ALD 1, [5], [8]. In *TM (Zim.)*, Elias LJ stated that "[p]lainly the ratio of [*HJ and HT*] is not limited just to sexual orientation cases but will apply to all grounds covered by the Convention." *TM (Zim.)*, [2010] EWCA (Civ) 916, [38].

79. As recognized by Kirby J in *Applicant NABD*: "I remind myself of the importance of legal accuracy in decisions of this kind. In a case such as the present, decisions of this kind can literally affect the lives of those subject to them." *Applicant NABD* (2005) 216 ALR 1, [145].

matters.[80] Particularly because the Australian High Court and United Kingdom Supreme Court enjoy such authority in the "transnational judicial conversation"[81] at the heart of creative thinking on refugee law,[82] it is important not only to reach "the right" result—which, in our view, the courts did—but also to reach that result on the basis of reasons that do not pose a risk of doctrinal distortion, and which will withstand the test of time.

We believe that the judgments in *S395* and *HJ and HT* fail this test. First, as developed in Part I, the courts' reliance on the risk of exogenous harm that will not, in fact, accrue to find a "well-founded fear" of being persecuted is flatly contradictory to the jurisprudence of all leading courts, under which there must be a real chance or serious possibility of the posited form of persecution. If there is no objective basis to believe that the harm said to be persecutory may well occur, the applicant's fear cannot be said to be well-founded.

Second and related, both courts failed to identify the endogenous harm occasioned by behavior modification as a relevant form of persecutory harm in cases of enforced concealment despite the fact that this is the harm that is most likely to be objectively well-founded. As discussed in Part II, the view that serious psychological harm is cognizable persecution enjoys nascent support in many courts and is in line with international human rights norms that inform the serious harm element of "being persecuted." A strong affirmation in the com-

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80. *See* Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U. W. AUSTL. L. REV. 1, 97 (1996) ("It is essential in modern society that the law be closely and cogently reasoned . . . . [L]egal certainty is impossible if and so long as taxonomy is neglected").

81. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994).

82. *See* Eval Benvenisti, *Reclaiming Democracy: The Strategic Use of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 264–67 (2008) (noting how national courts, through citing each other's interpretation of the Refugee Convention, interpreted the Convention collectively); James C. Hathaway, *A Forum for the Transnational Development of Refugee Law: The IARLJ's Advanced Refugee Law Workshop*,15 INT'L J. REFUGEE L. 418 (2003) (discussing the IARLJ, which furthers the transnational judicial conversation by allowing judges to collectively analyze refugee law); Michael Kirby, *Transnational Judicial Dialogue, the Internationalisation of Law and Australian Judges*, 9 MELB. J. INT'L L. 171 (2008) (discussing the increasing trend of Australian judges communicating with judges of other countries).

pelling context of these cases would have made a major contribution to clarifying what has become an increasingly prevalent concern.

Third, and despite the intuitive appeal of Lord Rodger's promotion of a genuinely liberated global society where all gay men—if they were so inclined[83]—could attend Kylie concerts, sip cocktails, or talk about other men, it does not follow in our view that risk accruing solely from one of these activities can be reconciled with the protective limits built into the nexus clause of the Refugee Convention. As raw as it might sound, the international community has not yet consented to "pick up the pieces" for every action that leads to even serious and unremediated harm. To the contrary, the "for reasons of" clause was included in the Refugee Convention precisely to delimit the scope of the refugee class to those persons at risk of serious harm *for reasons deemed fundamental.* As developed in Part III, many actions are, of course, appropriately included in the forms of civil or political status enumerated in the refugee definition. But it is equally clear that the non-discrimination norm that informs the five grounds of claim is not without limitation. To read the Convention as essentially boundless is not in our view helpful to the cause of ensuring that the protection needs of sexual minorities are fairly and reliably addressed.[84]

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83. In *HJ and HT,* Lord Rodger acknowledged that these are "stereotypical examples" of male homosexual conduct. HJ (Iran) v Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [78], [2011] 1 A.C. 596, 646 (Lord Rodger) (appeal taken from Eng. & Wales C.A.).

84. Indeed, although outside the scope of this article, there is an argument that the lack of normative guidance on the scope of what is a textually obvious limitation could inspire some subsequent decision makers to invent new means to avoid the recognition of gay refugee claims. *See* Millbank, *supra* note 15, at 392 (referring to the applicants from *S395* as an illustration of this recent trend). Millbank states:

> [H]aving brought a rare successful claim for judicial review to the ultimate appellate court in Australia, the men had their claim remitted to the tribunal for re-determination, expecting that it would consider whether they faced a real chance of persecution given that this was the issue in dispute at all five levels of adjudication. Yet on remittal the second tribunal decided that they were not gay after all, and this decision was then held to be unreviewable by the courts.

Id. at 392–93 (citations omitted). The Tribunal decision referred to by Millbank was overturned on appeal in *NAOX v Minister for Immigration & Citizenship* (2009) 112 ALD 54 (Austl.).

I. How Can an Implausible Risk Be Real?

The case of *S395* involved the application for refugee status of two gay Bangladeshi men "who had been living in Bangladesh in a domestic relationship" and had been "ostracized by their families."[85] One applicant recounted "that local people abused, insulted, bashed and tortured him"[86] and that after he and his partner moved to another location "they were attacked and beaten, and their possessions were destroyed."[87] His partner testified that he had been "attacked on a number of occasions by Islamic fundamentalists,"[88] "sentenced by the fundamentalists to 300 lashes of a whip with a stone on the end"[89] and been "condemned to death by stoning."[90] Both applicants claimed to be "captives in [their] homeland"[91] and feared that they would be "killed not only by the fundamentalists but also by the general masses."[92]

The allegations of past persecution were, however, found not to be credible, leading the tribunal to focus exclusively on the prospect of forward-looking risk. Because the couple framed their case around the risks that would accrue if they lived an openly gay life, their protection requests were denied by the first level tribunal on the grounds that they

> did not experience serious harm or discrimination prior to their departure from Bangladesh, and . . . there is [no] real chance that they will be persecuted because of their sexuality if they return. . . . [W]hile homosexuality is not acceptable in Bangladesh, Bangladeshis generally prefer to ignore the issue rather than confront it. [The applicants] lived together for over 4 years without experiencing any more than minor problems with anyone outside their own families. They clearly conducted themselves in a discreet man-

85. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (*S395*) (2003) 216 CLR 473, 479 (Gleeson CJ) (Austl.)

86. *Id.* at 480 (Gleeson CJ).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 486 (McHugh & Kirby JJ).

92. *Id.*

> ner and there is no reason to believe that they will not continue to do so if returned home now.[93]

The High Court of Australia adopted this conclusion, and proceeded to assess the applicants' claims based on the finding that they would, in fact, conceal their sexual identity if returned to Bangladesh.

The reasoning of the United Kingdom Supreme Court in *HJ and HT* is also predicated on the view that the applicants would modify their behavior if sent home. In relation to the Iranian applicant, the court relied on the finding below that "the appellant is now much more aware of the legal prohibitions on homosexuals in Iran and the potential punishments for breach of those prohibitions . . . . We are satisfied that as a matter of fact he would behave discreetly."[94] In the companion Cameroonian case, the Supreme Court adopted the conclusion of the initial tribunal "that in addition to conducting any relationship in private, [the applicant] would move to another part of the country where he would not be known."[95] The reasoning of the Supreme Court thus proceeded to con-

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93. *Id.* at 481 (quoting the lower Tribunal's factual finding).

94. HJ (Iran) v Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [43], [2011] 1 A.C. 596, 633 (appeal taken from Eng. & Wales C.A.) (quoting the lower Tribunal's factual finding).

95. *Id.* [43], [2011] 1 A.C. at 633 (Lord Rodger). This assumption relies on the unfortunate holding of the House of Lords in *Januzi v. Secretary of State for the Home Department*, [2006] UKHL 5, [2006] 2 A.C. 426 (appeal taken from Eng. & Wales C.A.), that an applicant can be required to relocate to a place of "safety" even if the home government is unable affirmatively to protect his or her human rights there. We believe this to be a misconstruction of the duty of internal protection conceived in consonance with the text, object, and purpose of the Refugee Convention. *See* James C. Hathaway & Michelle Foster, *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 357 (Erika Feller et al. eds., 2007) (arguing against the practice of denying refugee status to refugee seekers who are able to relocate internally within their home state); James C. Hathaway, *The Michigan Guidelines on Protection Elsewhere, Adopted January 3, 2007*, 28 MICH. J. INT'L L. 207 (2007) (stating that the insistence that protection for refugees be provided elsewhere may result in the denial to refugees of their rights under the Convention and providing guidelines for the reliance on protections provided by states other than the home state). In any event, as Lord Rodger conceded in *HJ and HT*:

> [T]here appears to have been nothing in the evidence to suggest that there was any area of Cameroon where gay men could live openly without any fear of persecution. So in no sense would the

sider eligibility for refugee status on the basis that there was essentially no chance that the truly horrific exogenous harms that would follow from being openly gay—imprisonment with the possibility of torture in Iran, and savage physical assaults in Cameroon—would eventuate.[96]

In view of these findings, how did the courts find a well-founded fear? Both the High Court and Supreme Court expressly acknowledged the central importance of the prospective examination of risk,[97] but sidestepped its application by failing explicitly to identify an objective risk of persecutory harm.[98] Indeed, Lord Rodger appears to treat the applicant's

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> applicant be returning to a part of the country where the state would protect him from persecution.

HJ and HT, [2010] UKSC 31, [84], [2011] 1 A.C. at 648. For an interesting analysis on the implications of *HJ and HT* to the jurisprudence on internal protection in the U.K. context, see Richard Buxton, *Asylum and the Doctrine of Internal Flight in the Light of HJ (Iran)*, 70 CAMBRIDGE L.J. 41 (2011).

96. In truth, there are reasons to doubt the factual accuracy of the findings of the lower tribunals in *HJ and HT*. The initial tribunal did not contest the Iranian applicant's assertion that as an openly gay man it was "impossible" for him to return to his country. *HJ and HT*, [2010] UKSC 31, [43], [2011] 1 A.C. at 633. Regarding the issue of whether the applicant "would" (as opposed to "should") internally relocate, see *supra* note 95.

97. In *S395*, the High Court considered that the "central question" for a decision maker is whether or not there is a real chance that the applicant will be persecuted if returned to their country of origin. *S395* (2003) CLR at 495, 500 (Gummow & Hayne JJ). In a similar vein the Supreme Court in *HJ and HT* affirmed that the Refugee Convention is concerned with the prospective assessment of risk and that this necessitates an examination of what the applicant will "actually do" if returned to their country of origin. *HJ and HT*, [2010] UKSC 31, [82], [109], [2011] 1 A.C. at 647–48 (Lord Rodger), 656 (Lord Dyson). Lord Hope was particularly emphatic:

> It should always be remembered that the purpose of this exercise is to separate out those who are entitled to protection because their fear of persecution is well founded from those who are not. The causative condition is central to the inquiry. This makes it necessary to concentrate on what is actually likely to happen to the applicant. As Lord Walker says in para 88, the inquiry is directed to what will happen in the future if the applicant is returned to his own country. An approach which disregards what is in fact likely to occur there in the case of the particular applicant is wrong and should not be adopted.

Id. [36], [2011] 1 A.C. at 631.

98. *S395* (2003) 216 CLR at 490 (Gummow & Hayne JJ, 503 (McHugh & Kirby JJ); *HJ and HT*, [2010] UKSC 31, [35]–[36], [82], [2011] 1 A.C. at 630–31 (Lord Rodger), 647–48 (Lord Hope).

subjective motives as dispositive of the "well-founded fear" requirement, drawing a direct and unqualified link between the applicant's subjective motive and the satisfaction of the well-founded fear requirement. In his view, where an applicant has chosen to modify his conduct primarily because of a fear of exogenous harm, refugee status should be recognized because "[s]uch a person *has* a well-founded fear of persecution."[99] This reasoning suggests that, where the threat of exogenous harm motivates an applicant to be discreet, there is of necessity a well-founded fear of that exogenous harm occurring. But the reality is precisely the opposite since the modification of behavior will, in most cases, obviate the risk.[100]

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99. *HJ and HT*, [2010] UKSC 31, [82], [2011] 1 A.C. at 647–48 (Lord Rodger) (emphasis added).

100. Quite apart from the doctrinal difficulties, the analytical focus in *S395* and *HJ and HT* on the reasons *why* an applicant would conceal or suppress his behavior runs the risk of inviting subjective assumptions about natural discretion, often informed by narrow (and often stereotyped) understandings of sexual identity. *See generally* Millbank, *supra* note 15 (discussing Australian tribunal judges' use of stereotypical notions of "gayness" as a template for evaluating refugee applicants). In order to avoid the far-reaching implications of *S395* decision makers have engaged in "mental-gymnastics" to find that applicants were not oppressed, but rather were discreet as a matter of "free choice." *Applicant NABD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (*Applicant NABD*) (2005) 216 ALR 1, [140] (Kirby J) (Austl.). Justices Callinan and Heydon expressly provided for this route in their dissenting judgment in *S395*:

> It is clear that the appellants did not seek to make a case that they wished to express their homosexuality in other than a discreet, indeed personal, way. There may be good reason, divorced entirely from fear, for this. They may have wished to avoid disapproval of the, or a significant section of the, society in which they lived, perhaps even marked disapproval. . . .
>
> . . . .
>
> On the Tribunal's findings, no fear of such harm as could fairly be characterized as persecution imposed a need for any particular discretion on the part of the appellants: such "discretion" as they exercised, was exercised as a matter of free choice.

S395 (2003) 216 CLR at 511, 513. The Supreme Court in *HJ and HT* also made clear that some motives for concealment or suppression are outside the ambit of refugee law. Lord Hope, for example, refers to discretion that stems from fear of

> [s]ocial and family disapproval of overt sexual behaviour of any kind, gay or straight, [which] may weigh more heavily with some people than others. Concealment due to a well-founded fear of persecution is one thing. Concealment in reaction to family or so-

While there is disagreement about whether the "well-founded fear" requirement requires demonstration of subjective trepidation *as well as* evidence of forward-looking risk[101]—we believe that it does not[102]—there is no authority whatso-

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> cial pressures is another. So one must ask why the applicant will conduct himself in this way. A carefully nuanced approach is called for, to separate out those who are truly in need of surrogate protection from those who are not.

HJ and HT, [2010] UKSC 31, [22], [2011] 1 A.C. at 625. Yet it is surely readily apparent that the line between discretion consequent to purely private and non-cognizable concerns and discretion as the result of a fear of being persecuted reflected in the prevalence of such social attitudes is a very hard one to draw in practice. The "carefully nuanced approach" that Lord Hope calls for is therefore likely as a practical matter unviable, leading to an extraordinary opportunity for judicial subjectivity.

101. Standard doctrine suggests that the "well-founded fear" inquiry contains both a subjective and objective element. *See, e.g.*, I.N.S. v, Cardoza-Fonseca, 480 U.S. 421, 431 (1987) ("[T]hat the fear must be 'well-founded' does not alter the obvious focus on the individual's subjective beliefs."); *Minister for Immigration & Citizenship v SZJGV* (2009) 259 ALR 595, [53] (Austl.) ("[T]he Convention definition of refugee has been held to encompass both subjective and objective elements. The subjective question is whether the applicant . . . has a fear of persecution. If that question is answered in the affirmative, the following question, whether that fear is well-founded, is an objective one."). There are also various statements supporting the existence of the subjective element in the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status. For example, the Handbook states:

> To the element of fear—a state of mind and a subjective condition—is added the qualification 'well-founded.' This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that the frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element . . . .

U.N. High Comm'r for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, U.N. Doc. HCR/IP/4/Eng/Rev.1, ¶ 38 (Jan. 1992), *available at* http://www.unhcr.org/refworld/docid/3ae6b3314.html [hereinafter UNHCR Handbook].

102. *See* Yusuf v Can. [1992] 1 FC 629, para. 5 (Can. C.A.) ("It is true, of course, that the definition of a Convention refugee has always been interpreted as including a subjective and an objective element . . . . [But] I find it hard to see in what circumstances it could be said that a person . . . could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience. The definition of a refugee is certainly not designed to exclude brave or simply stupid persons in favour of those who are more timid or more intelligent. Moreover, I am loath to believe that a refugee status claim could be dismissed on the ground that as the claimant was a young child or a person suffering from a mental disability, he

ever for the view that evidence of forward-looking, objective risk can be dispensed with.[103] Even the United States Supreme Court, which has opined that there is an "obvious focus on the individual's subjective beliefs," nonetheless insists that those beliefs can justify asylum only if also objectively grounded.[104] While courts have framed the objective standard in various ways—a "reasonable possibility,"[105] a "reasonable degree of likelihood,"[106] a "serious possibility,"[107] or a "real chance"[108]—the upshot of all the tests is much the same. Whatever the applicant believes, refugee status is to be recognized only where there is credible evidence (though it need not rise to the level of a probability[109]) that the harm said to be persecutory may well occur.[110]

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or she was incapable of experiencing fear, the reasons for which clearly exist in objective terms"); *Win v Minister for Immigration & Multicultural Affairs* [2001] FCA 132, [20] (Austl.) ("It is not fatal to such a claim of persecution that the claimant fails to show that he or she is a leading exponent of a claim to, or a wish to, exercise such rights."); HATHAWAY, *supra* note 18, ch. 3 (discussing the elements of "well-founded fear" in refugee law); James C. Hathaway & William S. Hicks, *Is There a Subjective Element in the Refugee Convention's Requirement of 'Well-Founded Fear'?*, 26 MICH. J. INT'L L. 505 (2004) (arguing that there is no subjective element in the "well-founded fear" standard); James C. Hathaway, *The Michigan Guidelines on Well-Founded Fear, Adopted March 28, 2004*, 26 MICH. J. INT'L L 493, 497 (2004) ("The existence of subjective fearfulness in the sense of trepidation should neither be a condition precedent to recognition of refugee status, nor advantage an applicant who faces an otherwise insufficiently well-established risk.").

103. United States domestic legislation provides, however, for a remedy beyond that contemplated by the Refugee Convention, allowing for a grant of "asylum" to persons who are unable to return home "because of persecution or a well-founded fear of persecution . . . ." Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2006).

104. *Cardoza-Fonseca*, 480 U.S. at 431.

105. *Id.* at 440.

106. R. v. Sec'y of State for the Home Dep't (*Sivakumaran*), [1988] 1 A.C. 958, [78] (appeal taken from Eng. & Wales C.A.).

107. Chan v. Canada (Ministry of Emp't & Immigration), [1995] 3 SCR 593, para. 120 (Can.).

108. *Chan Yee Kin v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379, 388 (Austl.).

109. *See Cordoza-Fonseca*, 480 U.S. at 431 ("That the fear must be 'well-founded' does . . . not transform the standard into a 'more likely than not' one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place.").

110. "[T]he relevant inquiry [is] whether a reasonable person in the asylum applicant's circumstances would fear persecution . . . ." Morales v.

In some, perhaps many, cases, "discretion" will prove impossible. This may be on account of the fact that even "discreet" members of sexual minorities are being sought out for persecution,[111] it might reflect the reality that concealment is not a realistic possibility for a particular claimant,[112] or there may be a real chance that the applicant will be "outed" notwithstanding the modification of behavior. But if, as in *S395* and *HJ and HT*, this is found not to be the case, the risk of exogenous harm for a person who would opt for self-repression is no more than "remote,"[113] "insubstantial,"[114] or a "far-fetched possibility."[115] The problem that arises in both *S395* and *HJ and HT* is thus clear: because, on the facts found or assumed by the courts, the applicants *would* conceal their identity as gay men and would therefore *not* face any real chance of imprisonment, physical assault, or other exogenous harm, a claim based on such harm must fail. As long as the persecutory harm is conceived as the exogenous harm that would result from living an openly gay life, it is impossible to show the existence of the objectively grounded, forward-looking risk that refugee law requires.

II. Why Avoid Recognizing Endogenous Harm?

In their pursuit of fair treatment of the cautious gay applicant, the Australian and British courts failed to identify the risk of any persecutory harm that could honestly be said to be "well-founded." Having done so, the basis upon which they recognized refugee status in *S395* and *HJ and HT* is doctrinally unsound. While their strong condemnation of a "duty of discretion" is both laudable and long overdue, it cannot displace the responsibility to ground refugee status in the real risk of a persecutory harm.

This is not to say, however, that there was no well-founded fear of being persecuted in the two cases. To the contrary, we

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I.N.S., 208 F.3d 323, 330 (1st Cir. 2000) (quoting Aguilar-Solis v. I.N.S., 168 F.3d 565, 572 (1st Cir. 1999)).

111. The story of Anne Frank provides a pointed example. *See infra* note 130.

112. See *supra* text accompanying note 43.

113. *Chan Yee Kin* (1989) 169 CLR at 389 (Mason C.J.).

114. *Id.* at 398 (Dawson J.).

115. *Id.* at 429 (McHugh J.).

believe that there was. The error, in our view, was the courts' failure to identify the harm that is plausible—indeed, likely—in a case of self-repression of one's sexual identity. For reasons developed below, the real risk in such cases will be the harm implicit in concealment, or that occasioned by the modification of one's behavior or suppression of one's fundamental identity. Even though the *exogenous* consequences of being openly gay are remote in cases of enforced discretion, the *endogenous* harms that follow from self-repression are likely to be readily established. And because such harms will often amount to the violation of core internationally recognized human rights, they are, if coupled with the home state's failure to counter the precipitating risk, appropriately recognized under prevailing doctrine as persecutory.

Sadly, the applicants bear some measure of responsibility for the failure of the Australian and British courts to pinpoint the endogenous harms as the relevant persecution. In *S395*, the applicants based their claims on the risk of the exogenous harm that would follow from living an openly gay lifestyle.[116] On appeal to the Federal Court, Judge Lindgren noted the applicants "did not complain that they had to modify their behaviour so as not to attract attention."[117] Similarly, the Chief Justice of Australia observed that

> [i]t was never part of the claim advanced by the appellants to the Tribunal that the persecution they had experienced in the past, and apprehended in future, took the form of repression of behavior about which they desired to be more open, and that they escaped harm only by concealing their relationship.[118]

The parties in *HJ and HT* went further, expressly rejecting identification of the harm as their experience of self-repres-

116. "It is to be emphasized that the first appellant's claim of fear of future persecution was based upon an account of violence, torture, and condemnation to death, and a prediction of death or serious injury, not upon any supposed concern about being obliged, against his will, to behave discreetly." *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (*S395*) (2003) 216 CLR 473, 480 (Gleeson CJ) (Austl.).

117. *Kabir v Minister for Immigration & Multicultural Affairs* [2001] FCA 968, [19] (Austl.).

118. *S395* (2003) 216 CLR at 481 (Gleeson CJ).

sion.[119] Astoundingly, even the UNHCR's intervention argued that "[t]here is no separate question of whether the modification [of behavior] is itself persecution"[120]—thus advancing a less-inclusive position than that taken in the Organization's own *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*:

> Being compelled to forsake or conceal one's sexual identity, where this is instigated or condoned by the State, may amount to persecution. LGBT persons who live in fear of being publicly identified will often conceal their sexual orientation as a result in order to avoid the severe consequences of such exposure, including the risk of incurring harsh penalties, arbitrary house raids, dismissal from employment and societal disapproval. Such actions can not only be considered discriminatory and as violating the right to privacy, but also as infringing the right to freedom of opinion and expression.[121]

The judgment in *S395* displays at least a glimmer of recognition that the relevant persecutory harm may be that occasioned by the modification of behavior. Justices McHugh and Kirby in the High Court of Australia characterize the nature of the relevant harm as the

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119. In a case such as the present, the relevant persecution is the objective serious harm that would occur were the applicant's sexual identity to become disclosed, rather than the individual experience of suppression. The domestic courts have, with respect, wrongly identified the relevant persecution as the latter, requiring the individual to show that his experience of suppression is not reasonably tolerable. This conceptual error is the result of a misreading of the leading decision of the Australian High Court in [*S395*].

Case on Behalf of the Appellant, [99], 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.) (on file with authors).

120. Case on Behalf of the First Intervener (U.N. High Comm'r for Refugees), [39], *HJ and HT*, [2010] UKSC 31, [2011] 1 A.C. 596 (on file with authors).

121. U.N. High Comm'r for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, ¶ 12 (Nov. 21, 2008), *available at* http://www.unhcr.org/refworld/docid/48abd5660.html. This paragraph is referred to in the UNHCR's submissions in *HJ and HT*. Case on Behalf of the First Intervener (U.N. High Comm'r for Refugees), [7], *HJ and HT*, [2010] UKSC 31, [2011] 1 A.C. 596 (on file with authors).

> *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.[122]

Despite the confusing characterization of the "threat" as the relevant harm, the judges' reference to the resultant "menacing implications" signals their awareness that the applicants' psychological response is the real persecutory harm.

Similarly, the Court of Appeal decision under review in *HJ and HT* had, in fact, recognized endogenous harm as the relevant risk, applying prior authority that a claim can be established where the applicant is forced to modify his behavior in a way that is "sufficiently significant *in itself* to place himself in a position of persecution."[123] The Secretary of State advanced this position before the Supreme Court, drawing on the plight of Anne Frank:

> If [Anne Frank] escaped and claimed asylum, the question would be whether she faced a real risk of persecution on return. The real Anne Frank would have been a refugee because she obviously did and therefore her example may not be helpful. But if (improbably) it was found that on return to Holland she would successfully avoid detection by hiding in the attic, the answer to the first stage of inquiry would be that she was not at real risk of persecution by the Nazis. But the second stage would be to ask whether permanent enforced confinement in her attic would itself amount to persecution. If it would, she would be a refugee.[124]

The Secretary of State's submission was embraced by Sir John Dyson, who opined that "[e]ven if it could be imagined that Anne Frank, as an asylum seeker, would not objectively have been at risk of being discovered in the attic, she would never-

122. *S395* (2003) 216 CLR at 490.

123. HJ (Iran) v Sec'y of State for the Home Department, [2009] EWCA (Civ) 172, [8], [2009] Imm. A.R. 600 (Pills L.J.) (appeal taken from Asylum & Immigr. Trib.) (U.K.) (emphasis added).

124. Case for the Respondent, [68], *HJ and HT*, [2010] UKSC 31, [2011] 1 A.C. 596 (on file with authors).

theless have had a well-founded fear of serious harm, a fear not eliminated by her decision to conceal her identity as a Jew and live in the attic."[125] Lord Hope simply raised the question "whether opting for discretion itself amounted to persecution," but made no attempt to answer it.[126]

Lord Walker, on the other hand, considered that a focus on the harm occasioned by modification of behavior "may be an unnecessary complication, and lead to confusion,"[127] while Lord Rodger made the unclear suggestion that this approach would require the applicant "to establish a form of secondary persecution."[128] Most forcefully of all, Lord Collins unequivocally rejected the notion: "Simply to re-state the Secretary of State's argument shows that it is not possible to characterize it as anything other than absurd and unreal. *It is plain that it remains the threat to Jews of the concentration camp and the gas chamber which constitutes the persecution.*"[129]

We believe that Lord Collins' reasoning is mistaken. The submission of the Secretary of State was neither absurd nor unreal. To the contrary, if it were found that Anne Frank could have successfully avoided detection by hiding in the attic,[130] then the Secretary of State is entirely correct to say that she was not at real risk of being sent to the concentration camps. Yet this would, as the Secretary of State argued, not require that Anne Frank be denied refugee status. The risk of permanent enforced confinement would itself be the violation of a core human right and hence a sufficiently serious form of harm to give rise to a risk of being persecuted. Lord Walker recognized as much when he noted that "[t]he conditions which [Anne Frank] had to endure, confined in her attic away from the normal pleasures of childhood and in constant fear

125. *HJ and HT*, [2010] UKSC 31, [118], [2011] 1 A.C. at 658.

126. *Id.* [24], [2011] 1 A.C. at 626.

127. *Id.* [96], [2011] 1 A.C. at 653.

128. *Id.* [75], [2011] 1 A.C. at 645.

129. *Id.* [107], [2011] 1 A.C. at 655 (emphasis added).

130. We know of course that the risk was not remote, with history providing clear evidence that the Frank family was at all times at serious risk of being discovered. The Frank family was discovered on the morning of 4 August 1944, and arrested by Dutch members of the Security Police. It is believed that Anne Frank (and her sister Margot) died in Bergen-Belsen, a concentration camp near Hanover, Germany. ANNE FRANK, THE DIARY OF A YOUNG GIRL, 338–39 (Otto H. Frank & Mirjam Pressler, eds., Susan Massotty, trans. 1995) (1947).

of discovery, were certainly severe enough to be described as persecution."[131]

The problem with the approach adopted by the Court of Appeal in *HJ and HT* is not the conceptualization of the harm as the endogenous harm, but rather the "reasonable tolerability" overlay the court insisted was required to substantiate a finding of persecution.[132] Although in the Supreme Court the Secretary of State attempted to downplay the significance of the "reasonable tolerability" standard, referring to it as no more than "shorthand" for the ordinary test for being persecuted,[133] it seems clear that the Court of Appeal used the test to, amongst other things, legitimate deference to the social mores of the country of origin.[134] In its (fully justified) determination to distance itself from this misguided "reasonable tolerability" overlay, the Supreme Court seems unfortunately also to have discarded without analysis the distinct but underlying notion that serious endogenous harm may amount to a risk of being persecuted.

It would, in truth, have been straightforward for both the Australian High Court and United Kingdom Supreme Court to have recognized the harm occasioned by the modification of one's behavior or suppression of one's identity as persecutory harm, drawing on the established view of the risk of being persecuted as comprised of the sustained or systemic failure of state protection in relation to one of the core entitlements that has been recognized by the international community.[135] Indeed, there are at least two ways[136] in which application of

131. *HJ and HT,* [2010] UKSC 31, [96], [2011] 1 A.C. at 653.

132. *See id.* [35], [73]-[81], [119]-[129], [2011] 1 A.C. at 630–31 (Lord Hope), 644–47 (Lord Rodger), 658–661 (Lord Dyson) (discussing the "reasonable tolerability" overlay).

133. Case for the Respondent, [68], *HJ and HT*, [2010] UKSC 31, [2011] 1 A.C. 596 (on file with authors).

134. For example, Pills L.J. in the Court of Appeals expressly noted that a "judgment as to what is reasonably tolerable is made in the context of the particular society." HJ (Iran) v. Sec'y of State for the Home Dep't, [2009] EWCA (Civ) 172, [32], [2009] Imm. A.R. 600 (appeal taken from Asylum & Immigr. Trib.) (U.K.).

135. *See supra* note 18.

136. The below discussion should not be read as an exhaustive treatment of the full range of rights that might be relevant where a gay applicant has engaged in self-oppression. For example, in certain circumstances such self-repression may infringe the right to hold opinions without interference, or

this accepted framework could have yielded the substantive result embraced by the courts without the doctrinally suspect recognition of refugee status based on the risk of a form of (exogenous) harm that was not, in fact, plausible. The first approach is to define the harm as the modification of behavior itself, amounting to the denial of the right to a private life. The second approach is to define the harm as the psychological harm occasioned by the modification of behavior. In both cases, the requirement that there be a failure of state protection will be readily established by the failure of the state to provide a meaningful response to the precipitating cause of the serious harm.[137]

A. *Privacy*

One approach, attributed to the decision of Rodger Haines QC of the New Zealand Refugee Status Appeals Authority ("RSAA") in *Refugee Appeal No. 74665/*03,[138] identifies risk to the right to privacy as the relevant harm. In considering the case of a young man from Iran who feared that he would be persecuted on account of his sexual orientation, the RSAA accepted that homosexuality is illegal in Iran, and continues to be punished with extreme severity (ranging from the death penalty to flogging).[139] To avoid these sanctions, homosexuality must be "carefully hidden under the camouflage of feigned heterosexuality."[140]

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to freedom of expression. Where the applicant is a child, self-oppression may infringe the child-specific rights contained in the Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

137. *See supra* text accompanying notes 30–32. It is important to be absolutely clear that this is not requiring the applicant to establish a secondary form of persecutory harm. The question is simply whether the state can and will provide protection against the precipitating cause.

138. *Refugee Appeal No. 74665/03* [2005] INLR 68 (N.Z.). The analytical strength of the New Zealand approach was expressly endorsed by the U.K. Supreme Court in *HJ and HT. HJ and HT*, [2010] UKSC 31, [72], [113]–[114], [2011] 1 A.C. at 644 (Lord Rodger), 657 (Lord Dyson). In the first English Court of Appeal case to consider *HJ and HT*, *TM (Zimbabwe) v. Secretary of State for the Home Department*, the English Court of Appeal attributed particular weight to the Supreme Court's reference to the RSAA approach. TM (Zim.) v. Sec'y of State for the Home Dep't, [2010] EWCA (Civ) 916, [39] (appeal taken from Asylum & Immigr. Trib.) (U.K.).

139. *Refugee Appeal No. 74665/03*, at para [34].

140. *Id.* at para [34].

Rather than artificially deeming risk of either the death penalty or flogging to be "well-founded" simply because fear of the same motivated the applicant to be discreet—the approach taken in *S395* and *HJ and HT*—the New Zealand tribunal instead examined the nature of the risk that would actually accrue if the applicant were to be returned to Iran. While concealment would mean that the death penalty and flogging were only remote possibilities (and therefore not "well-founded" risks), this was so only because the applicant would nearly certainly engage in a defensive act of "self-denial."[141] This submission to enforced concealment—not the remote risk of death or flogging—was identified by the Authority as the harm in relation to which there was a well-founded fear.

Drawing on its long-standing understanding of "the predicament of 'being persecuted' as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection,"[142] the Authority relied on the right to privacy set by article 17 of the Civil and Political Covenant as its benchmark. Noting that, in the case of *Toonen v. Australia*,[143] the UN Human Rights Committee determined both that "it is undisputed that adult consensual sexual activity in private is covered by the concept of 'privacy' "[144] and, most importantly, that "the continued existence" of even an unenforced anti-sodomy law infringes the privacy right,[145] the New Zealand Authority determined that returning the applicant to Iran would deny him "a meaningful 'private' life."[146] Opining that this risk infringes a core norm of international human rights law, the Authority determined that there was thus a genuine risk of "being persecuted."

While certainly plausible, it is of some concern that the Authority's approach relies on an interpretation of article 17

141. *Id.* at para [114].

142. *Id.*

143. Toonen v. Australia, Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994) (Human Rights Comm.) [hereinafter Toonen]; *see also Refugee Appeal No. 74665/03*, at paras [97]–[99], [103], [105], [112], [123] (evaluating Toonen's methodology).

144. Toonen, *supra* note 143, ¶ 8.2.

145. *Id.*

146. *Refugee Appeal No. 74665/03*, at para [126]. In support of this finding, the Authority relied heavily on the analysis of MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY (2d ed. 2005).

of the International Covenant on Civil and Political Rights (ICCPR) that is difficult to reconcile with the provision's rather conservative language. Article 17 does not enshrine a right to privacy in any absolute sense, but is simply a right not to "be subjected to arbitrary or unlawful *interference* with [one's] privacy . . . ."[147] Given that framing, it is unclear that the mere existence of unenforced anti-gay laws necessarily and *automatically* amounts to "subject[ion] . . . to interference" as the Authority assumed. While the approach adopted by the New Zealand Authority finds support in the European jurisprudence,[148] there are, of course, striking textual differences between article 8 of the European Convention on Human Rights (ECHR)—which provides an affirmative, right to "respect for" private life—and the more constrained right to non-interference codified by article 17. Moreover, the *Toonen* precedent upon which the New Zealand decision relies has never been expressly affirmed in the twenty years since the decision was issued, much less enshrined in a general comment.

Second, because the structure of article 17 prohibits only forms of interference that are "arbitrary," the Human Rights Committee has determined that the acceptability of interference is to be assessed on the basis of whether it is "reasonable in the particular circumstances."[149] It follows therefore that a breach of article 17 is more readily established in relation to a state where there is a general expectation of respect for autonomy and privacy. Because of this context-sensitive overlay built into the ICCPR, the decision in *Toonen* may well have been

147. International Covenant on Civil and Political Rights art. 17, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added).

148. The cognate right under the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] has been interpreted to comprise "the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfillment of one's own personality." X v. Iceland, App. No. 6825/75, 5 Eur. Comm'n Dec. & Rep. 86, 87 (1976).

149. Canepa v. Canada, Commc'n No. 558/1993, ¶ 11.4, U.N. Doc. CCPR/C/59/D/558/1/1993 (Apr. 3, 1997) (Human Rights Comm.); U.N. Human Rights Comm., General Comment No. 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1 (Apr. 8, 1988).

influenced by "evidence of general Australian tolerance of homosexual lifestyle . . . ."[150] If so, *Toonen*—and therefore, the article 17 argument dependent on it, relied on by the New Zealand Authority—may provide an insecure basis upon which to find that return to the sorts of states from which gay refugee claimants typically flee justifies finding a risk of "being persecuted" there.[151]

Finally, and more generally, there is surely a conceptual incongruity in relying on denial of a right to "privacy" as the means by which to recognize the serious harm faced by gay applicants who are forced to accept repression in order to be safe. Far too often, "privacy"—in a very absolute, unforgiving sense—is precisely what these refugee claimants seek to avoid.

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150. Sarah Joseph, *Gay Rights Under the ICCPR – Commentary on Toonen v. Australia,* UNIV. TAS. L. REV. 392, 407 (1994). The U.N. Human Rights Committee in Toonen explained its reasoning thus:

> The Committee cannot accept either that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy. It further notes that with the exception of Tasmania, all laws criminalizing homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether Sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the 'reasonableness' test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen's right under article 17, paragraph 1.

Toonen, *supra* note 143, ¶ 8.6. The relevance of the particular circumstances to a consideration of article 17 of the ICCPR was stressed in Gonzalez v. Republic of Guyana, Commc'n No. 1246/2004, ¶ 14.3, U.N. Doc. CCPR/C/98/D/1246/2004 (May 21, 2010) (Human Rights Comm.).

151. The New Zealand decision itself questions *Toonen's* approach to privacy upon which it otherwise relies, determining that "[i]t cannot be said that criminalization of consensual homosexual acts is on its own sufficient to establish a situation of 'being persecuted.' " *Refugee Appeal No. 74665/03*, at para [103]. Rather, the Authority considered that something more is required, namely that the anti-gay legislation be "accompanied by penal sanctions of severity which are in fact enforced." *Id.*; *see also id.* at para [112] ("[T]he approach taken by the Human Rights Committee in *Toonen* has left open the argument that in a similar case involving the domestic law of a Muslim state that applies Islamic law, consideration must be given to the public sensibility and morality obtained within Muslim societies, conceding to that state a margin of appreciation . . . .").

They would, to the contrary, like very much to be able to be who they are openly and without fear of severe consequences that would follow from failure to remain entirely private about their sexual orientation. When a gay person craving freedom nonetheless opts for concealment in order to be safe, he is not in any meaningful sense faced with a loss of "privacy." As Edwin Cameroon, now a Justice of the South African Constitutional Court, once argued, seeking to do an end run via privacy—in the refugee context or otherwise—might ultimately do more damage than good:

> [T]he privacy argument has detrimental effects on the search for a society which is truly non-stigmatizing as far as sexual orientation is concerned. On the one hand, the privacy argument suggests that discrimination against gays and lesbians is confined to prohibiting conduct between adults in the bedroom. This is manifestly not so. On the other hand, the privacy argument may subtly reinforce the idea that homosexual intimacy is shameful or improper: that it is tolerable so long as it is confined to the bedroom—but that its implications cannot be countenanced outside. Privacy as a rationale for constitutional protection therefore goes insufficiently far, and has appreciable drawbacks even on its own terms.[152]

Indeed, it could reasonably be argued that the concept of privacy, and the delineation between public and private spheres, in part fueled the "duty of discretion" that courts have now thankfully dismantled.

Rather than trying to shoehorn a right to be "out" or "visibly different" into a right to "privacy," it would in our view be more prudent to build on the structure of equality law in order to establish such a right.[153] Indeed, the robust duty of "equal protection of the law" enshrined in both article 7 of the *Universal Declaration of Human Rights*[154] and article 26 of the

152. Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. AFR. L.J. 450, 464 (1993).

153. Indeed, the scope of the non-discrimination and equality norms was considered by the RSAA in *Refugee Appeal No. 74665/03*, at paras [94]–[103].

154. "All are equal before the law and are entitled without any discrimination to equal protection of the law." Universal Declaration of Human Rights, G.A. Res 217 (III) A, art. 7, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

ICCPR[155] affords a powerful platform from which to derive such an understanding. In contrast to the accessory non-discrimination provision in article 2(1) of the ICCPR,[156] article 26 provides an autonomous, non-derivate guarantee of "equality before the law." The provision—which provides a guarantee of equality in relation to any matter regulated by law—might be relied on to challenge the legitimacy of any law sanctioning the differential treatment of sexual minorities. It has been clearly established that the provision requires equal protection in the exercise of rights and freedoms enumerated in any regional or international instruments, and, indeed, equal protection in the exercise of rights and freedoms however established by law.[157] Although the power of article 26 is presently curtailed by the propensity of the Human Rights Committee to defer to state perceptions of "reasonableness" in determining whether a given form of differentiation amounts to discrimination,[158] there is nonetheless scope for the "equal

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155. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, *supra* note 147, art. 26.

156. The non-discrimination provisions contained in article 2(2) of the International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, and article 14 of the ECHR, *supra* note 148, are similar to article 2(1) of the ICCPR.

157. Nowak provides the following example: "The [ICCPR] contains no provision granting a right to sit on a park bench. But when a State party enacts a law forbidding Jews or blacks from sitting on public park benches, then this law violates Art. 26." NOWAK, *supra* note 146, at 604–05. *See generally* Jason Pobjoy, *Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Protection of Refugee and Beneficiaries of Complementary Protection*, 34 MELB. UNIV. L. REV.181 (2010) (promoting article 26 of the ICCPR as a valuable tool in protecting the rights of highly vulnerable individuals).

158. Differential treatment will not constitute a violation of article 26 if it pursues a legitimate aim and is determined to be based on reasonable and objective criteria. Specifically, the Human Rights Committee has interpreted article 26 of the ICCPR to be subject to the proviso that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." U.N. Human Rights

protection of the law" duty to play a more robust role in sexual orientation cases, including to further an understanding of equality law that embraces an affirmative right to be openly different.

In sum, while the New Zealand Authority rightly recognized the link between the "being persecuted" standard and international human rights law, its reliance on the right to privacy to forge that link hangs by a thin thread. It is worthy of note that, even as it praised the logic of the approach adopted by the New Zealand Authority, the Supreme Court in *HJ and HT* declined to follow it.[159] Moreover, as a matter of principle there is something incongruous—and potentially, in the long run, detrimental—about relying on a right to privacy to protect the rights of gay claimants seeking to live an openly gay life. And while the duty of "equal protection of the law" might one day come to be understood as mandating an affirmative "right to be different," there is not yet a normative consensus in favor of such a meaning.

In these circumstances, we believe that there is clear benefit in exploring an alternative approach to conceptualizing the relevant persecutory harm in cases of enforced concealment. Focusing on the psychological harm occasioned by the modification of behavior will not result in the relatively automatic, class-based findings that New Zealand's reliance on privacy allows. In our view, it nonetheless affords a more secure means by which to establish the "serious harm" limb of the "being persecuted" requirement for at least those gay applicants most severely impacted by concealment of their sexual identity.

B. *Psychological Harm*

The view that psychological harm constitutes cognizable persecutory harm sits comfortably with international human rights law jurisprudence, and with the domestic jurisprudence

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Comm., General Comment No. 18: Non-Discrimination, ¶ 13, *in* Compilation of General Comments, *supra* note 68, at 146. *See generally* Jason Pobjoy, *Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Protection of Refugee and Beneficiaries of Complementary Protection*, 34 MELB. U. L. REV. 181 (2010). For a discussion on this deferential practice of the Human Rights Committee, see JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 129–47 (2005).

159. *See supra* note 138.

of courts in the common law world. Moreover, it is surely intuitively right that the "menacing implications" that self-repression will likely have on the psyche are legitimately the concern of refugee law.[160]

To illustrate this point, it may be useful to return to the somewhat laden example of Anne Frank. The most obvious risk here is the threat of "exogenous" harm at the hands of the Nazi Gestapo: deportation to the concentration camp, and the gas chamber. But it is equally clear that indefinite confinement in the attic will itself likely give rise to serious "endogenous" harm, as a passage from *The Diary of a Young Girl*, documenting Anne's "depths of despair," makes clear[161]:

> The atmosphere is stifling, sluggish, leaden. Outside, you don't hear a single bird, and a deathly, oppressive silence hangs over the house and clings to me as if it were going to drag me into the deepest regions of the underworld. At times like these, Father, Mother and Margot don't matter to me in the least. I wander from room to room, climb up and down the stairs and feel like a songbird whose wings have been ripped off and who keeps hurling itself against the bars of its dark cage. "Let me out, where there's fresh air and laughter!" a voice within me cries. I don't even bother to reply any more, but lie down on the divan. Sleep makes the silence and the terrible fear go by more quickly, helps pass the time, since it's impossible to kill it.[162]

Considering this scenario, Justice Madgwick in *Win* observed that "[even] if the Tribunal were satisfied that the possibility of her being discovered was remote, she would be sent back to live in the attic. It is inconceivable that the framers of the Convention did have, or should be imputed to have, such a

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160. Justices McHugh and Kirby observed in *S395* that "it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct." *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (*S395*) (2003) 216 CLR 473, 490 (Austl.). This passage is referred to with approval in the judgment of Sir John Dyson in *HJ and HT*. HJ (Iran) v. Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [116], [2011] 1 A.C. 596, 658 (appeal taken from Eng. & Wales C.A.).

161. FRANK, *supra* note 130, at 153.

162. *Id.* at 142.

result in contemplation."[163] Indeed, assuming the risk of capture by the Nazis was remote (though history provides clear evidence of the contrary) the risk associated with indefinite confinement in the attic was clearly established. Even if Anne Frank did not have a well-founded fear of deportation to prison camps and the gas chamber, she would still have a well-founded fear of *endogenous* harm, namely the psychological harm occasioned by the permanent state of confinement.

Concealing an aspect of one's identity, including desisting from an activity sufficiently connected to that identity, may give rise to psychological harm. In *RG (Colombia)*,[164] the applicant testified that, for him, self-repression "would be to die."[165] A psychiatric expert confirmed that the suppression of sexual identity for the applicant would be "likely to have traumatic effects."[166] Similarly, in *MK (Lesbians)*,[167] the U.K. tribunal heard evidence from a psychiatrist that a lesbian's attempt to suppress her sexual identity would be "a very potent factor contributing further to her deterioration."[168] The expert considered that "suppressing sexual identity meant living as someone whom you were not, which resulted in an anxiety increase,

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163. *Win v Minister for Immigration & Multicultural Affairs* [2001] FCA 132, [18] (Austl.). In *HJ (Iran) v. Secretary of State for the Home Department*, [2009] EWCA (Civ) 172, [10], [2009] Imm. A.R. 600 (appeal taken from Asylum & Immigr. Trib.) (U.K.), counsel for HJ referred the Court of Appeal to what he labeled the "Anne Frank principle." Lord Justice Pill responded that

> what Mr Raza Husain has described as the Anne Frank principle . . . is not disputed in this appeal. It would have be 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.

Id. For discussion of the "Anne Frank principle" on appeal, see *HJ and HT*, [2010] UKSC 31, [96], [106], [117]–[118], [2011] 1 A.C. at 653 (Lord Walker), 655 (Lord Collins), 658 (Lord Dyson).

164. RG (Colom.) v. Sec'y of State for the Home Dep't, [2006] EWCA (Civ) 57 (appeal taken from Asylum & Immigr. Trib.) (U.K.).

165. *Id.* [17].

166. *Id.*

167. MK v. Sec'y of State for the Home Dep't (*MK Lesbians*), [2009] UKAIT 0036.

168. *Id.* [67].

paranoia and disassociation."[169] More recently, in the case of *SW (Lesbians)* the U.K. tribunal heard evidence that the applicant suffered "clinical depression and stress" in Jamaica, "the reason for which she was unable to disclose to her male doctor."[170]

Traditional refugee law doctrine allows such endogenous harm to be taken into account in the assessment of whether there is a risk of "being persecuted." Drawing on the acknowledged link between serious harm and threats to core norms of international human rights law,[171] article 7 of the ICCPR, one of the few absolute rights in that treaty, provides a critical benchmark. It prohibits not only torture, but also "cruel, inhuman or degrading treatment or punishment."[172]

The range of actions encompassed by the notion of cruel, inhuman or degrading treatment has been said to be as "ex-

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169. *Id.* [68].

170. SW v. Sec'y of State for the Home Dep't (*SW Lesbians*), [2011] UKUT 00251 (IAC), [33]. In cross-examination the applicant stated: "She would not contemplate changing her open lesbianism to avoid harm, wherever she lived. She was 'out' now: being discreet had made her ill with depression and she had no intention of risking that again." *Id.* [20]. The tribunal (appropriately) accepted the applicant's testimony that she would not conceal her sexuality if returned to Jamaica and held that she had a well-founded fear of physical harm as a result of that decision. *Id.* [120]–[123]. It was therefore unnecessary for the tribunal to consider whether the clinical depression might itself amount to serious harm.

171. *See supra* note 18.

172. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." ICCPR, *supra* note 147, art. 7. Article 3 of the ECHR, *supra* note 148, and article 5 of the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, contain similar provisions. Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT], provides that each State Party "shall undertake to prevent in any territory under its jurisdiction any other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1." *See generally* SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 218–223 (2d ed., 2004); NOWAK, *supra* note 146, at 157–192; NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE 296–352 (2002).

tensive as the ingenuity of perpetrators,"[173] with formal recognition by UN supervisory bodies that both physical *and* psychological harm are relevant. General Comment No. 20 of the Human Rights Committee codifies the view that the proscription in article 7 relates "not only to acts that cause physical pain, but also to acts that cause mental suffering to the victim."[174] This proposition finds support in the jurisprudence of the Committee, which makes clear that cruel and inhuman treatment encompasses psychological harm, irrespective of whether physical injury was sustained.[175]

For example, in *Quinteros v. Uruguay*, the Committee determined that the mental anguish caused to a mother by the mysterious disappearance of her daughter amounted to a violation of article 7:

> [There was] anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The [mother] has the right to know what has happened to her daughter. In these respects, she too is a victim of the violation of the Covenant suffered by her daughter in particular, of article 7.[176]

Similar conclusions were reached in *Schedko v. Belarus* and *Staselovich v. Belarus*.[177] The Committee has also recognized

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173. NIGEL RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 140 (2009).

174. U.N. Human Rights Comm., General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), ¶ 5, *in* Compilation of General Comments, *supra* note 68, at 129.

175. *See* JOSEPH ET AL, *supra* note 172, at 218–23; Hathaway & Hicks, *supra* note 102, at 556–60. The jurisprudence of the U.N. Committee Against Torture provides further support for this proposition. *See, e.g.*, Osmani v. Republic of Serbia, Commc'n No. 261/2005, ¶ 10.3, U.N. Doc. CAT/C/42/D/261/2005 (May 25, 2009) (considering both physical and mental suffering in evaluating whether the state party violated the CAT).

176. Quinteros Almaeida v. Uruguay, Commc'n No. 107/1981, ¶ 14,U.N. Doc. CCPR/C/19/D/107/1981 (July 21, 1983).

177. In Schedko v. Belarus, Commc'n No. 886/1999, ¶ 10.2 U.N. Doc. CCPR/C/77/D/886/1999 (Apr. 3, 2003), the Committee recognized the "continued anguish and mental stress caused to the author [the mother of a condemned prisoner] by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite." A similar result was reached in Staselovich v. Belarus, Commc'n No. 887/1999, ¶ 9.2, U.N. Doc. CCPR/C/77/D/887/1999 (Apr. 28, 2003).

the mental harm occasioned by incarceration. In *N'goya v. Zaire*[178] the Committee found, in circumstances where a state had abducted someone and refused to allow any outside contact, "the removal of the victim and the prevention of contact with his family and with the outside world constitute cruel and inhuman treatment, in violation of article 7 of the Covenant."[179] Similarly, in *C v. Australia*[180] the Committee considered that a violation of article 7 had occurred where immigration detention (under Australia's mandatory detention policy for unauthorized "asylum-seekers") has resulted in the development of a serious mental illness.[181]

Critically, in considering whether the substantive harm feared amounts to cruel, inhuman or degrading treatment, it is necessary to consider the circumstances and susceptibilities of the particular applicant.[182] While the *standards* of international human rights law are, of course, universal, this does not mean that their application is in any sense insensitive to the specific vulnerabilities of particular persons. To the contrary, the prohibition of cruel, inhuman or degrading treatment focuses on the nature of the harm experienced by each individual, requiring attention to be paid not just to what harm is threatened, but also to how that harm would impact the applicant himself. In *Vuolanne v. Finland*, the Human Rights Committee expressly affirmed that the meaning of article 7 depends on "all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim."[183] The European Court of Human Rights, interpreting the regional cognate right, has similarly recognized the need

178. N'goya v Zaire (Democratic Republic of Congo), Commc'n No. 542/1993, U.N. Doc. CCPR/C/56/D/S42/1993 (Apr. 16, 1996).

179. *Id.* ¶ 5.5.

180. C v. Australia, Commc'n No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (Nov. 13, 2002).

181. *Id.* ¶¶ 8.4–8.5; *see also* Vuolanne v. Finland, Commc'n No. 265/1987, ¶ 9.2, U.N. Doc. CCPR/C/35/D/265/1987 (May 2, 1989) (recognizing that non-physical harm may violate article 7).

182. This doctrine is well-established in international human rights jurisprudence. *See generally* Hathaway & Hicks, *supra* note 102, at 545–46.

183. Vuolanne v. Finland, *supra* note 181, ¶ 9.2.

to consider "the age, sex, and health condition of the person exposed to [the treatment]."[184]

This insight from international human rights law aligns neatly with a growing number of refugee law decisions that recognize endogenous harm as persecutory. The jurisprudence demonstrates that the proposition that we are advancing is not novel; there is already emerging support in a range of contexts for the view that psychological harm is appropriately understood to be persecutory under the Refugee Convention.

The first group of cases involves applicants not themselves at risk of exogenous harm, but who are related to someone who is clearly facing serious harm. As the English Court of Appeal has held, "[i]t is possible to persecute a husband or a member of a family by what you do to other members of his immediate family."[185] This issue has been helpfully elaborated, particularly in decisions from the United States.

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184. Ireland v. United Kingdom, 2 Eur. Ct. H.R.25, 109 (1978). This approach has also been imported into refugee law. *See, e.g.*, EU Qualification Directive, *supra* note 33, art. 10(2) ("In assessing an applicant's fear of being persecuted or exposed to other serious and unjustified harm, Member States shall take into account . . . the individual position and personal circumstances of the applicant, including factors such as background, gender, age, health and disabilities so as to assess the seriousness of persecution or harm."). The United States Court of Appeals for the Ninth Circuit has also recognized that "[H]armful actions against adults that might be considered as mere harassment or discrimination in the case of an adult may constitute persecution when applied to children. Mansour v. Ashcroft, 390 F.3d 667, 679–80 (9th Cir. 2004) (Pregerson J., dissenting); *see also* Liu v. Ashcroft, 380 F.3d 307, 314 (7th Cir. 2004) (acknowledging that the fear threshold for persecution is lower in children than in adults). In *R. v. Special Adjudicator* (*Hoxha*), [2005] 1 W.L.R. 1063, 1072, [2005] UKHL 19, [34] (appeal taken from Eng. & Wales C.A.), Baroness Hale of the United Kingdom House of Lords considered that gender may be relevant in determining whether a particular action does, or does not, amount to a risk or being persecuted.

185. Katrinak v. Sec'y of State for the Home Dep't, [2001] EWCA (Civ) 832, [21] (Shiemann L.J.) (appeal taken from Immigr. Appeal Trib.) (U.K.). There is general acceptance in the United Kingdom context that "being persecuted" extends *beyond* physical harm. *See* R v. Immigration Appeal Tribunal (*Ravichandran*), [1995] EWCA (Civ) 16, [1996] Imm. A.R. 97, (appeal taken from Immigr. Appeal Trib.) (U.K.) ("I cannot think that the loss of freedom involved would properly be held insufficient to constitute persecution"); R v. Sec'y of State for the Home Dep't (*Sasitharan*), [1998] Imm. A.R. 487 (appeal taken from Immigr. Appeal Trib.) (U.K.) ("[T]he Special Adjudicator has taken cognizance of the fact that *physical harm is not the limit of*

In the case of *Abay*,[186] the mother of a girl who faced the risk of female genital mutilation argued that she, the mother, qualified independently for refugee status on the grounds of the psychological trauma that she would face if forced to try to shield her daughter from female genital mutilation in Ethiopia. The Court of Appeals for the Sixth Circuit accepted that argument:

> [There is] . . . a governing principle in favor of refugee status in cases where a parent and protector is faced with exposing her child to the clear risk of being subjected against her will to a practice that is a form of physical torture causing grave and permanent harm. Given the evidence . . . that Abay herself underwent the procedure at a young age; that Abay's mother has already attempted to mutilate Abay's older daughters, who still faced that prospect upon their marriage; that Abay would not be able to override any of her daughters' future husbands or in-law's wishes; and that the government of Ethiopia does not, as a practical matter, enforce laws intended to curb traditional practices, we conclude that Abay's fear of taking her daughter into the lion's den of female genital mutilation in Ethiopia and being forced to witness the pain and suffering of her daughter is

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persecution, but that there is an open ended category of forms of conduct capable of amounting to persecution, to be evaluated in the light of the Convention from case to case.") (emphasis added). We have seen a similar acceptance in the Australian Federal Court in *SCAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 80, [23] (Madgwick & Conti JJ) ("Insofar as psychological harm to the appellant's family members, rather than directly to himself, might have been in issue, *that could plainly be taken into account as an element of harm* to the appellant himself. To harm a child may also be to harm its custodial parents.") (emphasis added). In the more recent case, *NBLB v Minister for Immigration & Multicultural Affairs* [2005] FCA 1051, the Australian Federal Court was more equivocal. In that case the applicant stated that he would "go crazy" if returned to South Korea—specifically, the applicant claimed that harm to his family would constitute the persecution of the applicant, because he would be personally affected by that punishment. The Federal Court found that fear of psychological harm was not well-founded, irrespective of whether that could constitute persecution. *Id.* [80]–[82]; *see also SBTF v Minister for Immigration & Citizenship* [2007] FCA 1816, [48] (Austl.) (citing *SCAT*, [2003] FCA 80, to support the appellant's contention that psychological harm may be serious harm).

186. Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004).

> well-founded. Accordingly, we find that Abay is also a "refugee" within the meaning of the Act.[187]

This approach was approved by the Second Circuit Court of Appeals in the 2010 decision of *Kone v. Holder*[188]: "[T]he Board may consider on remand whether the mental anguish of a mother who was herself a victim of genital mutilation who faces the choice of seeing her daughter suffer the same fate, or avoiding that outcome by separation from her child, may qualify as such 'other serious harm.'"[189]

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187. *Id.* at 642. We note, however, that this approach is not boundless. Compare this to the more recent decision from the Sixth Circuit where a female Pakistani applicant unsuccessfully invoked her husband's politically inspired imprisonment for 15 days as amounting to persecution *of her.* Sultana v. Holder, 350 F. App'x 59, 61 (6th Cir. 2009). This caution sensibly derives from the recognition that there has to be some serious harm (exogenous *or* endogenous) vicariously inflicted on the applicant himself or herself rather than invoking what amounts to a purely derivative harm.

188. Kone v. Holder, 496 F.3d 141 (2d Cir. 2010).

189. *Id.* at 153; *see also* Benyamin v. Holder, 579 F.3d 970, 975 (9th Cir. 2009) (utilizing the same approach). Note, however, the First Circuit and Fourth Circuit have expressly rejected this approach, making the unqualified assertion that "'persecution' cannot be based on a fear of psychological harm alone." Niang v. Gonzales, 492 F.3d 505, 512 (4th Cir. 2007); Kechichian v. Mukasey, 535 F.3d 15, 22 (1st Cir. 2008); *see also In re* A-K-, 24 I. & N. Dec. 275, 278 (B.I.A. 2007) ("[A]llowing an applicant to obtain asylum or withholding of removal through persecution to his child would require granting relief outside the statutory . . . scheme established by Congress."). A similar argument has been advanced by spouses and partners of women subjected to forced sterilization or abortion. Applicants have referred to the "devastation" caused by a spouse's forced sterilization, *Xueqieng Lin v. U.S. Att'y Gen.*, 337 F. App'x 278, 280 (3d Cir. 2010), and the "severe emotional harm" caused by the loss of the "right to have more children," *Liang Chen v. U.S. Att'y Gen.*, 396 F. App'x 891, 893 (3d Cir. 2010). United States appellate courts have recognized the *possibility* of a claim grounded in psychological harm in this context, though in the majority of cases the courts have considered that the purported emotional distress did not reach the requisite threshold. *Id.* at 893–94; Chang Hao Lin-Lin v. U.S. Att'y Gen., 360 F. App'x 392, 394–95 (3d Cir. 2010); *Xueqieng Lin*, 337 F. App'x at 280; Guang Lin-Zheng v. U.S. Att'y Gen., 557 F.3d 147, 157 (3d Cir. 2009); *In re* J-S-, 24 I. & N. Dec. 520, 543 (B.I.A. 2008). *Cf.* Zi Zhi Tang v. Gonzales, 489 F.3d 987, 992 (9th Cir. 2007) (concluding that those who have undergone forced sterilization and abortion are entitled to withholding of removal); Qu v. Gonzales, 399 F.3d 1195, 1203 (9th Cir. 2005) ("Involuntary sterilization irrevocably strips persons of one of the important liberties we possess as humans: our reproductive freedom. Therefore, one who has suffered involuntary sterilization, either directly or because of the sterilization of a spouse, is entitled, without more, to withholding of removal"); *In re* Y-T-L-, 23 I. & N. Dec. 601,

The second group of cases recognizing the plausibility of endogenous forms of persecution involves claims where the applicant suffered psychological harm as a consequence of threats of violence or murder. As one decision maker noted, "fear, by its nature, obviously had implications for the psyche."[190] In a recent decision, the Court of Appeals for the Seventh Circuit stated:

> Threats alone, and particularly threats of death, can amount to persecution under certain circumstances. In [*Mitev*, 67 F.3d at 1331], we considered the possibility that living under threat of death by secret government forces might rise to this level . . . . *To live, day after day, knowing that government forces might secretly arrest and execute you is itself a form of mental anguish that can constitute persecution.* Yet, logic dictates that for an unfulfilled threat to rise to the level of persecution, it must be something extraordinarily ominous. It cannot simply be a threat of death that, in context, is just a matter of words.[191]

Various references to "threats" as relevant harms are evident also in the jurisprudence concerning sexual orientation. In *Guan*,[192] the Court considered that the applicants were living "at the level of furtiveness and fear brought about by the intolerance of the State."[193] In *Karouni*, the United States Court of

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607 (B.I.A. 2003) ("The act of forced sterilization should not be viewed as a discreet onetime act, comparable to a term in prison, or an incident of severe beating or even torture. Coerced sterilization is better viewed as a permanent and continuing act of persecution that has deprived a couple of the natural fruits of conjugal life, and the society and comfort of the child or children that might eventually have been born to them.").

190. *SBTF* [2007] FCA 1816, [29] (quoting *SBTF v Minister for Immigration &Citizenship* [2007] FMCA 1142, [58] (Austl.)).

191. Pathmakanthan v. Holder, 612 F.3d 618, 623 (7th Cir. 2010) (emphasis added). The Ninth Circuit has also opened the door to the possibility that in extreme cases the risk of threats as such might be a risk of being persecuted. *See* Rios v. Ashcroft, 287 F.3d 895, 900 (9th Cir. 2002) (finding repeated death threats a sufficient basis to establish persecution); Lim v. I.N.S., 70 F. App'x 68, 71 (9th Cir. 2000) ("To effect a well-founded fear, a threat need not be statistically more than fifty-percent likely . . . ."), *cited with approval in* Ramos Ortiz v. Ashcroft, 70 F. App'x 68 (3d Cir. 2003).

192. *Minister for Immigration & Multicultural Affairs v Guan* [2000] FCA 1033 (Austl.).

193. *Id.* [7].

Appeals for the Ninth Circuit accepted that the applicant's life was "intolerable" and that he "was living in fear every moment of [his] life."[194] Such references resonate with the words of Kirby and McHugh JJ in *S395* that "it is the *threat* of serious harm *with its menacing implications* that constitutes the persecutory conduct."[195]

A third group of cases involves applicants who have suffered psychological harm because of ongoing discrimination. The case of *SCAT* was the adjudication of a claim brought by a member of the Sabean Mandean religious minority from Iran. The essence of the case was that members of the minority faced widespread and pervasive discrimination. For example, they were regularly called "dirty Sabeans" by the majority Muslim population, were denied the right to handle food, were not touched in physical greetings, were excluded from clubs, their religion was denigrated, and women were frequently forced into marriages with Muslim men. The Federal Court of Australia considered that the cumulative effect of prolonged discrimination "was likely to entail severe psychological harm"[196]:

> If people are, from an early age, considered by the great majority of the people in the society in which they live too be "dirty," are positively treated as if they are dirty, and if there is otherwise widespread and far-reaching discrimination against them, it requires no degree in psychology to accept that this may well be very harmful to mental well-being.[197]

To similar effect, in *R (Hoxha)*, the House of Lords gave weight to the psychological risk of returning one of the female applicants—a Kosovar Albanian woman who had been raped by

194. Karouni v. Gonzales, 399 F.3d 1163, 1168 (9th Cir. 2005).

195. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (*S395*) (2003) 216 CLR 473, 490 (McHugh & Kirby JJ) (Austl.) (emphasis added).

196. *SCAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 80, [23] (Austl.).

197. *Id.* [21], *cited with approval in SBTF v Minister for Immigration & Citizenship* [2007] FCA 1816, [48] (Austl.). For an application of *SCAT* and *SBTF*, see *S2012 of 2003 v Minister for Immigration & Citizenship* [2008] FMCA 954(Austl.) and *SZKQV v Minister for Immigration & Citizenship* [2008] FMCA 2 (Austl.).

Serbian forces.[198] Baroness Hale suggested that the risk of continued and severe stigma could, at least in a severe case, amount to a risk of being persecuted, even where there was no longer any real chance of the rape itself being repeated:

> To suffer the insult and indignity of being regarded by one's own community . . . as "dirty like contaminated" because one has suffered the gross ill-treatment of a particularly brutal and dehumanizing rape . . . is the very sort of cumulative denial of human dignity which to my mind is capable of amounting to persecution.[199]

A fourth and final group of cases—of particular salience to gay persons opting for self-repression—concerns applicants who have suffered psychological harm as a consequence of the modification of behavior. There has been *some* recognition in domestic courts that the psychological harm occasioned by concealing a protected identity or desisting from a protected activity might give rise to a cognizable risks for the purposes of the "being persecuted" inquiry. As already noted, the English Court of Appeal in *HJ and HT* determined that psychological harm in these circumstances could amount to a risk of being persecuted.[200] This characterization of harm has also found

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198. R v. Special Adjudicator (*Hoxha*), [2005] UKHL 19, [87] (appeal taken from Eng. & Wales C.A.).

199. *Id.* [36]. Although in this case Baroness Hale relied on the more ambiguous notion of 'dignity', rather than the more concrete cruel, inhuman or degrading treatment standard, the latter would easily have embraced the relevant harms. In *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379, 430–31, McHugh J stated: "Other forms of harm short of interference with life or liberty may constitute 'persecution' for the purposes of the Convention and Protocol. Measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution . . . ." For a similar discussion in the New Zealand context, see *Refugee Appeal No. 71404/99*, 29 Oct. 1999, at paras [67], [74], *available at* http://www.refugee.org.nz/Casesearch/Fulltext/71404-99.htm.

200. *See supra* text accompanying note 123. In doing so, the Court of Appeal followed its earlier authority in Z v. Sec'y of State for the Home Dep't, [2004] EWCA (Civ) 1578, [2005] Imm. A.R. 75 (appeal taken from Immigr. Appeal Trib.) (U.K.); J v. Sec'y of State for the Home Dep't, [2006] EWCA (Civ) 1238, [2007] Imm. A.R. 73 (appeal taken from Asylum & Immigr. Trib.) (U.K.); Amare v. Sec'y of State for the Home Dep't, [2005] EWCA (Civ) 1600, [2006] Imm. A.R. 217 (appeal taken from Immigr. Appeal Trib.) (U.K.); RG (Colom.) v. Sec'y of State for the Home Dep't, [2006] EWCA (Civ) 57, [2006] Imm. A.R. 297 (appeal taken from Asylum & Immigr. Trib.)

some traction in the United States. In the case of *Fatin*,[201] the Court of Appeals for the Third Circuit posited, albeit "for the sake of argument" only, that requiring some women to wear chadors may be so abhorrent to them that it would satisfy the "being persecuted" threshold:

> [T]he concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs. An example of such conduct might be requiring a person to renounce his or her religious beliefs or to desecrate an object of religious importance.[202]

This suggestion was subsequently taken up and emphatically endorsed in *Fisher*.[203] In that case, the Court of Appeals for the Ninth Circuit considered it "clear that being forced to conform to, or being sanctioned for failing to comply with, a conception of Islam that fundamentally is at odds with one's own . . . can rise to the level of persecution."[204]

These four categories of refugee cases in which endogenous, psychological harm is recognized as persecutory align neatly with the jurisprudence of international human rights tribunals interpreting "cruel, inhuman or degrading treatment" as including serious psychological harm. Moreover, there is reason to believe that the torment of self-repression that would await the applicants in both *S395* and *HJ and HT* (recall the Bangladeshi applicants' reference to being "captives in our homeland" and the Iranian applicant's insistence that it was "impossible" for him to return to his country) is very

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(U.K.); and XY (Iran) v. Sec'y of State for the Home Dep't, [2008] EWCA (Civ) 911 (appeal taken from Asylum & Immigr. Trib.) (U.K.). In *Z v. Sec'y of State for the Home Dep't*, [2004] EWCA (Civ) 1578, [15], Buxton LJ (with whom Jacob LJ and Peter Gibson LJ agreed) stated that "[The] case only falls under the Refugee Convention if it results in a condition that can properly be called persecutory, in that it imposes on the subject *a state of mind or conscience* that fits with the definition of persecution . . . ." (emphasis added). *See RG (Colom.)*, [2006] EWCA (Civ) 57, [16] (noting that "the high level of distress that must be reached before a denial of freedom can be said to be persecutory.").

201. Fatin v. I.N.S, 12 F.3d 1233 (3d Cir. 1993).

202. *Id.* at 1242.

203. Fisher v I.N.S., 37 F.3d 1371 (9th Cir. 1994).

204. *Id.* at 1381.

much in line with refugee jurisprudence that has recognized persecution to be established on the basis of the psychological harm following from threats of violence, in consequence of ongoing discrimination and, most especially, that occasioned by desisting from a protected activity related to one's identity. It would have been a straightforward matter[205] for the courts to reach the same result without finding that there was a genuine risk of (an exogenous) harm that would not actually accrue.

III. Does Risk Following from Behavior Warrant Refugee Status?

The courts in *S395* and *HJ and HT* unequivocally acknowledged that risk for reasons of one's sexual *identity* falls squarely within the Convention's requirement that the well-founded fear of being persecuted be causally connected to one of the five nexus grounds, specifically "membership of a particular sexual group."[206] In *S395*, the Australian High Court affirmed the primary tribunal's finding that homosexual men in Bangladesh constitute a "particular social group" for the purpose of the Convention,[207] with Justices McHugh and Kirby going so far as to say that a contrary finding would "arguably have been perverse."[208] The United Kingdom Supreme Court took the same tack, with Lord Hope observing that there is "*no doubt* that gay men and women may be considered to be a par-

205. Of course, we acknowledge that this approach may raise evidential issues; particularly in regard to the nature of the evidence to be adduced to satisfy the requisite threshold. In this regard, it is important to recall that the most fundamental principle governing the fact-finding process in refugee claims is that the responsibility to seek out and present objective evidence of risk is shared by the person seeking protection, and the state to which the asylum request is addressed. *See* UNHCR Handbook, *supra* note 101, ¶ 196 ("[W]hile the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all means at his disposal to produce the necessary evidence in support of the applicant.").

206. *See supra* text accompanying note 34.

207. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (*S395*) (2003) 216 CLR 473, 494 (McHugh & Kirby JJ), 497 (Hayne & Gummow JJ) (Austl.).

208. *Id.* at 494.

ticular social group"[209] since "[t]he group is defined by the immutable characteristic of its members' sexual orientation or sexuality."[210] It is thus clear that if the risk accrues for reason of sexual identity per se—for example, the applicant fears that he will be arrested and imprisoned because of legislation criminalizing homosexuality, or will not openly identify himself as gay because he fears that he will be deprived of the ability to earn a livelihood if he does—then the nexus requirement is satisfied.[211]

Equally important, both courts also affirmed that risk for reasons of *imputed identity* satisfies the nexus criterion as easily as risk that follows from actual identity. In *HJ and HT*, Lord Rodger stated that

> [w]hen an applicant applies for asylum on the ground of a well-founded fear of persecution because

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209. HJ (Iran) v. Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [10], [2011] 1 A.C. 596, 620 (appeal taken from Eng. & Wales C.A.) (emphasis added). Both Lord Hope and Lord Rodger also refer to the Refugee or Person in Need of International Protection (Qualification) Regulations, 2006, S.I. 2006/2525, ¶ 6(1)(e) (U.K.), in support of this proposition.

210. *HJ and HT*, [2010] UKSC 31, [11], [2011] 1 A.C. at 621.

211. Significantly, only one of the "serious harm" or the "failure of state protection" needs to be causally connected to the protected interest. Islam v. Sec'y of State for the Home Dep't (*Shah*), [1999] UKHL 20, [1999] 2 A.C. 629, 653–54 (Lord Hoffmann). The House of Lords reasoned in *Shah* that if the risk of "being persecuted" is the sum of two facts—the threat of serious harm *and* the failure of state protection—that summative concept is logically "for reasons of" a Convention ground if either of the two essential elements is "for reasons of" a Convention ground. *Id.* In Lord Hoffmann's oft-cited formulation:

> [S]uppose that the Nazi government . . . did not actively organize violence against the Jews subjected to violence by neighbors. A Jewish shopkeeper is attacked by a gang organized by an Aryan competitor . . . . The competitor and his gang are motivated by business rivalry and the desire to settle old personal scores . . . . Is he being persecuted on grounds of race? . . . [I]n my opinion, he is. An essential element in the persecution, the failure by the authorities to provide protection, is based upon race. It is true that one answer to the question "why was he attacked?" would be "because a competitor wanted to drive him out of business." But another answer, and in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew he would receive no protection because he was a Jew."

Id.

> he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, *or that he would be treated as gay by potential persecutors in his country of nationality*.[212]

Similarly, in *S395*, Justices McHugh and Kirby noted the need to establish the "existence of a causal relationship between the harm feared and one or more of the characteristics or attributes, *real or imputed*, of the social group."[213]

Beyond well-founded fear of being persecuted that is grounded in actual or imputed identity, the courts in *S395* and *HJ and HT* also recognized that the nexus requirement can be satisfied where risk accrues not simply by reason of identity, but in response to at least some activities connected to the protected identity. In *S395*, Justices Gummow and Hayne made clear that

> [s]exual identity is not to be understood . . . as confined to particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense "discreetly") may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality . . . .[214]

And in *HJ and HT*, Lord Hope stated:

> [Sexual orientation] is a characteristic that may be revealed, to a greater or lesser degree, by the way the members of this group behave. In that sense, because it manifests itself in behaviour, it is less immediately visible than a person's race. But unlike a person's religion or political opinion, it is incapable of being changed. To pretend that it does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are.[215]

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212. *HJ and HT*, [2010] UKSC 31, [82], [2011] 1 A.C. at 647 (emphasis added).

213. *S395* (2003) 216 CLR at 486 (emphasis added).

214. *Id.* at 500–01.

215. *HJ and HT*, [2010] UKSC 31, [11], [2011] 1 A.C. at 621.

By reason of the strong link between the Refugee Convention's nexus clause and non-discrimination law, described below,[216] the courts were quite right to reject the rigid "is/does" dichotomy. Indeed, Lord Rodger's insistence that the scope of protected activity goes beyond that necessary to "enable the applicant to attract sexual partners and establish and maintain relationships with them"[217] is surely right. There is, however, a critical distinction between recognizing that a meaningful understanding of non-discrimination norms as the bedrock of the nexus requirement requires attention to action-based risks, and the position suggested in *S395* and *HJ and HT* that there are no limits to which action-based risks are relevant. In both cases, the possibility that at least some forms of behavior loosely (or stereotypically[218]) associated with homosexuality are not presently protected at law was ignored. The open-ended formulation of relevant actions adopted by the High Court of Australia[219] and, in particular, the all-embracing formulation advanced by Lord Rodger in the United Kingdom Supreme Court—which crescendos with a passage outlining what he believes it means to "live freely and openly as a gay man" (a life of Kylie concerts, exotically coloured cocktails and "boy talk" with straight female friends[220]), suggesting that "gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men"[221]—seem to assume that risk following from *any* "gay" form of behavior gives rise to refugee status.

Yet, this all-inclusive approach to identifying which actions are appropriately deemed to be included within the protected status of sexual orientation really cannot be reconciled to the accepted view that the Refugee Convention's beneficiary class is delimited. In defining the approach to interpreta-

216. *See infra* text accompanying notes 224–231.

217. *HJ and HT*, [2010] UKSC 31, [78], [2011] 1 A.C. at 645–46.

218. Lord Rodger himself admits this. *Id.* [78], [2011] 1 A.C. at 646.

219. In *S395*, Gummow and Hayne JJ rejected the suggestion that any line between protected and other activity should be drawn, asserting that "the tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality . . . ." *S395* (2003) 216 CLR at 501. They continued to say that "considering what an individual is entitled to do is of little assistance . . . ." in the assessment of refugee status. *Id.* at 502.

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

221. *Id.*

tion of the "membership of a particular social group" ground, the High Court of Australia held in the seminal case of *Applicant A*[222] that, "if [the drafters] had intended to provide a 'catch-all . . . ,' it is more likely than not that they would have amended the draft treaty by eliminating the specific grounds of persecution."[223] Having instead inserted a delimiting clause—that only risks of being persecuted "for reasons of" one of five grounds would give rise to refugee status—the need to grapple with the scope of that delimitation is unavoidable. Yet, the decisions in *S395* and *HJ and HT* essentially refuse to confront this question in the context of sexual orientation, thereby ironically resuscitating a version of the "catch-all" approach to the "social group" ground so emphatically rejected by the Australian High Court in *Applicant A*.

How, then, should the courts have proceeded? Senior courts of the common law world have long recognized the principle of non-discrimination—the core human rights value of the international system, and arguably a *jus cogens* norm[224]—as the principled reference point for identifying those interests protected by the Convention's nexus grounds.[225] In *Ward*, the Supreme Court of Canada invoked the principle of *ejusdem generis* to insist that the amorphous

222. *A v Minister for Immigration & Ethnic Affairs* ("*Applicant A*") (1997) 190 CLR 225 (Austl.).

223. *Id.* at 260 (McHugh J).

224. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702 cmt. n (1987) (defining *jus cogens* to include "systematic racial discrimination"). *See generally* HATHAWAY, *supra* note 158, at 28–31.

225. In Australia the traditional view has been to conceptualize "particular social group" by reference to a "social perception" test focusing attention on the external or outward perception of a group. *Applicant A* (1997) 190 CLR 225, 300. Importantly, however, in *S395* itself the Australian High Court effectively adopted a *ejusdem generis* approach. *Appellant S395/2002 v Minister of Immigration & Multicultural Affairs* (*S395*) (2003) 216 CLR 473, 494. Indeed, the Court expressly rejected the view adopted by the Refugee Review Tribunal on the basis of the social perception test that gay men could be divided into two sub-groups ("discreet" and "non-discreet" homosexuals). *Id.* at 494. Yet ironically, even as Australia—home of the "social perception" test—has impliedly questioned this approach, other jurisdictions have placed greater weight on the outward perception of a group:

> Given the varying approaches, and the protection gaps which can result, ... [t]he two approaches ought to be reconciled. The protected characteristics [*ejusdem generis*] approach may be understood to identify a set of groups that constitute the core of the so-

"membership of a particular social group" category be interpreted in consonance with the non-discrimination principle informing the other four Convention grounds: race, religion, nationality and political opinion. Drawing on the reasoning of the United States Board of Immigration Appeals in *Acosta*,[226] the Canadian Supreme Court considered that the meaning assigned to "particular social group" should "take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative."[227] The Court considered that anti-discrimination notions inherent in civil and political rights limited the particular social group category, and that in distilling the boundaries of that Convention ground it is appropriate to "find inspiration in discrimination concepts."[228]

The approach adopted in *Acosta* and *Ward* was subsequently approved by the House of Lords in *Shah*.[229] In that case, Lord Hoffmann advanced a test substantively indistinguishable from the North American reliance on *ejusdem generis*:

> In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention . . . .

> cial perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches . . . .
> . . .
>
> If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society.

U.N. High Comm'r for Refugees, "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶¶ 10–13, U.N. Doc. HCR/GIP/02/02 (May 7, 2002). Although the current state of the law thus remains unclear, decision makers and the UNHCR agree that the *ejusdem generis* approach lies at the core of any consideration of "particular social group," even if greater weight is now being given to the outward perception of the group.

226. *In re* Acosta, 19 I. & N. 211 (B.I.A. 1985), *overruled in part on other grounds by in re* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987). The Canadian Supreme Court in *Ward* approved *Acosta* as reflecting a "classic discrimination analysis." Canada (Att'y Gen.) v. Ward, [1993] 2 S.C.R. 689, 736.

227. *Ward*, [1993] 2 S.C.R. at 739 (La Forest J.).

228. *Id.* at 734 (La Forest J.).

229. Islam v. Sec'y of State for the Home Dep't (*Shah*), [1999] UKHL 20, [1999] 2 A.C. 629, 651 (Lord Hoffman) (appeal taken from Eng. & Wales C.A.).

> The obvious examples, based on the experiences of the persecutions in Europe which would have been in the minds of the delegates in 1951, were race, religion, nationality and political opinion. But the inclusion of "particular social group" recognised that there might be different criteria for discrimination, in *parie materiae* with discrimination on other grounds, which would be equally offensive to human rights . . . . In choosing to use the general term "particular social group" rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.[230]

The invocation of *ejusdem generis* or, of matters in *parie materiae*, is, of course, consistent with accepted principles of treaty interpretation requiring a decision maker to interpret a treaty "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their *context* and in light of its *object* and *purpose*."[231] Under this understanding, the textually plain intent to constrain the scope of the Refugee Convention's beneficiary class is respected, even as a clear and compelling basis for that delimitation is established. But despite the flexibility of this approach, it does not amount to an invitation to treat international refugee law as an all-encompassing remedy. And if the Convention grounds themselves are not boundless, on what possible basis can it be suggested that the scope of protected activity encompassed by such grounds is without limitation? If the activity that engenders

230. *Id.*

231. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (emphasis added). The International Court of Justice has pronounced that articles 31 and 32 of the VCLT constitute customary international law, and therefore apply to the interpretation of any treaty, irrespective of whether the state parties involved are parties to the VCLT Territorial Dispute (Libya/Chad), 1994 I.C.J. 6, 21. This is important as the VCLT does not technically apply to an interpretation of the Convention, as both the *Refugee Convention* and its attendant *Protocol* predate the VCLT. *See* VCLT, *supra*, art. 4 ("Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.").

the risk is intrinsic to one of the five forms of protected status, then refugee status must, of course, be recognized. But if the activity precipitating the risk is no more than marginally connected to one of the forms of protected status, then the ensuing risk of being persecuted cannot reasonably be said to be "for reasons of" a Convention ground.

The uncontroversial nature of this principle is clear from the preparedness of the Australian and United Kingdom courts to limit the scope of protected activities in the context of claims based on the cognate grounds of religion or political opinion. Perhaps the most obvious example of precipitating actions that cannot be said to give rise to a risk of harm that is "for reasons of" a protected status are those actions that infringe the rights of others. In *Applicant NABD,* a case involving religious persecution, Justice Kirby of the Australian High Court stated that

> the human rights of the applicant for protection must be accommodated to the human rights of other individuals, both in the country of nationality and in the country in which protection is sought. Violent, aggressive or persistently [non-consensual] conduct "for reasons of . . . religion" are not protected by the Convention, any more than by other instruments of international law.[232]

The position that actions that infringe the rights of others are not themselves protected is, of course, intrinsic in the very structure of international human rights law. In *Applicant NABD,* Justice Kirby relied on the language of article 18 of the ICCPR which makes clear that the right to freedom of religion is subject to "such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[233]

But it is by no means clear that only rights-violative actions are excluded from the ambit of the protected forms of civil or political status. To the contrary, at least in religion and political opinion cases, courts have been quite prepared to engage in line-drawing to separate protected from unprotected forms of activity. Indeed, in *HJ and HT*, Lord Hope expressly stated

232. *Applicant NABD of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (*Applicant NABD*) (2005) 216 ALR 1, [113] (Austl.).

233. *Id.* [116]. *See supra* text accompanying note 68.

that "where the fear is of persecution for reasons of religion or political opinion, it may be necessary to examine the nature and consequences of any activity that the applicant claims he or she may wish to pursue if returned to the country of nationality."[234] 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.[235] Similarly, the Court of Appeal has held that "standing up for law and order" in a corrupt system does not fall within the ambit of "political opinion."[236]

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. Indeed, the line drawing of courts in relation to religion and political opinion of the kind cited above has at times been problematic. Why was proselytizing not found to be protected religious activity? Why was standing up for due process in the face of corruption not a political opinion? This difficulty is accentuated in the sexual orientation context where—in contrast to "religion" and "political opinion" for which the ICCPR offers clear, if nascent, textual guidance on the scope of protected activities—the absence of any express mention of sexual orientation in international instruments means that guidance must be derived indirectly from the understandings of non-discrimination law, and international human rights law more generally.

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234. HJ (Iran) v Sec'y of State for the Home Dep't (*HJ and HT*), [2010] UKSC 31, [17], [2011] 1 A.C. 596, 623 (appeal taken from Eng. & Wales C.A.)).

235. Ahmad v. Sec'y of State for the Home Dep't, [1990] Imm. A.R. 61 (appeal taken from Immigr. Appeal Trib.) (U.K.) (affirming the Court of Appeal's earlier decision in Mendis v. Sec'y of State for the Home Dep't, [1989] Imm. A.R. 6 (appeal taken from Immigr. Appeal Trib.) (U.K.)). The Court of Appeal was careful to acknowledge that there could be no such constraint on an activity "widely regarded as [a] fundamental human right." *Id.* The Ahmad decision was distinguished in part in a later case interpreting the internal protection alternative. 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.).

236. Storozhenko v. Sec'y of State for the Home Dep't, [2001] EWCA (Civ) 895 (appeal taken from Immigr. Appeal Trib.) (U.K.).

For example, the jurisprudence makes clear that there is a private sphere of protected activity. The protected interest of sexual identity includes, at the very least, engaging in sexual conduct, seeking and maintaining a relationship, and cohabiting with a partner.[237] There is also clearly a right openly to identify oneself as a member of a sexual minority,[238] and to be safeguarded from discrimination in relation to such spheres as securing accommodation,[239] undertaking public service,[240]

237. *See* Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149, 161 (1981) (finding that legislation in Northern Ireland prohibiting anal intercourse interferes with the right to have one's private life respected); Modinos v. Cyprus, 16 Eur. H.R. Rep. 485, 493 (1993) (finding it undisputed that Cypriot legislation criminalizing private consensual homosexual relations was contrary to the right to privacy found in the ECHR and the Constitution of the Republic of Cyprus); Norris v. Ireland,13 Eur. H.R. Rep. 186, 196 (1988) (finding that even unenforced legislation criminalizing private homosexual acts infringes on the right to privacy); SL v. Austria, 37 Eur. H.R. Rep 799, 809 (2003) (finding that provisions in the Austrian Criminal Code defining the age of consent unjustifiably discriminated against homosexual men); Salgueiro da Silva Mouta v. Portugal, 31 Eur. H.R. Rep. 1055, 1071 (1999) (finding that a detrimental child custody decision based on the father's sexual orientation amounted to a violation of the EHCR); Toonen, *supra* note 143, ¶ 8.2 (finding it "undisputed that adult consensual activity in private" is protected by article 17 of the ICCPR); X v. Colombia, Commc'n No. 1361/2005, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (May 4, 2007) (finding Colombia in violation of article 26 of the ICCPR for denying pension benefits to same sex partners); Young v. Australia, Commc'n No. 941/2000, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (Sept. 18, 2003) (finding an Australian pension law which granted benefits to opposite sex partners but denied benefits to same sex partners to be a violation of article 26 of the ICCPR).

238. In these circumstances, the suggestion by the Full Federal Court of Australia that "public manifestation of homosexuality is not an essential part of being homosexual" is plainly incorrect. *WABR v Minister for Immigration & Multicultural Affairs* (2002) 121 FCR 196, 204. The non-discrimination framework is a tool that can assist decision makers in the task of ascertaining the scope of protected activities in an objective and principled manner. It is not an invitation for subjective line drawing, divorced from international standards. For a detailed discussion of the outdated, and at times patently discriminatory, reasoning adopted by refugee decision makers in attempting to define the scope of protected activities, see Dauvergne & Millbank, *Burdened by Proof*, *supra* note 15; Millbank, *supra* note 15.

239. Karner v. Austria, 39 Eur. Ct. H.R. 24 (2004); Kozak v. Poland, App. No. 13102/02, Eur. Ct. H.R. (2010).

240. Smith v. United Kingdom, 29 Eur. Ct. H.R. 493 (1999).

and engaging in political expression.[241] But to this point, the right to marry[242] or adopt children[243] has not been recognized as within the scope of protected activity. Such understandings may, of course, change over time as the normative consensus evolves.[244] As Justices Gummow and Hayne insisted in *S395*,

> [s]exual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.[245]

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241. Alekseyev v. Russia, App. Nos. 4916/07, 25924/08, 14599/0, Eur. Ct. H.R. (2010), ¶ 82.

242. Joslin v. New Zealand, Commc'n No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (July 17, 2002) (Human Rights Comm.); Schalk v. Austria, App. No. 30141/04, Eur. Ct. H.R. (2010).

243. Fretté v. France, 38 Eur. Ct. H.R. 21 (2004).

244. This is clearly shown in the same-sex marriage context, where, even as the Human Rights Committee and European Court of Human Rights held that differentiation on grounds of sexual orientation in relation to marriage was reasonable, they indicated that this might well change in the near future. In *Joslin v. New Zealand*, two members of the Committee observed that "the Committee's jurisprudence support[ed] the position that such differentiation may well, depending on the circumstances of a concrete case, amount to prohibited discrimination." *Joslin*, *supra* note 242, app. In *Schalk*, the European Court of Human Rights noted that there was an "emerging European consensus towards legal recognition of same-sex couples" and that it was an area to be regarded "as one of evolving rights with no established consensus." *Schalk*, App. No. 30141/04, ¶ 105.

245. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (*S395*) (2003) 216 CLR 473, 500–01 (Austl.). The U.K. Supreme Court in *HJ and HT* similarly remarked:

> At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behavior on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of hetero-

In our view, the protected status of sexual orientation ought more generally to encompass any activity reasonably required to reveal or express an individual's sexual identity. We acknowledge, of course, that there can be no single, universally acceptable definition of such activity,[246] and note the importance of ensuring a culturally sensitive and inclusive approach. But it remains that there will be some activities at least loosely associated with sexual identity which, though innocuous and inoffensive, are not reasonably required to reveal or express an individual's sexual identity. 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."

Reliance on international human rights law, of course, denies the possibility of immediate assertion that all activities in any way associated with sexuality are necessarily protected. We nonetheless believe that it affords the most principled basis for drawing a line between behavior or actions included within a form of protected civil or political status, and those which are not.

> sexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected.

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

246. Relying on an unstated presumption of what it means to be gay effectively denies cultural differences. As with gender, culture affects the ways in which gay and lesbian communities form and interact as well as the ways in which sexual orientation is individually expressed . . . . Sexual orientation, like gender identity, is created by and through culture, as opposed to having an essential core.

Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER & L. 367, 389–90 (2010).

First, by relying on external standards of reference of "universal applicability,"[247] the connection between Refugee Convention grounds and international human rights law promotes objective and consistent decision making. This objective framework reduces the risk of conflicting decisions between, and indeed within, jurisdictions. It also 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."[248]

Second, recourse to internationally agreed standards promotes an interpretation of the Refugee Convention that is sensitive to the reality that states can only be bound by what they have agreed. This is not only a matter of principle, but is also "strategically wise"[249] as judges are less likely to view an interpretation grounded in accepted legal standards as inappropriately activist or otherwise beyond their remit.[250]

Third, and perhaps most important, a commitment to interpret the nexus grounds in line with non-discrimination and related principles of international human rights law enables the primary delimiting criterion of refugee law to evolve in a contextually sensitive way. Because non-discrimination law is specifically designed to identify and respond to those forms of disfranchisement agreed to be unacceptable by the international community, it provides the perfect basis to give substance to the intention of the Convention's drafters to limit

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247. James C. Hathaway & Michelle Foster, *Membership of a Particular Social Group*, INT'L J. REFUGEE L. 477, 482 (2003).

248. The same problem of subjectivity might also affect the way that counsel frames a particular case. *See* Jain v. Sec'y of State for the Home Dep't, [2000] EWCA (Civ) 3009, [3] (appeal taken from Immigr. Appeal Trib.) (U.K.) ("More generally, there is, I suspect, in the basis on which the present case has been argued before us an inbuilt assumption as to the extent to which homosexuality and homosexual practices should be permitted in a modern State.").

249. James C. Hathaway, *The Relationship Between Human Rights and Refugee Law: What Refugee Judges Can Contribute*, *in* INT'L ASSOC.N OF REFUGEE LAW JUDGES, THE REALITIES OF REFUGEE DETERMINATION ON THE EVE OF A NEW MILLENNIUM: THE ROLE OF THE JUDICIARY 85, 85(1998).

250. Sepet v. Sec'y of State for the Home Dep't, [2001] EWCA (Civ) 681, [66] (appeal taken from Immigr. Appeal Trib.) (U.K.) ("However wide the canvas facing the judge's brush, the image he makes has to be firmly based on some conception of objective principle which is recognized as a legitimate source of law.").

refugee status to persons whose risk flows from forms of civil or political status deemed fundamental. By grounding interpretation of both protected forms of civil or political status *and* the activities inherent therein in international human rights law, we enable the Convention to "be seen as a living instrument in the sense that while its meaning does not change over time, its application will."[251] Indeed, senior courts were persuaded to embrace sexual orientation as a form of "particular social group" precisely on the grounds of the consonance of that characterization with contemporary understandings of non-discrimination law.[252]

Our concern with the decisions in *S395* and *HJ and HT* is not the adoption of a very vigorous (and yes, liberating) view of behavior understood to fall within the protected interest of "sexual orientation." Rather it is that the Australian and United Kingdom courts did so without providing any principled basis for their departure from the accepted position that the Refugee Convention's nexus grounds are to be conceived in line with non-discrimination principles. By suggesting that a boundless range of activities is protected under the rubric of sexual orientation, the courts have created a schism between the understanding of nexus adopted in cases based on a claimant's religion or political opinion (where protected activities are circumscribed by reference to evolving norms of international non-discrimination law), and cases based on a claimant's sexual orientation (where there is to be, it seems, no principled circumscription). There may be some good reason for differentiating between these categories—for example, that sexual orientation is more like the truly innate and unchangeable characteristics of race and nationality than like religion or political opinion, which are immutable only in the sense that disassociation imposes an unacceptable human rights cost. But if this (or some other) justification was in fact

251. *Id.* [6] (Lord Bingham). This conceptualization of the Convention mirrors the teleological approach taken by the International Court of Justice. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 31 (June 21); Aegean Sea Continental Shelf Case (Greece v. Turk.) 1978 I.C.J. 3, 32 (Dec. 19). The European Court of Human Rights has also taken a similar approach. Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18, ¶ 74 (2002).

252. *See supra* text accompanying notes 34–35.

relied on by the courts, they had a responsibility to articulate it.

In practice, the decisions in *S395* and *HJ and HT* are far-reaching. In the first decision to consider *HJ and HT,* for example, the English Court of Appeal noted that "[p]lainly the ratio of [*HJ and HT*] is not limited just to sexual orientation cases but will apply to all grounds covered by the Convention."[253] There has however been considerable concern and confusion surrounding the judgment's unqualified vision of protected activities. In the case of *TM*, handed down less than a month after *HJ and HT*, Justice Elias expressed his concern about the "far-reaching" language of *HJ and HT*, and made an attempt to employ international human rights standards to draw a line between protected and unprotected activity in the context of a political opinion case, observing that "if the proposed action is at the margins, persistence in the activity in the face of the threatened harm is not a situation of being persecuted and does not attract protection."[254] Yet less than four months later, in another political opinion case, the same court seemed to reject the suggestion that there might be limits on protected activities, observing that "[Lord Rodger's] comments on what was involved in the right of a gay man to live 'freely and openly,' make it hard to see where he would have drawn the line between 'core' and 'marginal' actions or activities."[255] More recently still, the English High Court suggested that the decision in *HJ and HT* "does not of course mean that the punishment of any form of sexual behaviour or of any manner of expressing religious or other opinions" is protected.[256]

While on the surface having generated a legal muddle, it is at least possible that this confusion was explicitly sown by the courts (or at least, by the United Kingdom Supreme Court). Was the goal perhaps to encourage lower courts to jettison the previously accepted link between the nexus clause and inter-

253. TM (Zim.) v. Sec'y of State for the Home Dep't, [2010] EWCA (Civ) 916, [38] (appeal taken from Asylum & Immigr. Trib.) (U.K.).

254. *Id.* [40].

255. RT (Zim.) v. Sec'y of State for the Home Dep't, [2010] EWCA (Civ) 1285, [32], [2011] Imm. A.R. 259 (appeal taken from Asylum & Immigr. Trib.) (U.K.).

256. Yameen v. Sec'y of State for the Home Dep't, [2011] EWHC (QB) 2250, [69] (U.K.).

national non-discrimination norms in favor of a more libertarian understanding of equality? There are, indeed, principled grounds to argue for an understanding of non-discrimination law not grounded in the protection of immutable characteristics, but which instead celebrates and protects difference (presumably subject to the duty not to infringe the rights of others). In this regard, Lord Rodger's stirring liberation manifesto echoes Kenji Yoshino's argument that the focus of non-discrimination law on the protection of immutable identity is unnecessarily cribbed, that we should instead embrace an "accommodation model" under which demands for conformity are countenanced only if those arguing for the same bear the burden of proof in what he terms a "reason-forcing conversation."[257]

However, if the Australian and British courts intended to unleash such a fundamental challenge to non-discrimination law grounded in immutability[258] or, indeed, if they wished to encourage a divorce of the nexus clause from non-discrimination law altogether, ought not their position have been made clear, and expressly justified? And if they did not intend to launch such a radical transformation, but simply to establish a *sui generis* rule for gay claimants, shouldn't that position have been forthrightly stated, and the risks of such a conceptual schism addressed?

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257. KENJI YOSHINO, COVERING 178–81 (2006).

258. It is important to recall, as Yoshino forthrightly acknowledges, that there is no sign that law is likely to shift away from its present focus on the protection of immutable identity, the strength of principled arguments favoring such a shift notwithstanding:

> But now I must temper passion with realism. I believe we should adopt a group-based accommodation model to protect traditional civil rights groups from covering demands. I believe with equal conviction, however, that courts are unlikely to adopt this course. The explosive pluralism of contemporary American society will inexorably push this country away from group-based politics—there will be too many groups to keep track of, much less to protect. Indeed, I expect English jurisprudence to look more like American jurisprudence fifty years from now than vice versa. Americans are already sick to death of identity politics; the courts are merely following suit.

Id. at 183.

Conclusion

"Hard cases, it has frequently been observed, are apt to introduce bad law."[259] In formulating what has become a legal adage, Judge Rolfe expressed his concern that the faithful application of legal rules—in that case, rules on privity of contract—would require him to deny relief to a deserving litigant, an injured coachman who had no direct contractual relationship with the negligent repair firm.

The circumstances of *S395* and *HJ and HT* are, of course, quite different. Despite what we view as the courts' misapplication of the "well-founded fear" test, failure accurately to identify the relevant risk of being persecuted, and disregard of the principled limits set by the refugee definition's nexus requirement, the courts ultimately ruled in favor of granting asylum to the applicants. As such—and in stark contrast to the disabled coachman of concern to Judge Rolfe who would receive no relief—the misapplication of legal rules in *S395* and *HJ and HT* meant that gay men seeking relief from the misery of a life of perpetual enforced concealment in Bangladesh, Cameroon, and Iran would be able "to live freely and openly . . . to be as free as their straight equivalents . . . to live their lives in the way that is natural to them as gay men, without fear of persecution."

In the face of such a clearly correct result, we may appear churlish to insist that the basis for recognition of refugee status in such cases be revisited. We wish to be absolutely clear that, like nearly everyone else in the human rights community, we deeply admire both the Australian and British courts' rejection of a "duty of discretion" to avert persecution, and more generally their commitment to the context-sensitive application of refugee law to gay applicants.

But it would in our view be a serious error to allow our instincts simply to celebrate the cases to override our intellectual responsibility to ensure that refugee law evolves in a way that is both principled and sustainable. While there is no question that *S395* and *HJ and HT* are watershed decisions, Oliver Wendell Holmes famously cautioned that "[g]reat cases like hard cases make bad law. For great cases are called great,

259. Winterbottom v. Wright, (1842) 152 Eng. Rep. 402 (Exch.) 406; 10 M. & W. 109, 116 (Rolfe J.).

not by reason of their importance . . . but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."[260]

As we have been at pains to show, the courts' errors are not without real and detrimental consequences, both for gay claimants (at least in the medium term) and for persons seeking refugee status on the basis of other Convention grounds (as decisions have already shown). Most important, the correction of these errors in line with the framework advocated here will in no sense compromise the ability of gay applicants and others to access asylum when faced with the prospect of indefinite self-repression to avert clear threats to their safety.

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. But, given the traumatic effects that normally follow from self-repression (anxiety, paranoia, disassociation, or worse) there is an alternative and solid basis, grounded in the traditional link between persecution and risk to core norms of human rights law, to affirm refugee status. Because the risk of severe psychological harm has been authoritatively interpreted to contravene the right to protection against cruel, inhuman or degrading treatment, this is the persecutory risk that is most likely to be well-founded in such cases.

And no, it is not the case that refugee status is owed whenever serious harm is threatened by reason only of an applicant having engaged in some activity that is vaguely or stereotypically associated with homosexuality (or any other protected ground). Drawing on norms of non-discrimination law, the "for reasons of" criterion in the Convention definition was conceived as a principled delimitation of the beneficiary class. This means that it is ordinarily a form of immutable identity—whether actual or imputed—that is the lynchpin to refugee status. In general terms, refugee status is owed only where risk ensues because of who the applicant is or what he believes. Where risk is the product not of identity per se but rather of having engaged in a particular activity, the nexus requirement can still be met. But this is so only when the activity engender-

260. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

ing the risk is fairly deemed to be intrinsic to the protected identity.

Refugee law is not an all-embracing remedy for every circumstance in which full freedom is not made available. This realization should not, however, blind us to the dominant reality: refugee law fairly interpreted may be imperfect, but is nonetheless a powerful means by which human rights commitments can be made real in the lives of those fundamentally disfranchised in their home states. It is a sign of strength that refugee law encompasses not just gay applicants facing the clear risk of prosecution under anti-gay laws or rabid vigilante violence, but also persons who would opt for the prisoner's dilemma of sacrificing their own psychological well-being to avert such harms. Similarly, the commitment of refugee law to deny states the right to circumscribe the beneficiary class on any basis other than by reference to principles of non-discrimination law, including both forms of fundamental identity and engagement in activities at the core of such protected identities, is a critical bulwark against self-interested retrogression.

We will, however, occasionally have to acknowledge that some persons whose aspirations for freedom pull at our heartstrings may not be able to meet even these progressively interpreted tests. Law is imperfect, and international law—subject to the need to secure the consent of an extraordinarily diverse community of states—is perhaps more imperfect than most law. It is nonetheless clear that the context-sensitive application of norms already agreed by states can yield powerful results, including the liberation of sexual minorities from ongoing self-repression.