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Summary of *Queer Cases Make Bad Law* by James Hathaway and Jason Pobjoy
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Do "queer cases"—like proverbial "hard cases"—make bad law?

In this article, we take a careful look at how common law courts have addressed the asylum claims of homosexuals fleeing anti-gay prosecutions and violence in their home countries. Two top courts—the High Court of Australia, and the Supreme Court of the United Kingdom—have now tackled the question in decisions hailed as major victories for both gay rights, and for the continuing vitality of the Refugee Convention itself.

In these recent decisions, both courts struck down a doctrine under which gay claims to asylum had been rejected on the grounds that the applicants could – and should—"be discreet" about their sexuality, and thereby avoid the risk of being persecuted at home. In an extraordinary passage that has attracted significant public attention, Lord Rodger of the new UK Supreme Court asserted that "just as male heterosexuals are to be 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 colored cocktails and talking about boys with their straight female mates."

While these decisions are clearly liberating (indeed, exciting), this article provides the first critical assessment of their impact on international refugee law as a whole. We suggest that to reach their preferred result, the Australian and UK courts ran roughshod over the duty to find a "well-founded fear" of future persecution; that they failed clearly to understand the real human rights costs of the enforced concealment that so-called "discreet" homosexuals face; and that by finding that the Convention's requirement to show that risk "for reasons of" a form of protected status was met when risk follows only from going to concerts, drinking cocktails, or engaging in "boy talk" the courts severed the established—and critically important—link between refugee law and non-discrimination norms.

We offer an alternative theory of how international refugee law can and should embrace the claims of sexual minorities who can avoid serious harm only by accepting self-repression. We believe that such claims should be assessed on the basis of the real, forward-looking risk of serious psychological harm that ensues in such circumstances. We also seek to open a discussion about just when risks that follow not from sexual orientation as such, but rather from actions vaguely (perhaps even stereotypically) associated with homosexuality can honestly be said to be threats "for reasons of" one's sexuality.