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Melissa Bordeaux

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# LIVING A LIE: WHY “DON’T ASK DON’T TELL” PRESENTS AN UNWORKABLE VIEW OF PERSONHOOD

MELISSA BORDEAUX\*

**Abstract:** A fundamental conflict exists between the understanding of personhood in asylum law and its conception in military law. Asylum law in the United States and the United Kingdom recognizes homosexuality as a fundamental characteristic of personhood, which cannot be concealed. Conversely, “Don’t Ask Don’t Tell,” the statutory ban on gays serving openly in the U.S. Military, demands complete suppression of any indication of homosexuality. This Comment argues that, in light of the framework for examining personhood most recently articulated by the U.K. Supreme Court, the arguments in favor of “Don’t Ask Don’t Tell” are both specious and destructive. This Comment proceeds first by examining the understanding of personhood in asylum law. It then contrasts this understanding with the demands and restrictions that “Don’t Ask Don’t Tell” imposes on homosexual military personnel. Finally, this Comment concludes by calling for a uniform application of the view of personhood found in asylum law.

## INTRODUCTION

As courts issue more and more decisions recognizing the rights of homosexuals, the statutory ban on gays in the military, commonly known as “Don’t Ask Don’t Tell,” stands as a reminder of an antiquated and unworkable view of personhood in U.S. law.<sup>1</sup> In *HJ v. Secretary of*

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\* Staff Writer, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (2010–2011).

<sup>1</sup> See *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 3015 (2010) (holding Hastings College of Law does not have to provide funding and official recognition to Christian group that violates its “all-comers” policy by refusing to allow homosexuals to join); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 923, 929 (C.D. Cal. 2010) (holding that “the Don’t Ask Don’t Tell Act infringes the fundamental rights of United States servicemembers” and “violates the Fifth and First Amendments” of the Constitution); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927, 991 (N.D. Cal. 2010) (holding Proposition 8, a voter-enacted amendment to the California Constitution which prohibits same-sex couples from marrying, “unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on basis of sexual orientation”); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396 (D. Mass. 2010) (holding federal Defense of Marriage Act serves no “identifiable

*State for the Home Department*, the U.K. Supreme Court issued an eloquent statement on sexuality and personhood, which unanimously rejected the notion that homosexuals can be forced to hide their sexuality.<sup>2</sup> U.S. asylum law similarly recognizes that homosexuals cannot be required to hide their sexuality in order to avoid persecution.<sup>3</sup> This understanding of personhood, found in both U.S. and U.K. asylum law, illuminates the absurdity of a policy codified in U.S. law prohibiting homosexuals from serving openly in the military.<sup>4</sup>

This Comment argues that the understanding of personhood most recently elucidated by the U.K. Supreme Court and already embraced by U.S. asylum law should be incorporated into U.S. military policy.<sup>5</sup> By recognizing the right to live freely and openly without fear of harm, the United States will eliminate the glaringly inconsistent and harmful

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legitimate purpose or discrete objective,” but rather exists solely “to disadvantage a group of which [Congress] disapproves”); *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding provision under federal Defense of Marriage Act defining marriage as union of one man and one woman to be an unconstitutional infringement on the authority of the state “to recognize same-sex marriages among its residents” and to afford them the “benefits, rights, and privileges” that accompany their marital status); *Fla. Dep’t of Children and Families v. Adoption of X.X.G. and N.R.G.*, 45 So. 3d 79, 92 (Fla. Dist. Ct. App. 2010) (holding that Florida law prohibiting adoption by gay men and lesbians is unconstitutional).

<sup>2</sup> See *HJ v. Sec’y of State for the Home Dep’t*, [2010] UKSC 31, [11], [113]–[118] (appeal taken from Eng.) (discussing homosexuality as an immutable characteristic that cannot be concealed).

<sup>3</sup> See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990) (holding that a homosexual Cuban man was entitled to a stay of deportation because he faced persecution resulting from his membership in a particular social group as a homosexual). In 1994, Attorney General Janet Reno issued an executive order declaring as precedent the holding in *Toboso-Alfonso* that homosexuals constitute a particular social group so as to receive protection under the Refugee Convention. See Immigration Equal. & Midwest Immigrant and Human Rights Ctr., *Winning Asylum, Withholding and CAT Cases Based on Sexual Orientation, Transgender Identity and/or HIV-Positive Status*, IMMIGR. EQUALITY, [http://immigrationequality.org/manual\\_template.php?id=1064#D\\_1](http://immigrationequality.org/manual_template.php?id=1064#D_1) (last visited Feb. 15, 2011).

<sup>4</sup> Compare 10 U.S.C. § 654 (2006) (codifying U.S. military policy that homosexual service members must conceal their sexuality or be discharged from the military, commonly referred to as “Don’t Ask Don’t Tell”), with *Karouni v. Gonzales*, 399 F.3d 1163, 1171–73 (9th Cir. 2005) (noting that sexuality is a fundamental characteristic that homosexuals cannot be required to hide); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093–94 (9th Cir. 2000) (discussing homosexuality as an immutable characteristic that cannot be changed), and *HJ*, [2010] UKSC at [11], [35], [115] (declaring that homosexual asylum seekers cannot be expected to conceal their sexuality because it is a fundamental aspect of identity).

<sup>5</sup> See *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23; *HJ*, [2010] UKSC at [82]–[83].

treatment of homosexuals embodied in “Don’t Ask Don’t Tell.”<sup>6</sup> Part I examines the understanding of personhood set out by the U.K. Supreme Court in *HJ*. Part II discusses the treatment of homosexuals in U.S. asylum law, showing that the view of personhood recently adopted by the U.K. Supreme Court has existed as U.S. legal precedent since 1994. Part III provides an overview of “Don’t Ask Don’t Tell,” the statutory ban on homosexuals in the military, in terms of the restrictions and demands it places on homosexual service members. Finally, Part IV concludes by advocating for the United States to apply in the military context the view of personhood outlined by the U.K. Supreme Court in *HJ* and found in U.S. asylum law. Adopting a uniform understanding of personhood would require repeal of “Don’t Ask Don’t Tell” because homosexual service members could no longer be required to hide a fundamental aspect of their identity.

#### I. THE VIEW OF PERSONHOOD ADOPTED BY THE SUPREME COURT OF THE UNITED KINGDOM

The U.K. Secretary of State for the Home Department (“Home Secretary”) denied asylum to HJ and HT, homosexual men from Iran and Cameroon, respectively.<sup>7</sup> In both Iran and Cameroon, homosexuality is a criminal offense punishable by imprisonment.<sup>8</sup> In Iran, it is a crime punishable by death for consenting adults to engage in homosex-

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<sup>6</sup> See 10 U.S.C. § 654; *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23; *HJ*, [2010] UKSC at [11], [76]–[78], [92].

<sup>7</sup> See *HJ v. Sec’y of State for the Home Dep’t*, [2010] UKSC 31, [4]–[5] (appeal taken from Eng.). The U.K. Border Agency defines asylum as follows:

Asylum is protection given by a country to someone who is fleeing persecution in their own country. It is given under the 1951 United Nations Convention Relating to the Status of Refugees. To be recognized as a refugee, you must have left your country and be unable to go back because you have a well-founded fear of persecution.

*Asylum*, U.K. BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/asylum> (last visited Feb. 15, 2011).

<sup>8</sup> See Bureau of Democracy, Human Rights, & Labor, *2009 Human Rights Report: Cameroon*, U.S. DEPARTMENT OF STATE (March 11, 2010), <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135942.htm> (“Homosexual activity is illegal and punishable by a prison sentence of six months to five years and a fine ranging from 20,000 to 200,000 CFA (\$40 to \$400).”); Bureau of Democracy, Human Rights, and Labor, *2009 Human Rights Report: Iran*, U.S. DEPARTMENT OF STATE (March 11, 2010), <http://www.state.gov/g/drl/rls/hrrpt/2009/nea/136068.htm> [hereinafter *Human Rights Report: Iran*] (“[Iranian] law prohibits and punishes homosexual conduct . . .”).

ual acts.<sup>9</sup> After being denied asylum, despite the legally enforced persecution in their home countries, HJ and HT appealed the Home Secretary's decision to the Asylum and Immigration Tribunal (AIT), and both appeals were dismissed.<sup>10</sup> The appellants appealed the AIT decisions to the U.K. Court of Appeal, and their appeals were again dismissed.<sup>11</sup> In HJ's case, the Court of Appeal held that he "could reasonably be expected to tolerate" living discreetly upon return to his home country.<sup>12</sup> The Court of Appeal also held that HT would hide his sexuality on return to Cameroon and therefore did not face a real risk of persecution in the future.<sup>13</sup>

In a unanimous decision, however, five justices of the U.K. Supreme Court repudiated the Court of Appeal's analysis, holding that the "reasonable tolerability" test is incompatible with the Convention Relating to the Status of Refugees ("Refugee Convention").<sup>14</sup> The court

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<sup>9</sup> See *Human Rights Report: Iran*, *supra* note 8 (noting that sodomy is a capital crime and describing instances in which minors were executed for engaging in sodomy despite a judicial directive banning capital punishment for minors).

<sup>10</sup> *HJ*, [2010] UKSC at [5].

<sup>11</sup> *Id.* at [6].

<sup>12</sup> See *HJ v. Sec'y of State for the Home Dep't*, [2009] EWCA (Civ) 172, [31] (Eng.), *rev'd*, [2010] UKSC 31.

<sup>13</sup> See *id.* at [44]–[45]. In reaching its decision, the Court of Appeal used the "reasonable tolerability" test to determine that the United Kingdom could deny asylum to homosexuals as long as it would be reasonably tolerable for them to avoid persecution by hiding their sexuality. See *id.* at [31], [44]–[45]. The United Kingdom Court of Appeal took the "reasonable tolerability" test from an Australian case in which the High Court of Australia stated that harm "will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it." *Id.* at [8]. In adopting the reasonable tolerability test, however, the Court of Appeal disregarded the High Court of Australia's point 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." *HJ*, [2010] UKSC at [26].

<sup>14</sup> See *HJ*, [2010] UKSC at [82]; Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 137. The Refugee Convention was adopted on July 28, 1951. *Id.*; U.N. HIGH COMM'R FOR REFUGEES, THE 1951 REFUGEE CONVENTION: QUESTIONS & ANSWERS 4 (2007), available at <http://www.unhcr.org/3c0f495f4.html>. The Convention, which was initially designed to address the European refugee problem caused by World War II, had restrictions limiting its applicability to Europeans involved in events that occurred before January 1, 1951. See U.N. HIGH COMM'R FOR REFUGEES, *supra*, at 5, 9. The 1967 Protocol Relating to the Status of Refugees removed these geographical and time limitations and expanded the scope of the Refugee Convention to address refugee problems worldwide. See *id.* at 5, 7; see also Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 606 U.N.T.S. 267 (removing language alluding to the events that occurred during and leading up to World War II in Europe). The Refugee Convention clearly spells out who is a refugee and the kinds of legal protection, social rights, and other assistance refugees should receive from state parties. U.N. HIGH COMM'R FOR REFUGEES, *supra*, at 4. The Refugee Convention defines a refugee as a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion,

therefore allowed the appeals, remitted both cases to the AIT, and, having precluded the use of the reasonable tolerability test, provided guidance as to the proper analysis for such asylum applications.<sup>15</sup>

In his opinion, Lord Hope of Craighead articulated a standard by which asylum should be granted when an applicant will be forced to conceal aspects of his or her sexual orientation upon return to his or her home country because the applicant genuinely fears that he or she will otherwise be persecuted, provided this fear is well-founded.<sup>16</sup> For Lord Hope, requiring homosexuals to conceal their sexuality is “incompatible with the principles of the [Refugee] Convention.”<sup>17</sup> Moreover, because homosexuality is a fundamental aspect of identity, homosexuals “cannot and must not be expected to conceal aspects of . . . [their] sexual orientation.”<sup>18</sup>

In place of the reasonable tolerability test, Lord Rodger of Earlsferry outlined a similar test for determining eligibility for asylum based on sexual orientation.<sup>19</sup> He concluded that this test is in conformity with the purpose of the Refugee Convention, which is to provide protection in the receiving state not available in the home state because of a well-founded fear of persecution.<sup>20</sup> Lord Rodger took exception to the Court of Appeal’s contention that certain asylum applications “can be rejected on the basis that the particular applicant could find it reasonably tolerable to act discreetly and conceal his sexual identity in-

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nality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . .” Convention Relating to the Status of Refugees, *supra*, art. 1.

<sup>15</sup> See *HJ*, [2010] UKSC at [35]–[39].

<sup>16</sup> *Id.* at [35].

<sup>17</sup> See *id.* at [21].

<sup>18</sup> *Id.* at [35].

<sup>19</sup> *Id.* at [82]–[83]. Lord Rodger instructed the AIT that, when considering sexual orientation-based asylum claims, it must first determine whether the applicant is gay or perceived to be gay. *Id.* at [82]. The AIT must then examine the way homosexuals are treated in the applicant’s country of origin. *Id.* If homosexuals who live openly are persecuted in the country of origin and the applicant would live openly, then he or she has a well-founded fear of persecution and is entitled to asylum. *Id.* Under this approach, the fact that the applicant could avoid persecution by living discreetly would not preclude him or her from receiving asylum. See *id.* If the applicant would live discreetly because he or she fears persecution, not simply to avoid social stigma, he or she is entitled to asylum. *Id.*

<sup>20</sup> *HJ*, [2010] UKSC at [82]. The purpose of the Refugee Convention is to ensure that “human beings . . . enjoy fundamental rights and freedoms without discrimination and that refugees should enjoy the widest possible exercise of these rights . . .” *Id.* at [113] (quoting *K v. Sec’y of State for the Home Dep’t*, [2006] UKHL 46, [10] (appeal taken from Eng.)). “The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man *in order to avoid persecution* on return to his home country.” *Id.* at [110].

definitely to avoid suffering severe harm.”<sup>21</sup> He argued that sexual orientation is an “innate *or* unchangeable characteristic” that is “so fundamental to identity and human dignity that it ought not be required to be changed.”<sup>22</sup> With this understanding, he stated that forcing a homosexual person to hide his or her sexuality is as unreasonable as requiring a person to conceal his or her race.<sup>23</sup>

Lord Rodger also discussed in detail the toll that concealment takes on a homosexual applicant:

At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous . . . . [T]he small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.<sup>24</sup>

In this way, Lord Rodger expanded the notion of sexual identity to include aspects of human relationships other than those that arise from physical conduct.<sup>25</sup> He concluded that the Refugee Convention protects a homosexual applicant’s right to live as freely, openly, and without fear of persecution as a heterosexual person in all aspects of life.<sup>26</sup>

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<sup>21</sup> *Id.* at [75].

<sup>22</sup> *Id.* at [76] (internal quotation marks omitted).

<sup>23</sup> *See id.*

<sup>24</sup> *Id.* at [77].

<sup>25</sup> *HJ*, [2010] UKSC at [78].

<sup>26</sup> *See id.* (“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.”).

## II. ASYLUM CLAIMS BASED ON SEXUAL ORIENTATION IN THE UNITED STATES

The understanding that individuals cannot be expected to conceal their sexual orientation because it is a fundamental aspect of identity has been accepted in U.S. asylum law since the early 1990s.<sup>27</sup> An alien who is present in the United States, or at a land border or port of entry, may apply for and be granted asylum if the Attorney General determines that he or she meets the legal definition of refugee.<sup>28</sup> A refugee is a person who has been persecuted, or who has a well-founded fear of persecution, for reasons of “race, religion, nationality, membership in a particular social group, or political opinion.”<sup>29</sup> Therefore, a claim for asylum must be based on one of these five grounds.<sup>30</sup>

For applicants who cannot successfully make an asylum claim based on race, religion, nationality, or political opinion, the concept of “particular social group” provides a more flexible opportunity to argue in favor of an asylum petition.<sup>31</sup> Because it has no statutory definition, there is room for interpretation when asylum claims are made on this basis.<sup>32</sup> Proving persecution based on membership in a particular social group is therefore the most successful avenue for sexual orientation-based asylum claims.<sup>33</sup>

As discussed in the landmark case *In re Acosta*, the four other grounds for asylum can provide a framework for determining what it means to belong to a particular social group.<sup>34</sup> Race, religion, national-

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<sup>27</sup> See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990) (holding that homosexuals are a particular social group for purposes of the Refugee Convention); *In re Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985) (holding that the common characteristic uniting members of a particular social group must be one that the members either cannot change or should not be required to change because it is “so fundamental to individual identity or conscience”); Immigration Equal. & Midwest Immigrant and Human Rights Ctr., *supra* note 3 (“In 1994, Attorney General Janet Reno declared as precedent the *Matter of Toboso-Alfonso* case in which a gay Cuban man was found to be eligible for withholding of removal on the basis of his membership in the particular social group of homosexuals.”).

<sup>28</sup> 8 U.S.C. § 1158 (2006).

<sup>29</sup> Immigration and Nationality Act (INA), 8 U.S.C. § 1101; Convention Relating to the Status of Refugees, *supra* note 14, art. 1.

<sup>30</sup> 8 U.S.C. § 1101.

<sup>31</sup> See *id.*

<sup>32</sup> Immigration Equal. & Midwest Immigrant and Human Rights Ctr., *supra* note 3.

<sup>33</sup> See *id.*

<sup>34</sup> See *In re Acosta*, 19 I. & N. Dec. at 233 (holding that members of a particular social group are united by immutable characteristics). In *Acosta*, a Salvadoran taxi driver claimed persecution based on his status as a member of a taxi cooperative who refused to support the guerillas. *Id.* at 234. The court held the applicant had not demonstrated fear of persecution based on membership in a particular social group because the defining characteris-



ity, and political opinion all describe persecution based on an “immutable characteristic.”<sup>35</sup> An immutable characteristic is one that “either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”<sup>36</sup> Thus, a person who faces persecution as a result of membership in a particular social group can be understood to share a “common, immutable characteristic” with other members of that group.<sup>37</sup> The defining characteristic could be anything group members “either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>38</sup>

Until a 1990 revision to the Immigration and Nationality Act (INA), homosexuality was treated as grounds for inadmissibility to the United States.<sup>39</sup> In a pivotal case for homosexual asylum seekers, *In re Toboso-Alfonso*, the Board of Immigration Appeals (BIA) upheld an immigration judge’s finding that homosexuals constitute a particular social group so as to fall under the protection of the Refugee Convention.<sup>40</sup> This ruling paved the way for asylum claims based on sexual orientation.<sup>41</sup> In 1994, Attorney General Janet Reno declared that this finding would serve as precedent for asylum cases based on sexual orientation.<sup>42</sup>

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tics of his membership in the taxi cooperative—that he was a taxi driver and did not participate in work stoppages mandated by the guerillas—were characteristics that he could change and therefore were not immutable. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*; see *Karouni v. Gonzales*, 399 F.3d 1163, 1171 (9th Cir. 2005); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

<sup>37</sup> See *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d at 1093–94; *Acosta*, 19 I. & N. Dec. at 233–34; see also Fadi Hanna, Case Comment, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913, 916–20 (2005) (arguing that requiring homosexual asylum-seekers to appear and act gay according to traditional stereotypes would be inconsistent with the conception of homosexuality as an immutable characteristic in asylum law).

<sup>38</sup> *Acosta*, 19 I. & N. Dec. at 233.

<sup>39</sup> See Brian J. McGoldrick, *United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?*, 8 GEO. IMMIGR. L.J. 201, 204–05 (1994). The 1952 version of the INA excluded “individuals with psychopathic personalities, sexual deviations, or mental defect.” *Id.* at 204. Although homosexuality was not explicitly listed as grounds for exclusion, the U.S. Supreme Court concluded that Congress intended to exclude homosexuals from the 1952 INA. *Id.* at 204–05. The legislative history of the 1990 amendment makes it clear “that members of Congress wished to remove homosexuality as a ground for exclusion . . .” *Id.* at 205.

<sup>40</sup> See *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990). Interestingly, although the Immigration and Naturalization Service challenged the immigration judge’s finding that homosexuals are a social group, it never challenged his finding that homosexuality is an immutable characteristic. *Id.* at 822.

<sup>41</sup> Immigration Equal. & Midwest Immigrant and Human Rights Ctr., *supra* note 3.

<sup>42</sup> *Id.*

In *Hernandez-Montiel v. INS*, the Ninth Circuit expanded the definition of what constitutes a social group to include gay men with female sexual identities.<sup>43</sup> Building on the language of personhood from *Acosta*, the court declared that sexual orientation and identity are characteristics “so fundamental to one’s identity that a person should not be required to abandon them.”<sup>44</sup> The court reasoned that homosexuality is a component of identity as innate as heterosexuality.<sup>45</sup> Rather than expect a person to change his or her sexuality, the court stated, it should be recognized as a “basic component of a person’s core identity.”<sup>46</sup>

In a powerful affirmation of principles expressed in *Hernandez-Montiel*, the Ninth Circuit explicitly declared in *Karouni v. Gonzales* that “all alien homosexuals are members of a ‘particular social group.’”<sup>47</sup> In reaching this decision, the court adopted the definition of particular social group from *Hernandez-Montiel*, stating that members are “united by a voluntary association . . . or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.”<sup>48</sup> The court refuted the government’s assertion that petitioner, a homosexual man from Lebanon, could avoid persecution in his home country by abstaining from homosexual acts.<sup>49</sup>

Because sexual identity is “so fundamental to . . . human identities,” the *Karouni* court found that the INA cannot be read to require homosexuals to abstain from homosexual acts in the future.<sup>50</sup> Therefore, the court reasoned, the law cannot impose a requirement of sexual repression on homosexuals because to do so would force them to relinquish the close personal encounters that form “an integral part of human freedom.”<sup>51</sup> In this way, the court entrenched in U.S. asylum law

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<sup>43</sup> See *Hernandez-Montiel v. INS*, 225 F.3d at 1094. In *Hernandez-Montiel*, the court held that a homosexual man with a female sexual identity, who was harassed and raped by the Mexican police, was entitled to asylum. *Id.* at 1099. Noting that sexual identity is a fundamental characteristic, the court rejected the BIA’s conclusion that the petitioner could avoid persecution simply by dressing like a man and not like a woman. *Id.* at 1096. Rather, the court declared that the petitioner “should not be required to change his sexual orientation or identity.” *Id.* at 1095. Therefore, because he was “a member of the particular social group of gay men in Mexico with female sexual identities,” he was entitled to asylum *Id.* at 1095, 1099.

<sup>44</sup> *Id.* at 1093.

<sup>45</sup> See *id.*

<sup>46</sup> *Id.* at 1093–94.

<sup>47</sup> See *Karouni*, 399 F.3d at 1172.

<sup>48</sup> See *id.* at 1171.

<sup>49</sup> *Id.* at 1173.

<sup>50</sup> See *id.*

<sup>51</sup> *Id.*

the principle that homosexuals cannot be required to hide their sexuality in order to avoid persecution.<sup>52</sup>

### III. “DON’T ASK DON’T TELL” PLACES IMPOSSIBLE RESTRICTIONS ON HOMOSEXUAL SERVICE MEMBERS

In the same year that the United States gave legal recognition to homosexuals seeking asylum, hundreds of homosexuals serving in the U.S. military were discharged pursuant to “Don’t Ask Don’t Tell.”<sup>53</sup> Codified into law in 1993, “Don’t Ask Don’t Tell” allows homosexuals to serve in the military as long as they do not disclose their sexual orientation and do not engage in homosexual conduct.<sup>54</sup> In so doing, however, the law imposes unreasonable restrictions on homosexual servicemen and servicewomen.<sup>55</sup> Under “Don’t Ask Don’t Tell,” members of the military can be discharged from service if they engage or attempt to engage in a homosexual act, state that they are homosexual, or if they have married or have attempted to marry a person of the same biological sex.<sup>56</sup> In addition to sexual intercourse, the statute prohibits bodily contact like hand-holding and kissing.<sup>57</sup>

Both the financial and human costs of “Don’t Ask Don’t Tell” have been astronomical.<sup>58</sup> From 1993 through 2009, more than thirteen

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<sup>52</sup> See *Karouni*, 399 F.3d at 1173; *Hernandez-Montiel*, 225 F.3d at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23.

<sup>53</sup> See Immigration Equal. & Midwest Immigrant and Human Rights Ctr., *supra* note 3; Sharon E. Debbage Alexander et al., *Conduct Unbecoming: The Tenth Annual Report on “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,”* SERVICEMEMBERS LEGAL DEF. NETWORK, 1 (Mar. 24, 2004), [http://sldn.3cdn.net/77d5825b8e0f3454f2\\_1cm6bgace.pdf](http://sldn.3cdn.net/77d5825b8e0f3454f2_1cm6bgace.pdf). In 1994, 617 service members were discharged under “Don’t Ask Don’t Tell.” *Id.*

<sup>54</sup> 10 U.S.C. § 654(b) (2006); see also Allyson Collins et al., *Uniform Discrimination: The “Don’t Ask, Don’t Tell” Policy of the U.S. Military*, HUM. RTS. WATCH, 2 (Jan. 2003), <http://www.hrw.org/sites/default/files/reports/USA0103.pdf> (discussing the requirement that homosexuals entirely conceal their sexuality in order to be eligible for armed service). Prior to the enactment of “Don’t Ask Don’t Tell,” homosexuals were entirely prohibited from serving in the military. See Alexander et al., *supra* note 53, at 14. When President Clinton was elected, there was hope that he would completely eliminate the ban on homosexuals in the military. See *id.* at 15. However, vehement opposition by the Joint Chiefs of Staff and the conservatives in Congress led him to adopt “Don’t Ask Don’t Tell” instead. See *id.*

<sup>55</sup> See 10 U.S.C. § 654(b), (f); Collins et al., *supra* note 54, at 2–3.

<sup>56</sup> 10 U.S.C. § 654(b).

<sup>57</sup> *Id.*; Collins et al., *supra* note 54, at 13. The statute defines “homosexual acts” as “any bodily contact, actively undertaken or passively permitted, between members of the same sex for purposes of satisfying sexual desires” and “any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in” such homosexual acts. 10 U.S.C. § 654(f) (3).

<sup>58</sup> See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 914–17 (C.D. Cal. 2010) (discussing discharge of troops, particularly those with highly specialized training, and

thousand military personnel were discharged under the policy.<sup>59</sup> Many service members discharged under “Don’t Ask Don’t Tell” have been those with critical skills like language fluency, military intelligence, counterterrorism, weapons development, and medicine.<sup>60</sup> The cost of replacing all of the troops dismissed under “Don’t Ask Don’t Tell” is estimated to be in the hundreds of millions of dollars.<sup>61</sup>

In addition to the financial costs, “Don’t Ask Don’t Tell” has taken an incalculable toll on the health and safety of homosexual service members.<sup>62</sup> They are denied many fundamental rights, including the right to be physically intimate with their partners while serving in the military.<sup>63</sup> They do not have the right to talk about their families with their fellow service members.<sup>64</sup> They must keep any communication with their partners secret because they can be discharged if the gender of their partner is revealed.<sup>65</sup> The pain of being separated from their loved ones for months or years at a time is exacerbated by the inability to express intimate feelings over the telephone.<sup>66</sup> Finally, the partners of homosexual service members may not even be notified if their loved one is injured or killed in battle.<sup>67</sup>

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the high costs of recruiting to replace those discharged under “Don’t Ask Don’t Tell”); Collins et al., *supra* note 54, at 3 (discussing the widespread anti-gay harassment and the absence of support services for homosexual service members).

<sup>59</sup> *Log Cabin Republicans*, 716 F. Supp. 2d at 915.

<sup>60</sup> *Id.* at 916.

<sup>61</sup> *Id.* at 917; Collins et al., *supra* note 54, at 4.

<sup>62</sup> See Alexander et al., *supra* note 53, at 17–18 (describing the “substantial backlash against service members perceived to be gay or even gay friendly” after the passage of “Don’t Ask Don’t Tell”); Collins et al., *supra* note 54, at 23–26 (detailing the harassment and violent assaults suffered by homosexual service members). For example, in 1999 Army Private First Class Barry Winchell was beaten to death with a baseball bat by his fellow soldiers because they suspected he was gay. See Alexander et al., *supra* note 53, at 20. Winchell’s murder was the culmination of months of daily harassment that had gone unchecked by his superiors. *Id.* at 20–21. In an investigation following the murder, the Department of Defense learned that as of March 2000, eighty percent of service members reported having heard derogatory anti-gay remarks in the previous year. *Id.* at 22.

<sup>63</sup> *Log Cabin Republicans*, 716 F. Supp. 2d at 923.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; Alexander et al., *supra* note 53, at 12 (“Unlike their peers, lesbian, gay and bisexual service members have no teary goodbyes at dock-side. Communication is cryptic, to obscure the gender of their loved ones left behind.”). Homosexual service members can be discharged even for “writing a personal letter, in a foreign language, to a person of the same sex with whom they shared an intimate relationship before entering military service . . . .” *Log Cabin Republicans*, 716 F. Supp. 2d at 923.

<sup>66</sup> Alexander et al., *supra* note 53, at 12.

<sup>67</sup> *Id.*

Additionally, forced suppression of sexuality has done great harm to the mental health of homosexual service members.<sup>68</sup> Fear of inadvertently disclosing their sexual orientation makes it impossible for them to rely on their partners for love and support during difficult times.<sup>69</sup> Compounding this burden are problems with access to institutional support services.<sup>70</sup> Homosexuals are frequently deprived of medical care, psychological assistance, and religious consultations because psychiatrists and chaplains have been known to report homosexual service members who have confided in them.<sup>71</sup>

#### IV. LEGAL CONSISTENCY, HUMAN DECENCY

“Don’t Ask Don’t Tell” imposes the same repression on homosexual service members that courts refuse to impose on homosexual asylum seekers.<sup>72</sup> U.S. law recognizes the fundamental rights of homosexual people seeking asylum but it simultaneously and systematically denies its own military personnel these very same rights.<sup>73</sup> This pernicious

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<sup>68</sup> *Position Statement on Gays, Lesbians, and Bisexuals in the Military*, AM. PSYCHOANALYTIC ASS’N (Jan. 2009), [http://www.apsa.org/About\\_APSaA/Position\\_Statements/Gays\\_Lesbians\\_and\\_Bisexuals\\_in\\_the\\_Military.aspx](http://www.apsa.org/About_APSaA/Position_Statements/Gays_Lesbians_and_Bisexuals_in_the_Military.aspx) [hereinafter *Position Statement*] (calling for the repeal of “Don’t Ask Don’t Tell,” in part because “[y]ears of psychological research and experience have shown the extensive mental toll of keeping one’s sexual orientation hidden”).

<sup>69</sup> *See id.*

<sup>70</sup> *See* Collins et al., *supra* note 54, at 19; Nathaniel Frank, *Don’t Ask, Don’t Tell: Detailing the Damage*, PALM CENTER, 8 (Aug. 2010), <http://www.palmcenter.org/files/DetailingCostofDADT.pdf>.

<sup>71</sup> Collins et al., *supra* note 54, at 19; Frank, *supra* note 70, at 8. Both the American Psychological Association (APA) and the American Psychoanalytic Association (APsaA) continue to call for the repeal of “Don’t Ask Don’t Tell.” *Sexual Orientation and Military Service Briefing Sheet*, AM. PSYCHOLOGICAL ASS’N, <http://www.apa.org/pi/lgbt/resources/military-sexual-orientation.aspx> (last visited Feb. 15, 2011); *Position Statement*, *supra* note 68. Noting that the military is a “highly stressful environment,” the APA has decried “Don’t Ask Don’t Tell” for precluding “effective mental health access for gay, lesbian and bisexual military personnel . . . .” *Sexual Orientation and Military Service Briefing Sheet*, *supra*. For homosexuals, living in an environment of “forced secrecy” with the constant “fear of being exposed” is “likely to disproportionately increase anxiety and disrupt optimal performance.” *Id.* However, because homosexuals are prohibited from revealing their sexual orientation, it is unlikely that those suffering from mental health issues will access the necessary support services. *Id.*

<sup>72</sup> *See* Karouni v. Gonzales, 399 F.3d 1163, 1171–73 (9th Cir. 2005); Hernandez-Montiel v. INS, 225 F.3d 1084, 1093–94 (9th Cir. 2000); *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822–23 (B.I.A. 1990); HJ v. Sec’y of State for the Home Dep’t, [2010] UKSC 31, [11], [35], [82]–[83], [113–18] (appeal taken from Eng.).

<sup>73</sup> *See* 10 U.S.C. § 654 (2006); *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23.

cious and unjustifiable inconsistency in the law must be corrected.<sup>74</sup> Rather than continuing to adhere to principles deemed unacceptable in other areas of the law, the United States should adopt the view of personhood found in asylum law; specifically that sexuality is an immutable characteristic that homosexuals cannot be required to hide.<sup>75</sup>

From a policy perspective, forcing homosexual service members to repress their sexuality is not a viable option.<sup>76</sup> “Don’t Ask Don’t Tell” puts homosexual service members in an impossible bind—they must either conceal a fundamental aspect of their identity or face military discharge.<sup>77</sup> According to Jonathan Hopkins, an Army Captain discharged under “Don’t Ask Don’t Tell,” homosexual service members live in constant paranoia, always worrying that their fellow soldiers will question their sexuality.<sup>78</sup> Hopkins notes that those who manage to live in compliance with “Don’t Ask Don’t Tell” “dedicate [themselves] to the most epic and despicably unnecessary sense of loneliness one can imagine, while working in a profession in which [they] desperately need the nurturing support of others.”<sup>79</sup> Indeed, Hopkins states that those who conceal their sexuality are “destroyed bit by bit on the inside each step of the way.”<sup>80</sup> Speaking from personal experience, Hopkins describes the atmosphere for homosexuals serving under “Don’t Ask Don’t Tell” as one of constant stigma and shame.<sup>81</sup>

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<sup>74</sup> See *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d. at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23; *In re Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985); *HJ*, [2010] UKSC at [35]–[39], [82]–[83].

<sup>75</sup> See *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d. at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23; *Acosta*, 19 I. & N. Dec. at 233–34; *HJ*, [2010] UKSC at [11], [35]–[39], [82]–[83], [113]–[118].

<sup>76</sup> See *Position Statement*, *supra* note 68; *Sexual Orientation and Military Service Briefing Sheet*, *supra* note 71.

<sup>77</sup> See *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d. at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23; *Acosta*, 19 I. & N. Dec. at 233–34; *HJ*, [2010] UKSC at [11], [21]; Alexander et al., *supra* note 53, at 12–16; Collins et al., *supra* note 54, at 2. Indeed, the psychological impact of repressing such a fundamental aspect of personhood is no less acute when it arises in a military setting. See *Position Statement*, *supra* note 68; *Sexual Orientation and Military Service Briefing Sheet*, *supra* note 71.

<sup>78</sup> Jonathan Hopkins, *Don't Ask Don't Tell, Don't Be All You Can Be*, N.Y. TIMES AT WAR BLOG (Sept. 13, 2010, 12:00 AM), <http://atwar.blogs.nytimes.com/2010/09/13/dont-ask-dont-tell-dont-be-all-you-can-be>. Hopkins is a decorated former U.S. Army Captain who graduated fourth in his class at West Point. *Id.* He served in the military for nine years and was deployed to Iraq and Afghanistan. *Id.* In August 2010, he was discharged under “Don’t Ask Don’t Tell.” *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

From a legal perspective, “Don’t Ask Don’t Tell” is problematic because it embodies principles consistently repudiated by courts in both the United States and the United Kingdom.<sup>82</sup> The law demands self-denial far beyond the already substantial sacrifices expected of service members and their families.<sup>83</sup> This self-denial is precisely what courts in the United States and the United Kingdom have refused to require of homosexuals seeking asylum.<sup>84</sup> Homosexuality, like any other immutable characteristic, is not something that people can be expected to suppress.<sup>85</sup> Yet, the United States continues to enforce a law that hinges on the erroneous notion that homosexual military personnel can and must hide their sexuality.<sup>86</sup> Thus, the reality recognized in asylum law—that sexuality is an immutable characteristic that cannot be concealed—should be applied to U.S. Military law, thereby eradicating “Don’t Ask Don’t Tell” and putting an end to a law that places impossible demands on homosexuals serving in the military.<sup>87</sup>

#### CONCLUSION

The understanding of personhood found in asylum law stands in stark contrast to the view of personhood at the foundation of “Don’t Ask Don’t Tell.” A recent ruling by the U.K. Supreme Court illuminates the unworkable principle at the heart of “Don’t Ask Don’t Tell,” specifically, that homosexuals can and must conceal their sexuality in order to continue serving in the military. In a unanimous decision, the U.K. Supreme Court set forth a view of personhood that encompasses sexuality. Viewing homosexuality as an immutable principle, the court rejected a policy which required homosexual asylum seekers to return to their home countries and conceal their sexuality to avoid persecution. Though this view of personhood has been entrenched in U.S. asylum law since 1994, the United Kingdom’s powerful affirmation of

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<sup>82</sup> See *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23; *Acosta*, 19 I. & N. Dec. at 233–34; *HJ*, [2010] UKSC at [131].

<sup>83</sup> See *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 923 (C.D. Cal. 2010); Frank, *supra* note 70, at 7; *Position Statement*, *supra* note 68; *Sexual Orientation and Military Service Briefing Sheet*, *supra* note 71.

<sup>84</sup> See *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23; *Acosta*, 19 I. & N. Dec. at 233–34; *HJ*, [2010] UKSC at [131].

<sup>85</sup> See *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d at 1093–94 *HJ*, [2010] UKSC at [77].

<sup>86</sup> See 10 U.S.C. § 654 (2006); Collins et al., *supra* note 54, at 2.

<sup>87</sup> See *Karouni*, 399 F.3d at 1171–73; *Hernandez-Montiel*, 225 F.3d at 1093–94; *Toboso-Alfonso*, 20 I. & N. Dec. at 822–23; *HJ*, [2010] UKSC at [11], [35]–[39], [82]–[83]; Collins et al., *supra* note 54, at 2.

homosexuality as a fundamental aspect of identity that cannot be suppressed accentuates the unworkable view of personhood found in “Don’t Ask Don’t Tell.” The United States should continue the trend of affording legal recognition to homosexuals by adopting the understanding of personhood found in asylum law, repealing “Don’t Ask Don’t Tell,” and ceasing to place unreasonable demands on its homosexual service members.



