

# THE RIGHT OF LESBIANS AND GAY MEN TO LIVE FREELY, OPENLY, AND ON EQUAL TERMS IS NOT BAD LAW: A REPLY TO HATHAWAY AND POBJOY

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## I. INTRODUCTION

It is only in recent history that those persecuted on the basis of sexual orientation and gender identity have been viewed by the majority of refugee-receiving nations as eligible to claim protection under the Refugee Convention. Over the past twenty-five years, lesbian, gay, bisexual, and transgender claimants, as well as their advisors, non-government organizations and scholars working on their behalf, have struggled to establish sexual orientation as an accepted particular social group (PSG),<sup>1</sup> and to develop nuanced and appropriate perse-

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1. This is now widely accepted. U.N. High Comm'r for Refugees, Guidelines on Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, ¶ 30, U.N. Doc HCR/GIP/02/01 (2002) [hereinafter UNHCR Gender Guidelines]; 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, art. 10(1)(d), 2004 O.J. (L 304) 12, 17 (EU) [hereinafter EU Qualification Directive], available at <http://www.unhcr.org/refworld/docid/4157e75e4.html> (“[d]epending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation.”). As of June 2011, thirty-three member

cution analysis addressing sexuality and gender identity claims. This has been a significant challenge. Barriers have included: failure to recognize that criminalization of gay sex is persecutory<sup>2</sup> (as well as the related but distinct concern that criminal sanctions may generate a persecutory environment, even in the absence of evidence of recent or systematic enforcement);<sup>3</sup> reluctance to accept that non-state actors are often the primary agents of harm;<sup>4</sup> lack of appropriately targeted and analyzed country of origin information;<sup>5</sup> on-going issues with

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states within the Council of Europe explicitly recognized sexual orientation as a PSG in either their national legislation or case law. COUNCIL OF EUR. COMM'R FOR HUMAN RIGHTS, DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 65 (2011).

2. U.N. High Comm'r for Refugees, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, ¶¶ 17–19 (Nov. 21, 2008) [hereinafter UNHCR Guidance Note], available at <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>. A further difficulty is that decision makers may then assume that the repeal of criminal sanctions means there is no further risk of persecution. 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). This approach was recently critiqued in *Rojo v. Holder*, 430 F. App'x 73, 75–76 (9th Cir, 2011).

3. This remains a major issue of contention. See, e.g., SABINE JANSEN & THOMAS SPIJKERBOER, FLEEING HOMOPHOBIA: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 21–26 (2011) [hereinafter FLEEING HOMOPHOBIA REPORT], available at [http://www.rechten.vu.nl/nl/Images/Fleeing%20Homophobia%20report%20EN\\_tcm22-232205.pdf](http://www.rechten.vu.nl/nl/Images/Fleeing%20Homophobia%20report%20EN_tcm22-232205.pdf) (summarizing the different evidentiary treatments of enforcement of criminal sanction in refugee cases in various European nations); UNHCR Guidance Note, *supra* note 2, ¶¶ 20–22 (arguing that an applicant should be able to submit criminal sanctions as evidence, even when they are not enforced, because such laws can be used by officials for extortion or unofficial persecution); *OO (Sudan) v. Sec'y of State for the Home Dep't*, [2009] EWCA (Civ) 1432, [22]–[48] (appeal taken from Asylum & Immigr. Trib.) (U.K.).

4. FLEEING HOMOPHOBIA REPORT, *supra* note 3, ch. 3; UNHCR Guidance Note, *supra* note 2, ¶ 27. The paradigm non-state actor persecutor still remains a gang of militia singling out strangers to attack or extort, rather than husbands and fathers trying to “correct” the behavior of a much loved but non-compliant family member. So, for example, forced marriage claims, including those by lesbians and gay men, have been largely marginalized in RSD to date, as discussed in Jenni Millbank & Catherine Dauvergne, *Forced Marriage and the Exoticisation of Gendered Harms in US Asylum Law*, 19 COLUM. J. GENDER & L. 898, 908, 935 (2011).

5. FLEEING HOMOPHOBIA REPORT, *supra* note 3, ch. 8; Nicole La Violette, INDEPENDENT HUMAN RIGHTS DOCUMENTATION AND SEXUAL MINORITIES: AN

the inappropriate assessment of credibility in the claimed sexual identity;<sup>6</sup> and the so-called “discretion” approach whereby persecution must be avoided rather than protected against.<sup>7</sup> Gains in dismantling these barriers have been hard won, with many validly based sexual orientation claims dismissed in the meantime.<sup>8</sup> In 2008, the United Nations High Commissioner for Refugees (UNHCR) issued a guidance note addressing the above concerns,<sup>9</sup> a recognition in itself that although the jurisprudence and practice of some receiving countries now deal appropriately and equitably with sexual orientation claims, many still do not.

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ONGOING CHALLENGE FOR THE CANADIAN REFUGEE DETERMINATION PROCESS, 13 INT’L J. HUM. RTS. 437, 462 (2009); Dauvergne & Millbank, *supra* note 2, at 340–42.

6. FLEEING HOMOPHOBIA REPORT, *supra* note 3, ch. 6; Laurie Berg & Jenni Millbank, *Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants*, 22 J. REFUGEE STUD. 195, 200, 204, 210, 217 (2009).

7. See 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, 98–100 (2003) (studying the application of the discretion test in Australian cases); Jenni Millbank, *A Preoccupation with Perversion: the British Response to Refugee Claims on the Basis of Sexual Orientation 1989–2003*, 14 SOC. & LEGAL STUD. 115 (2005) (reviewing application of the discretion test in the United Kingdom and arguing that “[d]ecision-makers have also manifestly failed to appreciate how repression and fear of persecution might contribute to such discretion”); 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) (indicating that despite the rejection of the discretion test by the High Court of Australia, lower level decisionmakers continue to “characterise gay men and lesbians as ‘naturally’ discreet”). In addition to my published work on this issue, I acted as adviser to Amnesty International Australia when it intervened as amicus curiae in *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473 (Austl.).

8. See, e.g., UK LESBIAN & GAY IMMIGRATION GRP., *FAILING THE GRADE: HOME OFFICE INITIAL DECISIONS ON LESBIAN AND GAY CLAIMS FOR ASYLUM* (2010) (comparing a 73% general refugee application initial rejection rate with a 98–99% initial refusal rate for gay and lesbian applications and arguing that decision makers incorrectly focus on homosexual actions rather than sexual identity, frequently applying the discretion test); STONEWALL, *NO GOING BACK: LESBIAN AND GAY PEOPLE AND THE ASYLUM SYSTEM* (2010) (arguing that United Kingdom Border Agency personnel are ill-trained in the relevant issues and finding that gay and lesbian applications are often refused because policy and case law are incorrectly applied).

9. UNHCR Guidance Note, *supra* note 2.

In this short note, I address Hathaway and Pobjoy's critique of the decisions of the High Court of Australia and Supreme Court of the United Kingdom, respectively, in *S395*<sup>10</sup> and *HJ and HT*.<sup>11</sup> These cases represent the two highest-level judicial determinations in the world to address gay refugee claims to date. While neither decision is beyond criticism,<sup>12</sup> the cases both separately and together advance the development of refugee jurisprudence on sexuality in major ways. These decisions emphatically reject discretion reasoning, affirm that the experience of sexual orientation extends beyond mere private sexual conduct, and articulate the importance of equality—both as between gay and straight people in the country of origin and between sexuality claims and other categories of claimants in the receiving country—in applying the protections of refugee law.

In Part III of their article in this special issue, Hathaway and Pobjoy claim that *S395* and *HJ and HT*, in articulating a right to live freely and openly, have taken an “all-embracing formulation” to “action-based risks” associated with sexual orientation.<sup>13</sup> The judgments, they say, “seem to assume that risk following from any ‘gay’ form of behavior gives rise to refugee status.”<sup>14</sup> The authors argue to the contrary that refugee law should “draw a line” to only protect actions deemed integral to

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10. *S395* 216 CLR at 473.

11. *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.).

12. See in particular, Janna Weßels’ concerns that the Supreme Court’s decision in *HJ and HT* reinscribes the untenable distinctions between “open” and “discreet” gay people and thereby continues a test constructed on concealment. Janna Weßels, *HJ (Iran) and Another: Reflections on a New Test for Sexuality Based Claims in Britain*, 24 INT’L J. REFUGEE L. (forthcoming 2012).

13. James Hathaway & Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT’L L. & POL. 315, 374 (2011). In Part I of their article, Hathaway and Pobjoy argue that the decisions were incorrect because an implausible risk cannot be (or should not have been found to be) real. *Id.* at 340–46. This argument is misplaced for the very reason that adjudicators using discretion reasoning have failed to undertake a forward-looking analysis of what risks are faced and whether they are real, instead relying on categorical assumptions that secrecy and safety are synonymous. In Part II of their article, Hathaway and Pobjoy draw on *S395* to make a case for the legal recognition of “endogenous harm,” the psychological harm of self-repression and fearful concealment, as a distinct aspect of persecution. *Id.* at 346–58. This is a novel and well-made argument that I do not have space to address here.

14. *Id.* at 374.

sexual orientation and not those that are deemed peripheral, trivial or stereotypical. The premise of Hathaway and Pobjoy's piece—that the two highest-level judgments to affirm equality for sexual orientation refugee claimants have gone too far—merits pause. I contend that Hathaway and Pobjoy's argument is both wrong in principle and dangerous in practice.

Below, I outline the “problem” of discretion and how *S395* and *HJ and HT* responded. Then, I argue in the two following sections that Hathaway and Pobjoy's claims rest upon a misleading and unsustainable act/identity distinction (comprising equally unsustainable binaries of integral/peripheral and necessary/voluntary acts). This premise informs their purported separation of protected from unprotected acts in their discussion of discrimination in analyzing nexus, and ultimately obscures the relationship between sexual orientation and gender identity to rights claims grounded in equal access to freedoms of expression, association, privacy *and* family life. Next, I demonstrate through analysis of previous jurisprudential developments in the United Kingdom that Hathaway and Pobjoy's proposed test of limiting protection only to activities “reasonably required” to express sexual orientation is highly susceptible to misapplication in practice. Finally, I suggest that Hathaway and Pobjoy's discussion of *HJ and HT* is clouded by an overreaction to a single line in Lord Rodger's judgment. I contend that the case can, and should, be read as a principled decision on equality of protection under the Refugee Convention.

## II. WHAT IS WRONG WITH A BIT OF DISCRETION

Reasoning premised on assumptions about the ease, naturalness, and legal correctness of concealing lesbian, gay, and bisexual identity is one of, if not the, most significant and resilient barriers to the fair adjudication of sexual orientation based refugee claims worldwide to date. While variously expressed,<sup>15</sup> “discretion reasoning” involves a “reasonable expect-

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15. In the United States, these issues are more often considered through the frame of “visibility.” In one sense, this concerns whether the applicant will be “visible” or identifiable to potential persecutors. See Jenni Millbank, *Gender, Sex and Visibility in Refugee Decisions on Sexual Orientation*, 18 GEO. IMMIGR. L.J. 71 (2003) (reviewing Australian and Canadian cases that addressed the role of applicants' public actions); Fadi Hanna, *Punishing Mascul-*

tation that persons should, to the extent that it is possible, cooperate in their own protection.”<sup>16</sup> “Discretion” may be articulated as a normative standard or requirement of “reasonableness”<sup>17</sup> but is often embedded as an assumption or factual finding that behavioral “modification,” “restraint” or “adaptation” will simply “happen.” There is often a narrow line in determinations between what is “expected” as a finding of fact, and required as a matter of law.<sup>18</sup>

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*lity in Gay Asylum Claims*, 114 YALE L.J. 913 (2005) (considering U.S. cases where applicants’ sexuality was not readily identifiable). Visibility also increasingly appears in U.S. jurisprudence requiring collective “social visibility” in order to define a PSG. This may lead to the finding that there is no PSG at all in sending countries where the entire class of applicants are closeted and the broader society disclaims their existence. Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 79–88 (2008); see Brian Soucek, *Social Group Asylum Claims: A Second Look at the New Visibility Requirement*, 29 YALE L. & POL’Y REV. 337 (2011) (arguing there are two interpretations of the “social visibility” requirement—metaphorical or literal—and it is incorrect to apply the literal approach, which requires that a PSG is based on a visibly recognizable trait). The BIA requirement of “social visibility” was stringently criticized by the Court of Appeals in the Seventh Circuit, *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009). However, the “social visibility” approach was recently upheld by the Court of Appeals in the Tenth Circuit, *Rivera-Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011), despite being contrary to UNHCR policy guidance and to the submissions of UNHCR intervening in that case. See U.N. High Comm’r for Refugees, *Guidelines on International Protection No 2: “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*, ¶¶ 11, 13, U.N. Doc. HCR/GIP/02/02 (May 7, 2002); Brief for the United Nations High Comm’r for Refugees as Amicus Curiae in Support of Petitioner, *Rivera-Barrientos v. Holder*, 658 F.3d at 1222. The “visibility” approach has also been taken in France, with troubling results for GLB. FLEEING HOMOPHOBIA REPORT, *supra* note 3, at 36.

16. V95/03527 (Unreported, Refugee Review Tribunal of Australia, Feb. 9, 1996).

17. *E.g.*, *MK v. Sec’y of State for the Home Dep’t (MK Lesbians)*, [2009] UKAIT 0036, [408] (U.K.) (“We take the view that the appellant would conduct herself discreetly as a lesbian in Albania and that it would be *entirely reasonable in the circumstances to expect her to do so.*” (emphasis added)).

18. *E.g.*, *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.). The tribunal held that a “person can *properly be expected* to take *some* steps to ensure the risk he faces is reduced,” *id.* [11], [2011] Imm. A.R. 217 (first emphasis added), but the Court of Appeal nonetheless interpreted this

The content of “discretion” is rarely spelt out. Expressed misleadingly as a matter of good manners or natural choice, it implicitly involves lifelong secrecy and all-encompassing strategies of concealment and deception.<sup>19</sup> “Discretion” in refugee law has included fact situations in which applicants have been expected to never tell anyone they are gay,<sup>20</sup> avoid any behavior which would identify them as gay,<sup>21</sup> relocate in order to

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as a finding of what *would* rather than what *should* happen. *Id.* See also “the requirement to be careful in future” in the second tribunal determination in *HJ and HT*, quoted on review in *HT (Cameroon) v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 1288, [8] (appeal taken from Asylum & Immigr. Trib.) (U.K.) and characterized by the Court as a requirement. *Id.* [6]. Lord Justice Pill also refers to the “requirement to respect social standards.” *HJ (Iran) v. Sec’y of State for the Home Department*, [2009] EWCA (Civ) 172, [36], [2009] Imm. A.R. 600 (Pill L.J.) (appeal taken from Asylum & Immigr. Trib.) (U.K.). Lord Hope notes this slippage between factual and normative “expectation.” *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [27], [29], [2011] 1 A.C. 596, 627–28 (Lord Hope of Craighead) (appeal taken from Eng. & Wales C.A.). The U.K. Border Agency implicitly acknowledged the normative aspect of the discretion approach in its revised guidance following *HJ and HT*: “Applications should therefore not be approached from the assumption that individuals could exercise discretion in order to avoid persecution.” U.K. BORDER AGENCY, SEXUAL ORIENTATION IN THE ASYLUM CLAIM 12 (2011), available at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/sexual-orientation-gender-ident?view=Binary>.

19. See, e.g., *JM v. Sec’y of State for the Home Dep’t (JM Homosexuality: Risk)*, [2008] UKAIT 00065, [149], [159] (U.K.) (“being mindful of his society’s concepts of good manners and the general social mores” and behaving “so as not to give rise to offence”).

20. See, e.g., *V98/08356* [1998] RRTA 4841 (Austl.) (“While it may indeed . . . be an infringement of a fundamental human right to be obliged to suppress one’s sexuality, it does not follow that it is an infringement of a fundamental human right if one is required, for safety’s sake, simply not to proclaim that sexuality openly. I do not believe there is a fundamental human right to proclaim one’s sexuality openly”); *N01/40155* [2003] RRTA 138 (Austl.) (refusing refugee application in part because applicant lived a “quiet” life in Ghana and rejecting applicant’s claim that he would tell potential employers about his sexual identity). In later U.K. cases, such conduct was characterized as “provok[ing]” public “outrage.” *JM Homosexuality*, [2008] UKAIT 00065, [148], [149]. The tribunal dismissively held, despite the applicant’s express wish for openness, he was not “somebody who is reasonably likely to proclaim his homosexuality to all and sundry whom he meets or to taxi drivers in the course of a journey.” *Id.* [148].

21. See, e.g., *R v. Sec’y of State for the Home Dep’t (Ex parte Binbasi)*, [1989] Imm. A.R. 595 (rejecting the application and indicating there was no persecution against “inactive” homosexuals); *Boyd v. Sec’y of State for the*

“attain the invisibility,”<sup>22</sup> only have anonymous sex in public places,<sup>23</sup> pretend that their partner is a flatmate,<sup>24</sup> or remain celibate.<sup>25</sup> Time and again, refugee adjudicators have held that a life of fearful concealment for lesbians and gay men “will not cause significant detriment to [the] right to respect for private life, nor will it involve suppression of many aspects of [their] sexual identity.”<sup>26</sup>

Discretion logic is a particularly invidious form of victim blaming because it affirms the perspective, if not the conduct, of the persecutor. In the words of Lord Justice Pill at Court of Appeal level in *HJ and HT*, according

a degree of respect for social norms and religious beliefs in other states is in my view appropriate. Both in Muslim Iran and Roman Catholic Cameroon, strong views are genuinely held about homosexual practices. In considering what is reasonably tolerable in a par-

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Home Dep't, [2000] UKIAT 00TH01419 (U.K.); *T v. Special Immigration Adjudicator*, [2000] EWJ 3020 (U.K.); *Dumitru v. Sec'y of State for the Home Dep't*, [2000] UKIAT 00TH00945 (U.K.).

22. *JD v. Sec'y of State for the Home Dep't (JD Zim.)*, [2004] UKIAT 00259, [19] (U.K.).

23. *See, e.g., V97/06483* [1998] RRTA 27 (Austl.) (denying application in part because the applicant did not participate in gay networks); *N97/20994* (Unreported, Refugee Review Tribunal of Australia, 4 May 1998).

24. *Cf. N99/29824* [2001] RRTA 890 (Austl.) (indicating an applicant lived in Australia with her current partner as a flatmate). Other cases encourage applicants to pretend their partner is a visiting friend. *E.g., MK v. Sec'y of State for the Home Dep't (MK Lesbians)*, [2009] UKAIT 00036, [404] (U.K.).

25. *See, e.g., V95/02999* [1995] RRTA 897 (Austl.) (refusing refugee application in part because applicant was not a “practising lesbian”); *cf. EK v. Sec'y of State for the Home Dep't (EK Non-overt Homosexual)*, [2004] UKAIT 00021 (U.K.) (arguing that claimant had and could continue to abstain from homosexual acts); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005) (rejecting the government's argument that persecution could be avoided through celibacy).

26. *HJ (Iran) v. Sec'y of State for the Home Dep't (HJ Homosexuality)*, [2008] UKAIT 00044, [46] (U.K.); *see also XY (Iran) v. Sec'y of State for the Home Dep't*, [2008] EWCA (Civ) 911, [13] (appeal taken from Asylum & Immigr. Trib.) (U.K.) (quoting the Immigration Judge from the Asylum and Immigration Tribunal, who called upon the applicant to use “care” and “discretion”).



ticular society, the fact-finding Tribunal is in my view entitled to have regard to the beliefs held there.<sup>27</sup>

Discretion reasoning has generated a plethora of legal errors in persecution analysis, including: reversing the onus of Convention protection, treating the scope of protection offered by the Convention grounds inequitably, distorting credibility assessment,<sup>28</sup> and construing internal flight alternatives as opportunities for re-concealment rather than safety.<sup>29</sup> It also leads to errors in defining the PSG, by treating “discreet” and “open” homosexuals as if they are two completely distinct,

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27. 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.). This was expressly disapproved by Sir John Dyson in HJ (Iran) v. Sec’y of State for the Home Dep’t (*HJ and HT*), [2010] UKSC 31, [129], [2011] 1 A.C. 596, 661 (appeal taken from Eng. & Wales C.A.). See also JM v. Sec’y of State for the Home Dep’t (*JM Homosexuality*), [2008] UKAIT 00065, [149] (U.K.) (finding that a gay applicant from Uganda will be “mindful of his society’s concepts of good manners and the general social mores” in concealing his sexuality); MK v. Sec’y of State for the Home Dep’t (*MK Lesbians*), [2009] UKAIT 00036, [384] (U.K.) (stating that a relevant factor in determining what was reasonably tolerable included “the social norms and religious beliefs commonly held in Albania”).

28. The assumption of universalized concealment (and its rationality) has led adjudicators to disbelieve applicants presenting narratives in which they were openly gay or undertook behavior in the past which risked exposure, as well as those who proposed to be openly gay in the future. See, e.g., *JM Homosexuality: Risk*, [2008] UKAIT 00065, [146], [149] (describing applicant as restrained in his lifestyle and assuming he would continue such discretion upon return to Uganda); AT v. Sec’y of State for the Home Dep’t, [2005] UKAIT 00119, [22]–[24] (U.K.) (rejecting video evidence submitted by the applicant, stating it was against human nature to record acts that would have exposed them to persecution); see also Jenni Millbank, *The ‘Ring of Truth’: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations*, 21 INT’L J. REFUGEE L. 1, 20 (2009) (reviewing a Canadian case that rejected applicant’s claim she had disclosed her sexuality publicly, stating she would never have done so in an intensely homophobic society, such as Ukraine).

29. Internal flight alternatives (IFA) dependent upon discretion were pivotal in HT. HT (Cameroon) v. Sec’y of State for the Home Dep’t, [2008] EWCA (Civ) 1288, [6] (appeal taken from Asylum & Immigr. Trib.) (U.K.). Despite discretion having been rejected in Canada for many years, discretion based IFA reasoning has appeared in recent Canadian tribunal decisions. Atta Fosu v. Canada (Minister of Citizenship & Immigration), IAB unreported (Feb. 7, 2008), rev’d [2008] F.C.R. 1135; Okoli v. Canada (Minister of Citizenship & Immigration), IAB unreported (June 2, 2008), rev’d [2009] F.C.R. 332.

stable, and mutually exclusive groups.<sup>30</sup> These errors are compounded in a future-focused analysis of the risk of persecution for the fundamental reason that there is no such thing as a complete and lifelong closet. A person may be closeted for some purposes or in certain spheres (work but not family, family but not friends, some friends but not all<sup>31</sup>), and even those assiduously committed to concealment are always at risk of exposure through the disclosures of others, or surveillance, and through their own lack of conformity to heterosexual behavioral norms over time, for example, if they do not marry and raise children by a certain age.<sup>32</sup>

Discretion reasoning is extraordinarily widespread, resistant to challenge and strongly associated with high rejection rates for lesbian, gay and bisexual refugee claims.<sup>33</sup> In 2011 the *Fleeing Homophobia* study, examining practices across the European Union, found discretion reasoning still occurring in Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, the Netherlands, Malta, Poland, Romania, Spain, Norway, and Switzerland.<sup>34</sup>

Discretion reasoning has appeared, and been challenged, since the very first cases on sexual orientation. In cases determined in Germany in the 1980s and in Canada, Australia, and New Zealand in the 1990s, several low-level decision makers rejected discretion in forceful terms.<sup>35</sup> It is notable that such reasoning rarely appeared again in Canada and New Zealand,

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30. The fallacy of this approach is well demonstrated by HT himself, who led a life of concealment until observed with his partner in his garden. HT was classified as “not discreet” by the first tribunal to consider his case, and as “discreet” by the second tribunal. *HT (Cameroon)*, [2008] EWCA (Civ) 1288, [4], [8]. Millbank, *supra* note 7, at 393–95; see also Dauvergne & Millbank, *supra* note 7, at 117–23 (arguing that PSG analysis based on distinctions between discreet and open is unsustainable); Weßels, *supra* note 12 (critiquing *HJ* and *HT* as continuing to embed this error).

31. For example, the second tribunal in *HJ* found the applicant was not, as he said, “living a lie” because he did have *some* friends who knew about his sexuality. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ Homosexuality)*, [2008] UKAIT 00044, [32] (U.K.).

32. See *SW v. Sec’y of State for the Home Dep’t (SW Lesbians)*, [2011] UKUT 00251, [95] (U.K.) (“Young women need to establish a heterosexual narrative to avoid being perceived as lesbian.”).

33. Millbank, *supra* note 7, at 393; UK LESBIAN & GAY IMMIGRATION GRP., *supra* note 8, at 4–5.

34. FLEEING HOMOPHOBIA REPORT, *supra* note 3, at 34.

35. Dauvergne & Millbank, *supra* note 7, at 115–16.

yet it remained prevalent in German and Australian decisions and, indeed, was subsequently endorsed at the appellate level in Australia in 2002, when a unanimous Full Court of the Federal Court of Australia held that the “public manifestation of homosexuality is not an essential part of being homosexual,” nor is the ability to “proclaim one’s sexual preference an essential right.”<sup>36</sup> In the United Kingdom, discretion reasoning was commonplace and rarely queried until the mid-2000s.<sup>37</sup>

In the 2000s, the discretion approach was rejected at high levels in a number of judicial and policy settings. In 2003, in *S395*, a slim majority of the High Court of Australia held that it was incorrect in law to require or expect gay men to “take reasonable steps to avoid persecutory harm”<sup>38</sup> as this would “undermine the object of the Convention if the signatory countries required them to modify their beliefs . . . or to hide.”<sup>39</sup> The majority judgments affirmed that the experience of sexual identity is not confined “to particular sexual acts [and will often] extend to many aspects of human relationships and activity.”<sup>40</sup> In 2005 and 2007, respectively, Sweden and the Netherlands amended administrative policy guidance for adjudicators to instruct that lesbians and gay men could not be required or expected to hide their sexuality in their countries of origin.<sup>41</sup> In 2008, the UNHCR stated that there is no “duty”

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36. *WABR v Minister for Immigration & Multicultural Affairs* (2002) 121 FCR 196, 204–05 (Austl.).

37. See, e.g., Toni A.M. Johnson, *Flamers, Flaunters and Permissible Persecution*, 15 FEMINIST LEGAL STUD. 99 (2007) (criticizing the use of the discretion standard in *RG. (Colombia) v. Secretary of State for the Home Department*, [2006] E.W.C.A. (Civ) 57 (appeal taken from Asylum & Immigr. Trib.) (U.K.)).

38. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (S395) (2003) 216 CLR 473, 492 (McHugh & Kirby JJ) (Austl.).

39. *Id.*

40. *Id.* at 500–01 (Gummow & Hayne JJ). Justices McHugh and Kirby stated

Subject to the law, each person is free to associate with any other person and to act as he or she pleases, however much other individuals or groups may disapprove of that person’s associations or particular mode of life. This is the underlying assumption of the rule of law. Subject to the law of the society in which they live, homosexuals as well as heterosexuals are free to associate with such persons as they wish and to live as they please.

*Id.* at 491.

41. See PETER HOJEM, FLEEING FOR LOVE: ASYLUM SEEKERS AND SEXUAL ORIENTATION IN SCANDINAVIA 15 (2009), <http://www.unhcr.org/4b18e2f19>.

to be discreet and added that discretion reasoning “[involves] the same submissive and compliant behavior, the same denial of a fundamental human right, which the agent of persecution seeks to achieve by persecutory conduct.”<sup>42</sup>

In 2010, it appeared that perhaps the tide had truly turned against discretion reasoning with the decision of the Supreme Court of the United Kingdom in *HJ and HT*. The joined cases of HJ from Iran and HT from Cameroon were a culmination of ten years of litigation by HJ and four by HT, encompassing no less than thirteen separate determinations by seventeen decision makers.<sup>43</sup> This history renders the judgment by the Supreme Court all the more striking: less than two months after the oral hearing, the Court issued a unanimous five-opinion judgment. The Supreme Court largely approved the majority approach taken in *S395* but condemned discretion reasoning in even stronger terms, and more explicitly grounded its decisions in equality rights. Lord Hope stated that “[gay people] are as much entitled to freedom of association with others of the same sexual orientation, and to freedom of self-expression in matters that affect their sexuality, as people who are straight.”<sup>44</sup> Lord Rodger held that

the Convention offers protection to gay and lesbian people—and, I would add, bisexuals and everyone else on a broad spectrum of sexual behaviour—because they are entitled to have the same freedom from fear of persecution as their straight counterparts. No-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor would anyone

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html; FLEEING HOMOPHOBIA REPORT, *supra* note 3, at 35. Note that these sources also indicate on-going difficulties putting such guidance into practice. OLOV WOLF-WATZ ET AL., NORM CRITICAL STUDY OF THE SWEDISH ASYLUM EVALUATION 4–5 (2010), available at [http://www.migrationsverket.se/download/18.1c1b3f51128bf913da580001304/normkritiskstudie\\_en.pdf](http://www.migrationsverket.se/download/18.1c1b3f51128bf913da580001304/normkritiskstudie_en.pdf).

42. UNHCR Guidance Note, *supra* note 2, ¶ 26 (quoting *Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at ¶ 113 (S. Afr.)).

43. E-mail from S. Chelvan, to author (Dec. 1, 2011) (on file with author).

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

proceed on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable.<sup>45</sup>

It is also noteworthy that the decision was greeted by the new conservative-led government with public statements of approval and commitment to compliance.<sup>46</sup>

In the course of their article, Hathaway and Pobjoy characterize the judgments and their conception of sexuality variously as: “far-reaching,” “too liberal,” “over-inclusive,” “extreme,” “extraordinarily broad,” “boundless,” “all-inclusive,” “open-ended,” “all-embracing,” “unqualified” and having “no limits.”<sup>47</sup> Hathaway and Pobjoy contend that, by protecting trivial or marginal conduct (also termed “precipitating” activity) not intrinsically connected to the protected identity, the decisions “unleash such a fundamental challenge” from a non-discrimination framework for analyzing persecution and thereby abandon the nexus requirement.<sup>48</sup> The authors view the judgments as “jettison[ing]” principles, risking “doctrinal distortion,” causing a “legal muddle,” as well as generating a “schism” between, and creating “collateral damage” for, religious and political claims.<sup>49</sup>

Hathaway and Pobjoy argue that “while risk that follows from actual or imputed sexual identity is readily encompassed by the non-discrimination norm that informs the nexus requirement, more nuance is required to identify the circumstances in which protection is owed where risk follows from actions rather than from identity per se.”<sup>50</sup> They continue:

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45. *Id.* [76], [2011] 1 A.C. at 645 (Lord Rodger of Earlsferry). *See also id.* [53], [65], [2011] 1 A.C. at 637–38, 640 (stressing that the underlying rationale of the Convention is to ensure that people are free to live openly without fear of persecution).

46. *See, e.g., Gay Asylum Seekers Win Protection from Deportation*, THE GUARDIAN (July 7, 2010), <http://www.guardian.co.uk/uk/2010/jul/07/gay-asylum-seekers-rights-deportation> (quoting Home Secretary Theresa May); U.K. BORDER AGENCY, *supra* note 18, at 12–13 (explaining the new test set forth in *HJ and HT*).

47. Hathaway & Pobjoy, *supra* note 13, at 335, 335, 334, 333, 377, 374, 334, 343, 334.

48. *Id.* at 386.

49. *Id.* at 385, 338, 385, 384, 337.

50. *Id.* at 333.

“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 engendering the risk is fairly deemed to be intrinsic to the protected identity.”<sup>51</sup> In the next two sections, I address this argument as it relates to nexus and to “intrinsic” acts.

### III. ACTIVITIES AND NEXUS

Much of Hathaway and Pobjoy’s article addresses activity (the colored cocktail) as *causal* of persecution. Time and again, they return to the issue of behavior in stating that there can be no nexus if conduct is marginal or “trivial” and should not therefore be protected, as opposed to acts which are integral or intrinsic to the identity. This focus on “activity” is misleading in addressing the question of nexus and persecution. “Activity” associated with sexual orientation does not *cause* the persecution, nor does it *form the basis of protection*; it simply reveals or exposes the stigmatized identity. This can be demonstrated using a major human rights issue and a trivial stereotype, both drawn from Hathaway and Pobjoy’s own paper: undertaking a same-sex marriage and listening to the music of Kylie Minogue. The authors argue that both of these examples fall outside the scope of human rights protections and therefore of the Convention nexus, while I seek to demonstrate that both may, in certain circumstances, meet the Convention nexus irrespective of whether they could themselves be characterized as protected conduct in human rights law.

Citing European Court of Human Rights and U.N. Human Rights Committee decisions affirming that cohabiting gay couples are entitled to legal treatment equal to unmarried heterosexual couples but (as yet) denying the right to marry or adopt children, Hathaway and Pobjoy state that the right to marry is not therefore within the “scope of protected activity” for the purposes of refugee law.<sup>52</sup> Focusing on whether an *activity* is protected misdirects the analysis of persecution. If a lesbian is *unable* to marry in her country of origin, she could not be said to be persecuted for this reason alone.<sup>53</sup> Refugee

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51. *Id.* at 388.

52. *Id.* at 381.

53. *See, e.g.,* N04/48869 [2004] RRTA 431 (Austl.) (finding the claimant was not at risk of persecution in the Philippines, which had not legalized

law provides no remedy for the lack of ability to marry. But, if a lesbian goes abroad to marry, or undergoes a ceremony of marriage in her home country which is not legally recognized, and this exposes her sexuality such that she comes to the attention of persecutors, then it is clear that the risk of persecution is “for reasons of” her PSG of lesbians in her country.<sup>54</sup> It is apparent that the nexus is satisfied by asking: do persecutors in this example attack lesbian A who underwent a ceremony of marriage with her partner, but leave lesbian B alone because she remained unmarried and cohabits with her partner in the absence of ceremony? I say it is immaterial to her claim whether her “actions” in marrying fall within the “scope of protected activity” posed in Hathaway and Pobjoy’s formulation because it is not her action that forms the basis of the claim. Persecutors around the world are not attacking lesbians on the basis of who got *married*.<sup>55</sup>

Equally clearly, there is no fundamental human right engaged by listening to the music of Kylie Minogue. This is the paradigm example given by Hathaway and Pobjoy of a “relatively trivial activity that could be avoided without significant human rights cost.”<sup>56</sup> Yet, the trivial nature of the activity would not prevent the nexus being satisfied—unless persecutors were attacking all those who listen to Kylie on a non-dis-

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same-sex marriage); *N03/45618* [2003] RRTA 240 (Austl.) (denying the application despite applicant’s wish to marry her partner, not permitted in the Philippines).

54. Similarly, Hathaway and Pobjoy give an example of religious actions which fall outside the protection of religious freedom as “too remote to attract legal protection”: refusal to pay taxes that support a war which is opposed on religious ground. Hathaway & Pobjoy, *supra* note 13, at 334. While the right to religious freedom may not excuse one from paying taxes without penalty it does not follow that persecution, which arose from such a scenario, lacks nexus to the Convention. If through the failure to pay taxes the state was alerted to the fact a person was of a particular religion and tortured them as a member of that religion (unlike other non-taxpayers who were merely subject to a fine), then the nexus to Convention protection is established.

55. This is another example of the inherent volatility of an act/identity or conduct/status distinction—while the ceremony of marriage is an act, being married is arguably a status.

56. Hathaway & Pobjoy, *supra* note 13, at 335. I would also argue that there is *always* a human rights cost in concealing one’s sexuality for fear of reprisal, and Part II of Hathaway and Pobjoy’s article should have rendered them more alert to this consideration. *Id.* at 346–58.

criminary basis (with the State also failing to protect them on such basis). That is, if persecutors hate the music of Kylie Minogue and want *it* eradicated (a view I could have some sympathy with), while simultaneously leaving openly identified gay men unharmed if only they voluntarily relinquished their CD collections, then the persecution would not involve a Convention nexus. But, the trivial nature of the act itself is irrelevant to determining the question of nexus.

#### IV. TRIVIAL ACTS AND PROTECTED IDENTITIES

Both *S395* and *HJ and HT* are significant judgments for the reason that they reject the act/identity distinction that has been so problematic for gay men and lesbians seeking equality in law,<sup>57</sup> including refugee law.<sup>58</sup> In the words of Lord Hope,

The group is defined by the immutable characteristic of its members' sexual orientation or sexuality. This 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.<sup>59</sup>

Hathaway and Pobjoy state that "the courts were quite right to reject the rigid 'is/does' dichotomy."<sup>60</sup> Yet, their focus on activity and their concern to distinguish "trivial" from "integral" "associated activities," as opposed to "identity per se," maintains and reinscribes this false dichotomy. I suggest that acts and identities in the context of sexual orientation refugee

57. CARL STYCHIN, *LAW'S DESIRE* 149–50 (1995).

58. Paul O'Dwyer, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y.L. SCH. L. REV. 185, 186 (2007–2008); Millbank, *supra* note 15, at 87–90; Nicole La Violette, *The Immutable Refugee: Sexual Orientation in Canada (A.G.) v. Ward*, 55 UNIV. TORONTO FAC. L. REV. 1, 30 (1997).

59. *HJ (Iran) v. Sec'y of State for the Home Dep't (HJ and HT)*, [2010] UKSC 31, [11], [2011] 1 A.C. 596, 621 (Lord Hope) (appeal taken from Eng. & Wales C.A.).

60. Hathaway & Pobjoy, *supra* note 13, at 374.



claims cannot be separated and categorized in this way. This is evident in the example given by Hathaway and Pobjoy of persecution on the basis of identity per se: “legislation criminalizing homosexuality.”<sup>61</sup> Such legislation almost exclusively criminalises the act of gay sex, not the identity per se.<sup>62</sup>

There are multiple and complex possibilities around the way that behavior may reflect or relate to an identity which render it impossible to categorize them as necessary/integral as opposed to chosen/peripheral. An activity may *express* the identity, or it may *reveal* the identity. The activity may be obviously integral, such as gay people having sex with partners of the same sex (although the reverse proposition does not necessarily apply). Conversely, an action may appear peripheral, such as plucked eyebrows,<sup>63</sup> but be integral in some contexts—for example if that is how some gay men signal to other men that they are gay, so as to be able to meet partners and friends. Arguably, gay men do not need to pluck their eyebrows to *express* an innate sense of gayness, and thus such grooming could be characterised as “a relatively trivial activity that could be avoided without significant human rights cost”<sup>64</sup> on an objective assessment of what is “reasonably required” to express sexual identity. But plucked eyebrows may be an integral aspect to *revealing* gayness in a particular context in a way that cannot be predetermined.

The difficulty in trying to delimit the relationship between act and identity in sexuality claims in the refugee context is compounded because expression and revelation can occur in ways that are deliberate or inadvertent, and may indeed be deliberate for some purposes or audiences but inadvertent

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61. *Id.* at 372.

62. *See, e.g.,* OO (Sudan) v. Sec’y of State for the Home Dep’t, [2009] EWCA (Civ) 1432, [9] (appeal taken from Asylum & Immigr. Trib.) (U.K.) (affirming the lower tribunal’s finding that a gay man from Sudan who had engaged in same-sex activities not involving anal sex was not at risk of prosecution because the relevant sexual offense was anal penetration). The other example offered by Hathaway and Pobjoy is failure to openly identify oneself as gay for fear of losing one’s livelihood, Hathaway & Pobjoy, *supra* note 13, at 400, yet as discussed below, “open” identification also necessarily requires either speech or act. *See infra* text accompanying notes 63–64.

63. Noted as a signifier of gayness, for example, in HUMAN RIGHTS WATCH, WE ARE A BURIED GENERATION: DISCRIMINATION AND VIOLENCE AGAINST SEXUAL MINORITIES IN IRAN 44 (2010).

64. Hathaway & Pobjoy, *supra* note 13, at 335.

for others. The plucked eyebrows, manicured carefully and intended only for other gay men to see might be successfully hidden under a fringe of hair or thick glasses for years, but one day a careless gesture, a nosey neighbor peering in the bathroom window, or a vengeful ex-lover call forth the wrath of persecutors. Does the characterization of eyebrow plucking by a man as trivial or stereotypical really mean that the threatened or actual persecution that follows is not—or ought not to be—protected by the Convention?

Hathaway and Pobjoy argue that nexus should only be satisfied when “the activity engendering the risk is fairly deemed to be intrinsic to the protected identity.”<sup>65</sup> What is an “intrinsic” manifestation of sexual orientation? The authors say that Lord Rodger was “surely right” in his finding that the scope of protected behavior cannot be limited to attracting and maintaining a relationship with a same-sex partner, but argue that the Convention ought not to cover “forms of behavior loosely (or stereotypically) associated with homosexuality”<sup>66</sup> even if “innocuous and inoffensive.”<sup>67</sup> Hathaway and Pobjoy contend that “the protected status of sexual orientation ought . . . to encompass any activity *reasonably required* to reveal or express an individual’s sexual identity.”<sup>68</sup> This leaves unanswered pressing questions posed in refugee adjudications based on sexuality, many of which concern aspects of public expression, including socializing in public places, such as clubs and bars, including gay bars with gay friends. This is conduct I see as clearly integral to self and group identity, and to freedom of association, which is a core expression of the identity. Yet, adjudicators have frequently held such conduct to be “trivial activity that can be avoided without significant human rights costs”<sup>69</sup> and definitively *not* reasonably required to express one’s sexual identity.<sup>70</sup> Similarly, transgender applicants, par-

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65. *Id.* at 388–89.

66. *Id.* at 374.

67. *Id.* at 382.

68. *Id.* at 382 (emphasis added).

69. *Id.* at 335.

70. See, e.g., HJ (Iran) v. Sec’y of State for the Home Dep’t (*HJ Homosexuality*), [2008] UKAIT 00044, [44], [45] (U.K.) (“It is difficult to see on the evidence that a return to that way of living [where appellant cannot attend gay clubs, hold his partner’s hand publicly or otherwise publicly express his sexuality] can properly be characterised as likely to result in an abandon-

ticularly those who have not undergone surgical bodily modification, have struggled with act/identity distinctions, such that public appearance in the non-birth gender has been viewed by some adjudicators as “a decision to dress as a female”<sup>71</sup> or as a voluntary choice about trivial aspects of clothing rather than as significant expressions of identity.<sup>72</sup>

There is also an inherent contradiction in the premise that international human rights law protects the right to openly identify oneself as a sexual minority<sup>73</sup> but not to undertake an activity which, deliberately or inadvertently, reveals that identification. To pose a principle in which all identifying speech is protected but some identifying acts are not is absurd. For these reasons of principle, I contend that there is no “line” that can be definitively drawn between integral and marginal conduct associated with sexuality. Sexual orientation is expressed—and revealed—in hundreds, if not thousands, of subtle and obvious ways through appearance, speech, behavior, dress and mannerisms. Below, I also briefly address concerns of practical application if Hathaway and Pobjoy’s formulation were to be adopted in the future.

## V. THE CALL TO CIRCUMSCRIPTION

Hathaway and Pobjoy state that the nexus requirement should be met “only when the activity engendering the risk is fairly deemed to be intrinsic to the protected identity.”<sup>74</sup> The use of the words “fairly” and “deemed” in this formulation of what is integral to sexual identity are very telling, and should

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ment of the appellant’s sexual identity”); *MK v. Sec’y of State for the Home Dep’t (MK Lesbians)*, [2009] UKAIT 0036, [406] (U.K.) (“Although it was the appellant’s claim that if she were to return to Albania she would have to repress her sexuality, we take the view that apart from not being able to visit gay cafés, since there are none, she would not have any desire to express her sexuality in any way different from the way in which she has expressed it in the United Kingdom”); *T v. Special Immigration Adjudicator*, [2000] EWJ 3020 (U.K.).

71. *Hernandez-Monteil v. I.N.S.*, 225 F.3d 1084, 1089 (9th Cir. 2000) (quoting and reversing the immigration judge), *overruled on other grounds* by *Thomas v. Gonzalez*, 409 F.3d 1177, 1187 (9th Cir. 2005).

72. Joseph Landau, *Soft Immutability and Imputed Gay Identity: Recent Developments in Transgendered Sexual-Orientation Based Asylum Law*, 32 *FORDHAM URB. L.J.* 237 (2005).

73. Hathaway & Pobjoy, *supra* note 13, at 380.

74. *Id.* at 389.

alert us to the value-laden interpolation involved in such a task. Lines between what is “integral” and what is “marginal” conduct associated with sexual minorities in another culture prospectively drawn by Western decision makers have often failed to properly encompass accepted human rights standards, as the lower level decisions in *HJ and HT* amply demonstrate. Over a decade of my own research on sexuality-based refugee status determination has found that what is experienced as a core right by gay men and lesbians is rarely received as such by adjudicators, who have grudgingly protected private sexual conduct while characterizing virtually every other manifestation of sexuality as peripheral, non-protected and dispensable.<sup>75</sup> Even if a core and marginal distinction appears meaningful in the abstract, once applied in practice it is likely to end up turning into a very different principle. Put bluntly, the more marginal a group is in social and legal terms, the more likely that what is experienced as core by them is *deemed* marginal by adjudicators.

Hathaway and Pobjoy themselves acknowledge that “drawing a line between protected and unprotected activities” is “not an easy task” and that cases on religious and political grounds have resulted in “line drawing” which has, at times, been “problematic.”<sup>76</sup> I agree that the case examples referenced by them were indeed problematic, but would add that, as Justices Gummow and Hayne noted in *S395*, “[t]he dangers of arguing from classifications are *particularly acute* in matters in which the applicant’s sexuality is said to be relevant.”<sup>77</sup> “Line drawing” around related conduct is immeasurably more difficult under the Convention ground of PSG in general, and the sub-group of sexuality in particular, because, unlike political and religious grounds, there is no party or organized hierarchy, no published doctrine, policy platform, text or foundational document. This means that there is even less of a framework through which one can determine what is “integral” or “reasonably required” conduct related to sexuality in a given cultural context, compared to political and religious

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75. Adjudicators have rarely addressed international human rights law or norms in their opinions. Jenni Millbank, *The Role of Rights in Asylum Claims on the Basis of Sexual Orientation*, 4 HUM. RTS. L. REV. 193, 227 (2004).

76. Hathaway & Pobjoy, *supra* note 13, at 379.

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

claims.<sup>78</sup> Yet, in credibility determinations, absurd as it sounds, adjudicators *have* frequently used a Western template or “gay catechism” questioning (treating knowledge of the works of Oscar Wilde as proxy for the Bible) in trying to assess whether applicants are really gay.<sup>79</sup> Badly drawn lines in religious cases will only ever be worse drawn in sexuality claims. It is striking that the authors argue that it is not practically viable to distinguish between an applicant’s motivations for *concealment* of sexual identity,<sup>80</sup> which they label an “extraordinary opportunity for judicial subjectivity,”<sup>81</sup> yet at the same time, they call for judicial determinations of what is reasonably required in *expression* of sexual identity.

Judgments about the importance (or not) of different aspects of sexual identity and the voluntariness of their expression—about what can be “avoided without significant human rights cost,” what can be “reasonably tolerated,” and what is “reasonable” to “expect” of the behavior of lesbians and gay men—are at the very heart of discretion reasoning. Hathaway and Pobjoy are not arguing for discretion reasoning, but they are in a very real sense arguing *from* it. Their answer to the problem they identify as a “boundless” right to self-expression for gay people affirmed by *HJ* and *HT* is instead only to protect “activity *reasonably required* to reveal or express an individual’s sexual identity.”<sup>82</sup> “Reasonable” to date has been a byword for lesser protections in sexual orientation cases. There is a very real danger that a call to circumscription, even one purportedly based on non-discrimination principles, once interpreted and applied at lower levels of adjudication, will end up as another version of discretion.

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78. This is not to say that religious and political claims are always well assessed by reference to formal doctrines. See, e.g., Michael Kagan, *Refugee Credibility Assessment and the “Religious Imposter” Problem: A Case Study of Eritrean Pentecostal Claims in Egypt*, 43 VAND. J. TRANSNAT’L L. 1179 (2010).

79. Millbank, *supra* note 28, at 18.

80. Hathaway & Pobjoy, *supra* note 13, at 342–45 & nn.100–01. Lord Hope asserts that concealment for fear of persecution and concealment for other reasons are clearly distinct, *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [22] [2011] 1 A.C. 596, 625 (Lord Hope) (appeal taken from Eng. & Wales C.A.), a position I agree is untenable. See also WeBels, *supra* note 12.

81. Hathaway & Pobjoy, *supra* note 13, at 343 n.100.

82. *Id.* at 382 (emphasis added).

This is, indeed, precisely what happened through the course of the *HJ* litigation. In 2003, Justices Kirby and McHugh suggested in *S395* that persecution does not cease to be persecution because it can be avoided.<sup>83</sup> Their Honors went on to note that persecution should be defined as reaching an intensity or duration such that the person persecuted “cannot be expected to tolerate it.”<sup>84</sup> In 2006, Lord Justices Maurice Kay and Buxton in the first Court of Appeal decision concerning *HJ* applied *S395* in holding that the original adjudicator had fallen into error in not asking *why* *HJ* had concealed his sexuality while living in Iran.<sup>85</sup> Lord Justice Maurice Kay explicitly considered whether what Hathaway and Pobjoy term “endogenous” harm could itself be persecutory, but he did so by conflating the High Court’s references to persecution and the expression of sexual identity<sup>86</sup> to ask whether:

“[D]iscretion” is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to “matters following from, and relevant to, sexual iden-

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83. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473, 489 (McHugh & Kirby JJ) (Austl.) (“The purpose of the Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution. Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to State sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But 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. 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.”).

84. *Id.* at 489.

85. *J v. Sec’y of State for the Home Dep’t*, [2006] EWCA 1238, [16], [2007] Imm. A.R. 73 (Kay L.J.) (appeal taken from Asylum & Immigr. Trib.) (U.K.); *id.* [19], [2007] Imm. A.R. 73 (Buxton L.J.).

86. *Id.* [16], [2007] Imm. A.R., [16] (Kay L.J.). Lord Collins characterizes the test as “based on a misunderstanding” of McHugh and Kirby JJ’s judgment. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [102]–[103], [2011] 1 A.C. 596, 654 (Lord Collins of Mapebury) (citing *S395* (2003) 216 CLR at 489 (McHugh & Kirby JJ)).

tity” in the widest sense recognised by the High Court of Australia. This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the ‘discretion’ which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression of many aspects of life that “related to, or informed by, their sexuality.”<sup>87</sup>

This passage characterizes concealment as something that may be intolerable. However, Maurice Kay’s formulation was swiftly recoined as a test of what was “reasonably tolerable,” which continued to impose positive requirements of concealment. For the next four years, U.K. adjudicators denied claims from countries such as Uganda, Sudan, Afghanistan, and Iran, including that of HJ himself, on the basis that so-called modifications, adaptations, and precautions were objectively reasonable in the circumstances.<sup>88</sup> The question of whether a life of secrecy in fear of risks including the death penalty was “reasonably tolerable” for applicants who had not previously been exposed to harm was answered in the affirmative, as adjudicators perfunctorily held that this did *not* entail their sexuality being “unduly constrained.”<sup>89</sup> So, for example:

We do not find that any limited restraint or discretion exercised by the appellant so as not to give

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87. *J* [16], [2007] Imm. A.R. 73 (Kay L.J.) (citations omitted).

88. *OO (Sudan) v. Sec’y of State for the Home Dep’t*, [2009] EWCA (Civ) 1432, [9], [17] (appeal taken from Asylum & Immigr. Trib.) (U.K.) (rejecting claimant’s application and finding that modifications of behavior do not merit granting an application where they can be reasonably tolerated); *XY (Iran) v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 911, [13] (appeal taken from Asylum & Immigr. Trib.) (U.K.) (holding there was no reason applicant would or could not use “care” and “discretion” upon return to Iran); *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ Homosexuality)*, [2008] UKAIT 00044, [44] (U.K.) (finding the applicant could reasonably be expected to adapt upon return to Iran). In addition, *AJ v. Sec’y of State for the Home Dep’t (AJ Risk to Homosexuals)*, [2009] UKAIT 00001, and *SB (Uganda) v. Sec’y of State for the Home Dep’t*, [2010] EWHC (Admin.) 338 (U.K.), both quashed similar AIT determinations on judicial review because there had been past persecution such that future discretion was not possible.

89. *JM v. Sec’y of State for the Home Dep’t (JM Homosexuality)*, [2008] UKAIT 00065, [140], [159] (U.K.).

rise to offence in public would in any event cause the appellant to act otherwise than his integrity or sexuality would allow.

We find therefore . . . that the appellant upon return will act discreetly and that it is reasonable to expect him to do so.<sup>90</sup>

In a dazzling *Catch-22*, a life of concealment was itself evidence that such a life was reasonably tolerable, because it had, after all, been lived by the applicant. As Sir John Dyson noted in *HJ and HT*, the tribunal held that, “for 16 years HJ had been able to conduct his homosexual activities in Iran ‘without *serious* detriment to his private life and without that causing him to suppress *many* aspects of his sexual identity.’”<sup>91</sup> Sir Dyson responded

True, HJ had endured them for 16 years, but that did not make them tolerable, let alone reasonably tolerable to him . . . . In short, there was no basis on which the tribunal could properly conclude that the fact that HJ had to conceal his identity as a gay man was reasonable tolerable to him.<sup>92</sup>

It is a testament to the misapplication of the “reasonably tolerating” approach that it was Lord Justice Maurice Kay himself who granted HJ permission to appeal to the Court of Appeal a second time, following the negative redetermination of his matter by the tribunal.<sup>93</sup> Hathaway and Pobjoy note that it is “technically true” that the decision maker’s job is to assess risk and not mandate conduct. Yet, it is clear on examining the history of HJ’s case that decision makers felt entitled to mandate conduct. While HJ claimed that it was “impossible”<sup>94</sup> for him to return to “living in extreme fear and of having to

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90. *Id.* [159]–[160]. Note that this was contrary to the case of the applicant, who said that he wished to live openly. *Id.* [24].

91. *HJ and HT*, [2010] UKSC 31, [122], [2011] 1 A.C. at 659 (Sir Dyson) (emphasis added) (quoting *HJ Homosexuality*, [2008] UKAIT 00044, [44]).

92. *Id.* [122], [2011] 1 A.C. at 659–60.

93. Thanks to S. Chelvan for pointing this out to me. See *HT (Cameroon) v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 1288, [12] (appeal taken from Asylum & Immigr. Trib.) (Rix L.J.) (U.K.) (stating this suggested “there are, to put it at its lowest, difficulties in the application of the test in *f*”).

94. *HJ Homosexuality*, [2008] UKAIT 00044, [44].



live a lie every day of his life,”<sup>95</sup> U.K. adjudicators applied an “objective”<sup>96</sup> assessment of what was reasonable to expect<sup>97</sup> by way of “adaptation”<sup>98</sup> as well as what was reasonable to tolerate, such that the question of how he ought reasonably to conduct himself in Iran was central throughout.<sup>99</sup> Expressed as factual, it was also normative—expecting is requiring.<sup>100</sup> Hathaway and Pobjoy’s proposed test to circumscribe protected behavior based on what is “reasonably required” to express one’s sexuality is dangerously susceptible to similar misapplication and misunderstanding.

Moreover, any reintroduction of notions of reasonableness in behavior would return the onus to applicants to demonstrate that their conduct meets this “objective” standard.<sup>101</sup> How is an applicant from Iran able to demonstrate that a life they have not previously had in Iran is *reasonably required*? Applicants who claimed that they could *not* reasonably tolerate a life of secrecy did so by reference to their romantic and social lives in the United Kingdom, and to international human rights standards, only to routinely be told that refugee law does *not* guarantee equal freedoms in the receiving and sending countries.<sup>102</sup> This represents an impossible

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95. *Id.* [41].

96. *Id.* [39].

97. *Id.* [44].

98. *Id.*

99. *Id.* See also HJ (Iran) v. Sec’y of State for the Home Department, [2009] EWCA (Civ) 172, [31]–[32], [2009] Imm. A.R. 600 (Pill L.J.) (appeal taken from Asylum & Immigr. Trib.) (U.K.) (affirming the Asylum and Immigration Tribunal’s application of the reasonably tolerable test).

100. Lord Hope and Sir John Dyson both note this slippage. HJ (Iran) v. Sec’y of State for the Home Dep’t (*HJ and HT*), [2010] UKSC 31, [27]–[29], [2011] 1 A.C. 596, 627–28 (Lord Hope) (appeal taken from Eng. & Wales C.A.); *id.* [123], [2011] 1 A.C. at 660 (Sir Dyson).

101. AJ v. Sec’y of State for the Home Dep’t (*AJ Risk to Homosexuals*), [2009] UKAIT 00001, [55]. The issue of onus is significant. Applicants under the “reasonably tolerable” test frequently failed because they had not raised this as part of their original claim or as a sole or main motivation for their claim, including HJ himself. *HJ Homosexuality*, [2008] UKAIT 00044, [45]; S. Chelvan, *Put Your Hands Up (If You Feel Love)*, 25 IMMIGR., ASYLUM & NATIONALITY L. 56, 56 (2011).

102. *E.g.*, Amare v. Sec’y of State for the Home Dep’t, [2005] EWCA (Civ) 1600, [31], [2006] Imm. A.R. 217 (appeal taken from Immigr. Appeal Trib.) (U.K.) (“The Convention is not there to safeguard or protect potentially affected persons from having to live in regimes where pluralist liberal values are less respected, even much less respected, than they are here.”). Paradox-

advocacy trap for applicants. As a practical matter, where can the objective standard of what is reasonably required be drawn from, and how can applicants hope to meet it?

A call for “circumscription” of conduct related to sexuality, if heeded, would once again place the burden of Convention protection back on the victims, who must only express (or reveal, or expose) themselves in ways that are “reasonably required.” As Justices Gummow and Hayne remind us in *S395*,

The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection. Moreover, the use of such language will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity. No less importantly, if the Tribunal makes such a requirement, it has failed to address what we have earlier identified as the fundamental question for its consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question.<sup>103</sup>

## VI. MISREADING *HJ* AND *HT*: KYLIE MINOGUE AS A STRAW MAN

Having addressed the substance of Hathaway and Pobjoy’s arguments, I suggest in conclusion that this controversy could be (re)considered a storm in a teacup—or perhaps more aptly a tempest in a cocktail glass. Hathaway and Pobjoy focus a great deal of attention, and much of their ire, on a single line of Lord Rodger’s judgment, in which he references stereotypical examples of gay life as “going to Kylie concerts, drinking

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ically, Lord Hope makes a similar pronouncement. *HJ and HT*, [2010] UKSC 31, [35], [2011] 1 A.C. at 630 (Lord Hope) (“On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test.”).

103. *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473, 501 (Gummow & Hayne JJ) (Austl.).

exotically coloured cocktails and talking about boys.”<sup>104</sup> The authors refer to this example no less than five times and rely upon it as the conceptual centrepiece of Part III of their article. This focus on a trivial example itself trivializes the very real harms that are experienced by sexual minority claimants and the grave disadvantages they still face in refugee law. HJ endured sixteen years of concealing his sexuality in Iran, where the death penalty by hanging or stoning for gay sex remains a real possibility, as is punishment such as whipping for more commonly charged offences against public morality, and violence at the hands of the police and paramilitary basij.<sup>105</sup> HT lived a life of secrecy for ten years in Cameroon until he was seen with his partner in his garden. HT was beaten by a mob, who tried to castrate him and stabbed him in the stomach, and then beaten again by police officer who arrived on the scene.<sup>106</sup> Following this incident, HT spent two months in a hospital in Cameroon recovering from his wounds. HT also served six months of a twelve-month sentence in prison in the United Kingdom for attempting to transit through to Canada on a false passport, and his application for asylum was only heard at the end of this custodial sentence. He was then subject to administrative detention in the United Kingdom for a further eight months.<sup>107</sup> Neither HJ nor HT made any claim involving a colored cocktail.

The relevant passage from Lord Rodger’s judgment reads:

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

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104. *HJ and HT*, [2010] UKSC 31, [78], [2011] 1 A.C. at 646 (Lord Rodger).

105. HUMAN RIGHTS WATCH, *supra* note 63, at 4, 27.

106. *HT (Cameroon) v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 1288, [3] (appeal taken from Asylum & Immigr. Trib.) (U.K.).

107. HT, Presentation at Fleeing Homophobia Conference (Sept. 6, 2011); E-mails from S. Chelvan, to author (Dec. 1, 2011 & Jan. 16, 2012) (on file with author).

physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.

It would be wrong, however, to limit the areas of behaviour that must be protected to the kinds of matters which I have just described—essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight . . . . 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 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 the fear of persecution.<sup>108</sup>

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108. *HJ and HT*, [2010] UKSC 31, [77]–[78], [2011] 1 A.C. at 645–46 (Lord Rodger).

Arguably Hathaway and Pobjoy are so distracted by the stereotypical examples given in this passage that they refuse to read the judgment as it should be read. The most significant principle of *HJ and HT* is equal access to fundamental rights and freedoms in the lived expression of sexual identity.

The stereotypical examples given by Lord Rodger do no more than preface an important statement of principle, which is one of *equal treatment in the society concerned* and a *natural range of self-expression* that encompasses both erotic and social aspects. This is neither boundless nor unprincipled. Nor should it be dismissed as a “stirring liberation manifesto.”<sup>109</sup> Rather, it is a clear statement of law about the significance of an equality approach in assessing persecution.<sup>110</sup> Lord Hope also directly expresses the dual aspects of both freedom of association and freedom of expression within an equality framework.<sup>111</sup>

*HJ and HT*, properly read, is a principled defense of equal access to human rights protections for lesbians and gay men. Moreover, it is entirely possible to read the case as consistent with Hathaway’s own non-discrimination framework of analysis for refugee law if one disregards his unsustainable effort in this issue to separate acts from identities (and reasonably required acts from “peripheral” ones).

## VII. CONCLUSION

*HJ and HT* affirms that the Convention must protect from persecution lesbians, gay men, and bisexual people around the world living a normal life. It is not within the knowledge of the decision maker, nor within the responsibility or the control of the applicant, to foresee and categorize everyday activi-

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109. Hathaway & Pobjoy, *supra* note 13, at 386.

110. The application of equality to the social context may also have problematic aspects. For example in a society where among heterosexual people, women have very little freedom compared to men, and/or where lesbians have less freedom compared to gay men, an un-nuanced equality approach could lead to an understanding of the rights of lesbians as lesser in scope than those accorded to gay men. See, e.g. *MK v. Sec’y of State for the Home Dep’t (MK Lesbians)*, [2009] UKAIT 0036 (U.K.) (finding there is limited opportunity for persecution of lesbians because, unlike gay men, they do not frequent cruising areas or join LGBT organizations); *Kizza v. Sec’y of State for the Home Dep’t*, [2002] UKIAT 06100, (U.K.).

111. *HJ and HT*, [2010] UKSC 31, [14], [2011] 1 A.C. at 622 (Lord Hope).

ties as either intrinsic to, or marginal from, sexual orientation such that some are protected and others excluded.

It is only by starting with the expectation that gay men and lesbians are entitled to enjoy the full range of fundamental human rights and freedoms that their refugee claims can be properly assessed as a failure of state protection, rather than an unreasonable or improbable violation of prevailing cultural norms. The rejection of discretion reasoning in *HJ* will not lead inexorably to the trivialization of international human rights through the creation of a right to drink exotically colored cocktails. It is not trivial acts that are protected by the *HJ and HT* formulation, it is the equal treatment of gay men and lesbians with heterosexual people, rightly acknowledging the fact that any one of an infinitely broad range of acts, including “small tokens and gestures”<sup>112</sup> may express or reveal the protected identity.

With *HJ*, the Supreme Court of the United Kingdom righted a great wrong. The premise of concealment of gay and lesbian sexuality has diverted and distorted analysis of risk of persecution, the definition of particular social group, and the availability of internal relocation in many thousands of claims worldwide. While the judgments in *HJ and HT* were broadly and forcefully expressed, this was a necessary step in redressing a major error of law and in shifting a discriminatory culture of adjudication. The decision signals respect and concern for the rights of lesbians and gay men. I hope that it will give courage to sexual minorities living under oppressive and dangerous regimes to bring about change from within, knowing that should they be exposed to persecution and seek international protection they can no longer be told to go home and hide.

In the introduction to *HJ and HT*, Lord Hope says, “It is crucially important that [gays and lesbians] 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.”<sup>113</sup> To date, the protection offered to sexual orientation has plainly been lesser than those extended to other groups and other grounds, and I cannot comprehend how *HJ and HT* could be seen to offer more.

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

113. *Id.* [3], [2011] 1 A.C. at 619 (Lord Hope).

The right to live freely and openly is neither boundless nor extreme; it is equality. Even were I to be proved wrong in every particular of my argument and Hathaway and Pobjoy correct in every particular of theirs, it is impossible to accept that *HJ and HT* could inflict a greater harm than the one it has remedied.