Urban bias shapes social perceptions about sexual minorities. Predominant cultural narratives geographically situate sexual minorities in urban gay communities, dictate the contours of how to be a modern gay person, and urge sexual minorities to “come out” and assimilate into gay communities and culture. This Article contests the urban presumption commonly applied to all sexual minorities and focuses specifically on how it affects rural sexual minorities, who remain largely invisible in the public discourse about sexuality and equality.

This Article makes two important contributions. First, by exposing urban bias, it opens a broader discussion of how law and society construct gay identity in class, race, and place exclusionary ways. The cultural prerogative to come out and into gay community denies sexual minorities the agency to negotiate their identities according to the circumstances that govern their lives, and subordinates aspects of identity centered around families, religion, and place-based communities of origin. Urban bias erases the most marginalized sexual minorities’ experiences from public discourse and places the burden on individuals to make positive change for themselves. The assumption that rural sexual minorities must move to the city both presumes autonomy of movement where none may exist and denies it where it does. The prevalent urban gay narrative reinforces the belief that homosexuality and rural America are incompatible, makes rural areas more threatening for those who remain, and inhibits legal and social solutions for helping rural sexual minorities live comfortably in their communities.

* Luke A. Boso

Law Teaching Fellow, Williams Institute, University of California at Los Angeles School of Law. I will always be grateful to the people and places that made me who I am today. Most of all, I thank my partner, Alexander Ruiz, who offered me unwavering love and support throughout this project. I especially appreciate the guidance, critiques, and mentoring I received from Scott Cummings and Russell Robinson. I also thank Michael Boucai, Devon Carbado, Cheryl Harris, Nan Hunter, Darren Lenard Hutchinson, Jerry Kang, Holning Lau, Christine Littleton, Anne Lofaso, Sheldon Lyke, Doug NeJaime, Jenny Pizer, Nancy Polikoff, Lisa Pruitt, Orly Rachmilovitz, and Brad Sears for their helpful comments, critiques, and suggestions. I received helpful feedback by presenting an earlier draft of this Article to the faculty of the Critical Race Studies program at UCLA School of Law, and I am thankful for that opportunity. Thanks to Eva Wood for her research assistance, and to Stephanie Plotin and the research staff of UCLA’s Hugh & Hazel Darling Law Library. Finally, I am deeply indebted to the Williams Institute, Brad Sears, and Richard Taylor for making this work possible.
Second, this Article draws attention to the legal dilemmas faced by a largely invisible population. Many rural sexual minorities lack even basic legal protections against discrimination on the basis of sexual orientation. The resulting legal vulnerability is often exacerbated by courts. Judges tend to take the factors and norms common to rural life into account only when approving the belief that sexual minorities do not belong in small towns. They ignore rural context when it may buttress sexual minorities’ claims to legal protections and access to justice. Both strains of legal analysis perpetuate discrimination and deny autonomy. This Article offers suggestions for how judges should take rural sexual minorities into account in order to maximize their ability to live free of oppression and control their own lives.

I. INTRODUCTION

Despite conventional wisdom, same-sex desire and self-identified gay, bisexual, and lesbian people exist and thrive outside of urban

---

1 I use several terms to describe rural people who are not strictly heterosexual—people who have same-sex desire, same-sex attraction, or engage in same-sex sex. I debated over the proper terminology to capture whom I mean to address, and the terms I chose reflect the imperfection inherent in classification: “sexual minorities,” “same-sex attraction,” “same-sex desire,” “same-sex sex,” “men who have sex with men (MSM),” and “women who have sex with women (WSW).” Many rural people identify as bisexual, lesbian, or gay—in which case I denote self-designation. But as this Article explains, many others do not so identify. I attempt
enclaves. Analysis of the latest U.S. Census data shows that same-sex couples are present in almost every county of every state. They live and work on farms in the Midwest and the Great Plains, in Appalachian coal-mining towns, in New England valleys and woodlands, in the deep South, in desert villages in the Southwest, and in small rural communities all across America. Many were born and raised rural, and others retreated to the countryside in search of a simpler life. Some long to “get out,” and others cannot imagine leaving home.

The mere existence of these seldom-studied people defies the cultural truism that anyone who has same-sex desire belongs in urban gay communities. Judith Halberstam describes the popular conflation of same-sex desire and urban place as a form of metronormativity: the “story of migration” from country to town where “closeted subjects ‘come out’ into an urban setting.” Kath Weston identifies the “Great Gay Migration” as the voyage from rural to urban in search of gay liberation and identity.

to use terminology sensitive to the tension between rural experiences and mainstream identity politics. I do not use the word “queer” to identify rural people since many would contest its use as applied to them. Further, I do not address transgender populations because their realities may differ from those who have same-sex desire, and few studies have examined those unique experiences in a rural setting.


For stories about MSM who grew up on farms in the American Midwest, see Will Fellows, Farm Boys: Lives of Gay Men from the Rural Midwest (1998). See also Jerry Lee Kramer, Bachelor Farmers and Spinsters: Gay and Lesbian Identities and Communities in Rural North Dakota, in Mapping Desire 200 (David Bell & Gill Valentine eds., 1995) for stories of self-identified lesbians’ experiences in rural farming country.


See generally, e.g., John Howard, Men Like That: A Southern Queer History (1999). Professor Howard details how rural same-sex attracted Southerners negotiate and express their sexuality under the watchful eyes of their communities.


This well-worn and frequently enacted narrative presumably allows for “the full expression of the sexual self in relation to a community” and culture of self-identified gays, lesbians, and bisexuals.\(^{11}\) Contemporary activists reproduce urban gay narratives by assuring youth that “It Gets Better,”\(^{12}\) a promise premised on the belief that coming out, being “openly gay,” and assimilating into an LGBT community are the key ingredients for happy lives.\(^{13}\) Often, the message is clear: come to the city where you can be who you truly are,\(^{14}\) and create for yourself a “life worth living.”\(^{15}\)

The persistent calling for sexual minorities to come out and integrate into gay communities signals that it gets better for those with the economic means to uproot from one community to another, the emotional detachment requisite to leave families and homes, and the social capital necessary for acceptance into gay communities. This narrative does not necessarily liberate poor people or people of color who find race and class hierarchies within gay communities.\(^{16}\) Nor does it liberate rural sexual minorities who embark on the Great Gay Migration and feel unsophisticated, backwards, and isolated by urban queer culture: “the sense of sexual outsiderness is often swapped for the outsiderness of being rural in the urban, of having to let go of heritage and homeland.”\(^{17}\)

Further excluded in this narrative are the many sexual minorities who either cannot or do not want to leave their homes and families of origin. Structural hurdles, such as limited educational opportunities and poverty, may make leaving impossible for rural sexual minorities who dream of escape. And for the many others who choose small-town life, the positive aspects of rural living may outweigh the imagined acceptance and freedom ostensibly available in the city. The assumption that rural sexual minorities must integrate into gay communities both presumes autonomy of

---

11 HABERSTAM, supra note 9, at 36.
13 Id.
14 See, e.g., Mike Bloomberg: It Gets Better, http://www.itgetsbetter.org/video/entry/2876/ (last visited Jan. 12, 2012). New York City mayor Bloomberg reaches out to youth: “We need you. New York has always been the place where anyone can go and be who they are, regardless of ethnicity, religion, gender, sexual identity.”
15 It Gets Better: Coming Out, Overcoming Bullying, and Creating A Life Worth Living (Dan Savage & Terry Miller eds., 2011).
17 David Bell, Cowboy Love, in COUNTRY BOYS: MASCULINITY AND RURAL LIFE 174 (Hugh Campbell, Michael Mayerfield Bell, & Margaret Finney eds., 2006) [hereinafter Bell, Cowboy Love].
movement where none may exist and denies it where it does. In turn, channeling sexual minorities into cities makes rural environments more threatening for those who remain.

Metronormativity—or society’s urban bias—is reflected in law. Sexual minorities are uniquely vulnerable in many small towns and rural areas. Social discrimination and limited economic opportunities leave them restricted in their ability to live freely and comfortably in their homes, and more rural than urban sexual minorities lack even basic legal protections against discrimination on the basis of sexual orientation. Judges, moreover, facilitate and perpetuate discrimination against rural sexual minorities. Even through seemingly pro-gay analysis, courts limit opportunities to participate in rural communities on one’s own terms.

This Article makes two central points. First, courts must combat discrimination against rural sexual minorities, not exacerbate it. Judges tend to invoke factors common to rural life as justifications for discrimination. But while they credit the belief that homosexuality is incompatible with small-town living, they ignore rural context when it may buttress sexual minorities’ claims to legal protections and access to justice. Both strains of legal analysis perpetuate discrimination, deny autonomy, and aggravate the vulnerability that rural sexual minorities experience in their communities.

For example, by crediting rural conservative sexual norms in family and employment disputes as justifications for discrimination, courts wrongly cast sexual minorities as outsiders and condition economic opportunities and full participation in family life on covering or hiding their sexuality. Conversely, by failing to appreciate how low population density, lack of anonymity, and the limited acceptance of sexual difference common in rural areas render sexual minorities vulnerable to societal discrimination, courts facilitate that discrimination by denying the privacy and constitutional protections necessary to live safely and securely in rural communities. Courts are therefore active participants in the social force that encourages sexual minorities to leave their rural homes if they want to live openly or evenly discretely as gay people.

Second, the predominant social script in which one must “come out” and assimilate into gay community and culture in order to have a life...

---

worth living is rooted in urban bias. Exposing metronormative assumptions about sexual minorities allows for a broader discussion of how law and society construct gay identity in class, race, and place exclusionary ways. The cultural prerogative to come out and into gay community and culture denies sexual minorities the agency to negotiate their identities according to the circumstances that govern their lives. Urban bias both erases the most marginalized sexual minorities’ experiences from public discourse and places the burden on individuals to make positive change for themselves. For rural sexual minorities, the accepted urban gay narrative reinforces the belief that homosexuality and rural America are incompatible, and erects a blockade that inhibits legal and social solutions for helping rural sexual minorities live autonomously in their communities. Sexual minorities’ access to justice in the American legal system cannot depend upon where one lives.

This Article draws attention to the legal dilemmas faced by a largely invisible population. To appreciate the unique experiences of this heterogeneous group, and to identify potential legal responses that might improve their lives, the Article begins in Part II with a brief discussion of what it means to be “rural” or from a “small town.” Part III then explains and contests the core tenets of urban bias.

With a focus on the judiciary, Part IV examines law’s role in the lives of rural sexual minorities. This Section demonstrates how courts facilitate discrimination against rural sexual minorities, and it urges judges to consider rural sexual minorities’ experiences in legal analysis. Section IV-A discusses employment and family law contexts where courts invoke norms common to rural life to justify societal discrimination. Section IV-B discusses courts’ analysis of LGB political power under the Equal Protection Clause, and it explains that, by taking rural sexual minorities’ experiences into account, judges are more likely to find that all LGB people

---

19 SAVAGE, supra note 15.
20 Focusing on individual solutions to sociocultural problems “pathologizes” and “re-victimizes” rural LGBT people. Because rural sexual minorities often cannot or do not want to leave their home environments, “change of their home communities must be pursued.” Carol A. Snively, Building Community-Based Alliances Between GLBTQQA Youth and Adults in Rural Settings, 16(3) J. GAY & LESBIAN SOC. SERVICES 99, 103 (2004).
21 Only one other legal article focuses specifically on rural sexual minorities. See Bud W. Jerke, Student Article, Queer Ruralism, 34 HARV. J. L. & GENDER 259 (2011). Jerke discusses metronormative assumptions regarding LGB identity, and focuses on judicial rhetoric where courts explicitly denote both (1) rural geographic setting or background and (2) homosexuality. He advocates for a form of rural blindness, suggesting that rural geography is often irrelevant. This Article significantly expands on Jerke’s work, particularly regarding urban bias in the law, but departs from it by identifying potential sites for legal intervention where courts can and should take rural context into consideration.
constitute a suspect or quasi-suspect class deserving of heightened judicial scrutiny. Section IV-C discusses evidence and argument about homosexuality specifically in rural court proceedings, and urges judges to critically analyze whether the introduction of evidence or argument about sexual orientation may result in unfair prejudice or impede access to justice. Section IV-D examines legal issues regarding sexual privacy, and cautions judges to appreciate that the blurred distinction between the rural “public” and the rural “private” should not render sexual minorities’ privacy rights meaningless.

The Article closes in Part V by calling for legislators, scholars, and gay rights activists to be more attuned to the experiences of rural sexual minorities, and to what former director of the National Gay and Lesbian Task Force, Urvashi Vaid, once called the “second gay America”—that is, the much larger gay America where “poor people live” and where rural people “live quiet lives far removed from the much-analyzed spectacle of urban gay communities.”

Though this Article focuses on the role of courts, legislative and policy interventions that provide social and economic safety nets are a much larger piece of the foundational work requisite for LGB security, safety, and autonomy in rural communities. This Article does not offer solutions to all problems plaguing sexual minorities who live in small towns, but it aims to draw attention to the needs of those who might not be in the position to do so themselves.

II. DEFINING “RURAL”

At first blush, the meaning of “rural” may seem obvious, but it is “actually very difficult to define precisely.” People understand rural by employing an array of factors, and what constitutes rural depends on the “experiences of the people who are doing the defining.” Social scientists argue against a single identifiable rural definition, and advocate instead for a pluralistic conception in which ruralities are understood as constructed social categories.

---

24 Comerford et al., supra note 5, at 419.
26 See, e.g., Scott Herring, Another Country: Queer Anti-Urbanism 13 (2010) (“Space and place are as much act and experience as they are dirt and rock, concrete and steel.”); Woods, supra note 23, at 11 (“The question of defining rurality hence becomes one of how
In a case involving the statutory interpretation of “rural” in a zoning context, the West Virginia Supreme Court demonstrated the concept’s fluidity:

[A] rural community is, by definition, completely unrelated to an urban or metropolitan area. . . . Thus, a “rural community” may be distinguished by its dominant character as a social and economic unit founded in rural, land-based interests. It is inhabited, in the main, by country people, who live a country life, and who engage in country pursuits. Its residents are removed from the immediacy of urban and suburban environs, and are not immediately tied to any city or urban area; they work, socialize and politick as an independent, integral community.27

Though vague and somewhat circular, the court’s characterization represents the complexity of rurality as something more than sheer population and geography. This Article similarly posits the rural as multifaceted.

In discussing the rural as a concept that has identifiable meaning, I am cautious to avoid essentializing rural people and places. Age, class, race, culture, and geographic region coalesce to ensure that there is no uniform rural experience. Being a sexual minority in the rural South might differ dramatically from a sexual minority’s experiences in a small town in New England, a farming community in the Midwest, or in a Native American community in the Southwest.28 Empirical and qualitative studies of rural areas nonetheless reveal key commonalities about the ways in which people construct themselves as being rural, understanding rurality as a state of mind.”); Paul Cloke, Conceptualizing Rurality, in THE HANDBOOK OF RURAL STUDIES 18, 18 (Paul Cloke, Terry Marsden, & Patrick Mooney eds., 2006) (“The rural stands both as a significant imaginative space, connected with all kinds of cultural meanings . . . .”); Gorman-Murray et al., supra note 32, at 1 (“The rural, then, is a symbolic lens for certain moral and cultural values which vary across space and time.”); Jo Little & Patricia Austin, Women and the Rural Idyll, 12(2) J. RURAL STUD. 101, 102 (1996) (describing the rural as “a world of social, moral, and cultural values as defined and understood by rural dwellers”); Gerald W. Creed & Barbara Ching, Recognizing Rusticity: Identity and the Power of Place, in KNOWING YOUR PLACE: RURAL IDENTITY AND CULTURAL IDENTITY 1, 12 (Barbara Ching & Gerald W. Creed, eds., 1997) [hereinafter Recognizing Rusticity] (“place identities are clearly linked to a particular kind of place, but even identities built upon the land are social constructions”).


28 “Even within the United States, of course the rural is far from homogenous – the West brings a very different country from the South, for example . . . .” David Bell, Homosexuals In the Heartland: Male Same-Sex Desire in the Rural United States, in COUNTRY VISIONS 178, 178-9 (Paul Cloke ed., 2003) [hereinafter Bell, Heartland].
which sexual minorities experience and think about their homes. The generalizations I present reflect what studies in diverse fields consistently show to be characteristic of many—but certainly not all—rural places, as well as real differences between rural and urban experiences.

There are several important dimensions of rurality that shape the discussion of how rural place affects sexual minorities’ lives. First, as a bedrock principle, the rural universally implicates population, space, and geography. Perhaps the most practical way to define rural communities is to think of them as geographically isolated areas with low population densities. The U.S. Census, for example, uses an intricate set of guidelines to classify urban and rural areas largely based on population density; several federal statutes likewise define rural areas according to these criteria. Such a definition hinges on objectively quantifiable physical space and demographic differences.

Yet there is no agreement on precisely how small or how far away from a major city a “small town” or rural community must be to qualify under these objective measures. In discussing rural places and small

---

Footnotes:

29 See, e.g., Pruitt, Rural Feminist Theory, supra note 18, at 424 & n.5 (deploying “rural” to describe primarily “sparsely populated areas,” and noting that “all rural areas share one common characteristic: relatively low population densities”); Comerford et al., supra note 5, at 419 (noting the size and population density of a community as a factor “in what constitutes a rural environment”); Debra Lyn Bassett, Ruralism, 88 IOWA L. REV. 273, 289-90 (2003) (to encapsulate a meaning of the rural that refers only to people living in especially small, isolated communities, Bassett defines rural as “communities of 2,500 or fewer people, and which are located at least fifty miles from a community of 20,000 or more”); Ken Deavers, What Is Rural?, 20(2) POL’Y STUD. J. 184, 185-86 (1992) (typically small-scale, low-density settlements located some physical distance from large urban centers); and GLENN V. FUGUITT ET AL., RURAL AND SMALL TOWN AMERICA 4 (1989) (small size and low settlement density).

30 Urban Area Criteria for the 2010 Census, 76 Fed. Reg. 53,029 (Aug. 24, 2011), http://www.census.gov/geo/www/ua/fedregv76n164.pdf. “The Census Bureau’s urban-rural classification is fundamentally a delineation of geographic areas . . . .” Id. at 53,030. Its basic definition of “urban” is “densely developed territory, encompassing residential, commercial, and other nonresidential urban land uses within which social and economic interactions occur.” Id. at 53,043. Rural is defined as “[t]erritories not defined as urban.” Id.

31 The federal government regularly classifies areas as “rural” based on (inconsistent) population numbers. See, e.g., 7 U.S.C.A. § 6612(3)(A) (West 2011) (limiting “rural communities” to those with a population of “not more than 10,000 individuals”); 12 U.S.C.A. 2128(f) (West 2011) (designating “rural areas” as “all territory of a State that is not within the outer boundary of any city or town having a population of more than 20,000 based on the latest decennial census of the United States”); 42 U.S.C.A. § 11501 (West 2011) (drawing the rural line at jurisdictions with fewer than 50,000 people). For a fuller discussion of how the federal government defines the rural, see Bassett, supra note 29, at 285-88.


32 See, e.g., FUGUITT ET AL, supra note 29, at 5 (What is small depends strictly on the viewpoint of the observer).
towns, this Article addresses only those places that are non-densely populated and significantly removed from large metropolitan areas. But because of the problems inherent in settling on seemingly arbitrary numbers, and because existing studies of rural sexual minorities vary widely on these measures, this Article does not delineate precise boundaries for what falls within or outside rurality’s scope.

To focus solely on quantifiable geographic or population-based factors, however, “reveal[s] little about the social . . . processes that shape urban and rural localities.” In addition to objective numerical measures, this Article also addresses social structures, communicative channels, cultural norms, and economic circumstances common to rural life.

Low population density “produces a high density of acquaintanceship;” people “know each other well and place more meaning on casual social interaction.” This lack of anonymity often reinforces cultural and ideological homogeneity produced, in part, by lack of internal ethnic diversity. The sense of community intimacy and identity made possible by low population density paired with an underlying homogeneity in cultures and beliefs leads to a rural social structure that “organize[s] around an appreciation for solidarity expressed through blending in.”

---

34 Woods, supra note 23, at 7.
37 Melanie D. Otis, Issues in Conducting Empirical Research With Lesbian and Gay People In Rural Settings, in HANDBOOK OF RESEARCH WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER POPULATIONS, 280, 283 (William Meezan & James I. Martin eds., 2009). See also, e.g., Diane Kholos Wysocki, “Growing Up Gay In Rural Nebraska” Or A Feminist Relocates to the Midwest, 4(3) SEXUALITY & CULTURE 57, 59 (2001). Describing her experience moving to Kearney, Nebraska and teaching at a local university, Wysocki notes that many of her students “had spent their entire lives in communities with very little diversity.” “Students often admitted to growing up in areas where everyone was like them: white, Christian, Republican, and heterosexual.” Id. Rural communities can, however, vary drastically from one another. See generally David L. Brown & Kai A. Schafft, Ethnic and Racial Minorities in Rural Areas, in RURAL PEOPLE AND COMMUNITIES IN THE 21ST CENTURY: RESILIENCE AND TRANSFORMATION 122 (2011) (discussing the geographic areas where rural minority populations are concentrated in the United States).
38 Sonya Salamon, From Hometown to Nontown: Rural Community Effects of Suburbanization, 68(1) RURAL SOC. 1, 10 (2003).
39 Otis, supra note 37, at 284.
community ethos that embraces solidarity and “fitting in” holds value, and purchases a sense of belonging that is central to acceptance and survival in rural life.

Without the ebb and flow of demographic and ideological change, rural areas tend to be more ideologically conservative than urban areas and hold more traditional values. Religious institutions play a primary role in small-town life, and social conservatism can wield enormous power in defining norms and expectations. Particularly with respect to sexuality, social norms and the community’s power to police them can dictate the parameters of acceptable desires, behaviors, and identity formation. Simply put, sexual difference is generally less accepted in rural areas than in urban.

41 Following a two-year field study in rural Appalachia, Mary Gray explains: “Rural communities . . . organize around an appreciation for solidarity expressed through blending in. Sameness is neither hard to come by nor much to ask for in a small town. But a semblance of sameness, particularly rooted in family connections, purchases something valued in rural communities: the sense of familiarity and belonging so central to structures of rural life.” Id.

42 Id.

43 See, e.g., Seth C. McKee, Rural Voters In Presidential Elections, 1992-2004, 5(2) FORUM 1, 10, 22 (2007) (data from voter exist polls taken between 1992 and 2004 shows that rural voters are far more socially conservative than are urban voters); Anna Greenberg & William Greener, Rural America Competitive: Bush Problems and Economic Stress Put Rural America “In Play” in 2008, 2007 GREENBERG QUINLAN ROSNER RES. 1 (finding that fifty percent of rural Americans are self-ascribed conservatives as compared to the national average of forty percent); see also Pruitt, Rural Feminist Theory, supra note 18, at 426 (suggesting that rural women’s lives are profoundly shaped by conservative views).

44 See, e.g., Anastasia R. Snyder & Diane K.McLaughlin, Female-Headed Families and Poverty In Rural America, 69(1) RURAL SOC. 127 (2004). “Historically, people in rural areas have held more traditional attitudes and values than their urban counterparts, and many rural residents retain the core rural ideals of independence, self-sufficiency, and community cohesion.” Id. at 129 (internal citation omitted).

45 Otis, supra note 37, at 283 (further noting that many rural areas, unlike most urban areas, lack access to secular social service providers); see also Howard, supra note 6, at 64 (describing the home, the school, and the church as the three “key institutions” of rural life).


47 See, e.g., Julia A. Puckett et al., Out in the Country: Rural Sexual Minority Mothers, 15(2) J. LESBIAN STUD. 176, 177 (2011) [hereinafter Pucket et al., Rural Sexual Minority Mothers] (summarizing findings showing that rural residents are, on average, more uncomfortable with LGB people, and are “more likely to believe that LGB people should not have the same rights as heterosexuals”); Vicki Lea Eldridge et al., Explaining Comfort with Homosexuality in Rural America, 51(2) J. HOMOSEXUALITY 39, 49 (2006) (respondents with rural backgrounds were more uncomfortable with homosexuality than those with urban backgrounds); Gregory M. Herek, Heterosexuals’ Attitudes Towards Bisexual Men and Women in the United States, 39(4) J. Sex Res. 264, 270 (2002) (results of a national telephone survey...
These facts limit the possibilities for—and tangible access to—
difference in lifestyles and cultures, powerfully distinguishing urban from
rural settings. Though it is tempting to presume that modern media and
advances in technology (especially online social networking) have diluted
social isolation and ideological homogeneity in rural areas, the notion that
the Internet and other forms of technology serve to connect all Americans
is nothing but a cruel myth to many rural dwellers, literally millions of
whom lack telephone service, much less Internet access. Moreover, for
those who are wired-in, “[i]ndividuals can be selective—watching, listening to, and reading those materials that are most in keeping with their prior values and beliefs.”

Some might object to these generalizations regarding rural
normative context, as well as to the purported differences between urban
and rural cultural experiences. In response, I offer the following
qualifications. First, it is true that some rural areas are socially progressive
and accepting of difference and openly LGB people. These small
communities, however, are not the norm. They tend to have highly
educated populations—as in small college towns, for example—or strong
metropolitan links.

Second, it is also true that many city and suburban neighborhoods
boast community solidarity similar to that seen in rural areas. And
certainly, social conservatism and public hostility toward sexual difference
is not unique to rural life. But the effects of intra-urban solidarity and anti-

showed that self-identified rural and small town residents “expressed significantly more negative attitudes than residents of larger urban centers and suburban locales”).

Yueh-Huang Huang & William P. Stewart, Rural Tourism Development: Shifting
Basis of Community Solidarity, 34(4) J. TRAVEL RES. 26, 30 (April 1996). (discussing the “close
personal ties and solidarity” that are considered critical to the maintenance of many rural
communities); see also T. LYNN SMITH, THE SOCIOLOGY OF RURAL LIFE 35-36 (1952) (“[T]he
rural world is characterized by a different type of social solidarity from the urban solidarity. The
former has a unity based on similarities, the union which results from common traits, objectives,
and sameness of experience . . . .”).

Deborah Bray Peterson et al., Issues in the Development of HIV-Preventive
Interventions for Men Who Have Sex With Men (MSM) in Rural Areas, 23(2) J. PRIMARY
PREVENTION 199, 200 (Winter 2002) [hereinafter Peterson et al., HIV-Preventative
Interventions] (internal citations omitted).

Fern K. Willits, Robert C. Bealer, & Donald M. Crides, Persistence of Rural/Urban

See generally Kenneth Kirkey & Ann Forsyth, Men in the Valley: Gay Male Life on
the Suburban-Rural Fringe, 17 J. RURAL STUD. 421 (2001). “[I]n some parts of the U.S., such
as the northeast, rural areas are largely integrated into nearby metropolitan areas.” Id. at 425.

See also Emily Kazyak, Disrupting Cultural Selves: Constructing Gay and Lesbian Identities in
Rural Areas, 34 QUAL. SOC. 561, 569 (2011) (greater acceptance of sexual diversity in rural
areas is linked to higher levels of education and income ).
gay negativity in metropolitan areas and their attendant suburbs are more nuanced than in rural communities. These factors “may be buffered by the mere existence of more tangible and stable gay resources” and the fact that anti-gay discourse does not dominate the public climate in ways comparable to in the rural. 53 Urbanites have access to, or at least familiarity with, a diversity of lifestyles, attitudes, and resources that rural dwellers simply lack. 54 This is a substantial distinction.

Finally, this Article examines measures of rurality that relate to class, economic opportunity, and access to resources. The nation’s poor overwhelmingly live in rural areas, and studies demonstrate that the poorest counties in the United States are rural. 55 Compared to city dwellers, rural people have lower incomes; fewer rural people attain white-collar employment; rural people have fewer educational opportunities; and significantly fewer rural people attend or even apply to college. 56 Moreover, the insufficiency of basic amenities and resources exacerbates the felt effects of endemic poverty. Americans living in rural communities “are three times as likely to live in substandard housing” than city-dwellers, 57 and have historically been disadvantaged regarding the quantity and quality of available public services such as fire and police protection; water, refuse, and sewage systems; organized recreational opportunities; shopping outlets; and religious facilities. 58 Even when quality services are available, many rural residents lack the transportation necessary to facilitate meaningful access. 59

54 City-dwellers possess a degree of exposure to diverse people and cultures by virtue of living in a more demographically diverse place. “Rural America as a whole is and has tended to be far less racially and ethnically diverse than America’s urban cities.” Brown & Schafft, supra note 37, at 141; see also Huang & Stewart, supra note 48, at 30.
55 J. Dennis Murray & Peter A. Keller, Psychology and Rural America: Current Status and Future Directions, 46(3) AM. PSYCHOLOGIST 220, 222 (March 1991). See generally Willits et al., supra note 51, at 71 (showing that more rural than urban families live in poverty).
56 See Fugitt et al., supra note 29, at 401; see also Bassett, supra note 29, at 306-316. Bassett argues that, even for rural natives who do obtain a college degree, “[o]vercoming these odds usually still places the rural dweller at the bottom of the heap when competing for the most competitive and desirable jobs, because the ‘qualifications’ of rural dwellers typically will include degrees from less prestigious state-supported institutions. And employers tend to regard applicants who graduated from elite institutions as more ‘qualified’ than those who graduated from non-elite, state-supported institutions.”
57 Murray & Keller, supra note 55, at 222 (internal citations omitted).
58 Willits et al., supra note 51, at 71.
59 Otis, supra note 37, at 283. See also Katherine Cason, Poverty In Rural America, in THE HIDDEN AMERICA, supra note 35, at 27 (noting that, in rural areas, “public transportation is rare,” and often the “only way for an individual to get around . . . is by personal transportation such as a vehicle or by sharing a ride with a friend”).
To fully understand the lives of sexual minorities in small towns, it is crucial to broadly spatial, demographic, cultural, and economic elements together.\footnote{Otis, supra note 37, at 287.}

III. CONTESTING URBAN BIAS

Urban bias shapes how law and society perceive sexual minorities. The tenets of metronormativity geographically situate gays, lesbians, and bisexuals in urban gay communities; dictate the cultural contours of how to be a modern gay person; and demand outness and open affiliation with LGB identity. These urban biases elide non-gay communities and sources of belonging, including families of origin, religion, and predominately straight small towns and rural places. They propel one’s sexual self to penultimate importance, and subordinate other, perhaps more central, aspects of identity. Critically, they mask the vulnerability and needs of those who fail to subscribe to urbanized norms.

By focusing on the disjuncture between rural life and stereotypical urban gay narratives, this Article makes two important contributions. First, it draws attention to the needs of an otherwise invisible population. Second, it demonstrates that the experiences of rural sexual minorities are similar to other sexual minorities who exist on the margins. Exposing and contesting urban biases therefore allows for a broader discussion of the ways in which law and society construct gay identity in class, race, and place exclusionary ways.

A. The Great Gay Migration

A popular narrative is lodged in the collective American psyche regarding sexual minorities. Someone who is born or raised in a small town feels different from her peers and begins to question her sexuality. Worried that she is “the only one”\footnote{One rural Pennsylvanian recalls: “I had what I’ve discovered since then is a very common syndrome. I very much had that feeling of ‘I’m the only one.’ I’ve heard a lot of people say that since then. Especially people who were not in a city where they could see other gay people around. . . . It’s like, ‘Gee, there’s no other gay people around me. I’ve never seen another gay person. I’ve got to be the only one on the face of the earth!’” Weston, supra note 10, at 261 (internal ellipses omitted). Despite widespread availability of the Internet, it remains true today that many rural sexual minorities grow up with no positive gay role models, and some youth may not even know that gay people exist. Socially conservatie families and churches in rural areas wield enormous power over the information to which youth have access.} with feelings of same-sex desire, she searches for others like her and discovers in America’s biggest cities entire
neighborhoods full of gay, lesbian, and bisexual people. Inevitably, she resolves to leave home and move to a gay-friendly city, like New York or San Francisco, where she will begin an openly gay life free of the oppression and isolation she felt in her hometown.62

Modern queer identities and communities have historical roots in urban growth, wartime dislocation, and American industrialization.63 As urban gay enclaves proliferated in the twentieth century, thousands of LGB people flocked to major urban areas in the United States in what Dr. Kath Weston calls the “Great Gay Migration.”64 Many sexual minorities embark on the Great Gay Migration because they believe that cities harbor tolerant attitudes towards sexual difference,65 that accepting gay communities will welcome them with open arms,66 and that the anonymity offered by city life will permit unfettered pursuit of a lesbian, gay, or bisexual identity.67 And as more sexual minorities take flight to urban gay spaces, opportunities for finding like-minded friends, suitable sexual partners, or a long-term romantic relationship increase for those who make cities their home.68 These factors contribute to the widely shared belief that cities are the refuge of gay people.69 In turn, scientists and scholars who study homosexuality and LGB populations have focused predominately on urban

62 See generally Kazyak, supra note 52, at 561-63 (2011) (describing as a cultural “stock character” the oppressed rural gay who flees to the city, finds a queer community, and becomes liberated).

63 For a rich historical accounting of the development of urban gay life prior to the 1960s, see generally George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World (1994).

64 See generally Weston, supra note 10.

65 See Stephen Clark, Progressive Federalism? A Gay Liberationist Perspective, 66 ALB. L. REV. 719 (2003) (the Great Gay Migration “bring lesbians and gay men to places where more tolerant attitudes make for a better quality of life”). Indeed, America’s cities offer greater legal and social protection for those who are openly LGB; cities such as New York, Los Angeles, San Francisco, and Washington D.C., all commonly perceived as socially progressive, offer an array of legal protections and recognitions for LGBT residents.

66 See Weston, supra note 10, at 253; Samuel A. Marcosson, Romer and the Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of their “First Line of Defense” In the Same-Sex Marriage Fight, 24 J. CONTEMP. L. 217, 230 (1998) (cities are “refuges where lesbians and gay men could find others like ourselves and find a somewhat safer existence”).


68 See Richard A. Posner, Sex and Reason 126 (1992) (reasoning that, as more homosexuals move to cities, cities become more attractive to other homosexuals due to the increasing size of the dating pool).

locales, further contributing to the urbanization of gay knowledge and perception.\textsuperscript{70}

As cities rose to prominence in modern gay narratives, a corollary belief surfaced and cemented: those with same-sex desire do not belong in small towns. Modern gay identities and communities owe much to urbanization, but same-sex desire is not—nor has it has ever been—confined to large cities. Yet society’s preoccupation with the urban has resulted in a lack of information about the experiences of sexual minorities who live in rural areas;\textsuperscript{71} what little information people assume to have is often premised on the cultural trope that homosexuality in small towns mirrors the violence and pain suffered by Matthew Shepard\textsuperscript{72} or as portrayed in \textit{Brokeback Mountain}.\textsuperscript{73} People often wonder why anyone would choose to endure life in a supposedly intolerant and even brutally violent place.\textsuperscript{74} The dissonance implicit in the question presumes autonomy of movement where none may exist and denies it where it does.

This Article does not discredit or disparage the experiences of those who have the desire and means to move from the country to the city in search of a better life. There is truth to the notion that cities can sometimes offer sexual minorities greater freedom and acceptance than they experience in their hometowns.\textsuperscript{75}

There are, however, real and important consequences to pervasive urban bias in law and society. First, the presumption that same-sex desire is best experienced and exercised in a city ignores urban narratives that end


\textsuperscript{71} See, \textit{e.g.}, Jo Little, \textit{Gender and Sexuality in Rural Communities}, in \textit{THE HANDBOOK OF RURAL STUDIES}, supra note 26, at 373 (it took until the mid-1990s for academics to challenge the “neglect of rural homosexuality”).

\textsuperscript{72} In October 1998, Matthew Shepard was tied to a fence, severely beaten, left unconscious, and ultimately died in rural Laramie, Wyoming. See \textit{generally JUDY SHEPARD, MY SON’S MURDER IN LARAMIE, AND A WORLD TRANSFORMED} (2009).

\textsuperscript{73} \textit{Brokeback Mountain} is a short story and popular 2005 movie that focus on the intimate relationship of two men living in the rural American west; it ends in tragedy when one of the men is depicted as beaten to death, presumably because of his sexuality.

\textsuperscript{74} See \textit{HALBERSTAM}, supra note 11, at 36-37 (“metronormativity” embodies the “story of migration from ‘country’ to ‘town,’” . . . a spatial narrative within which the subject moves to a place of tolerance after enduring life in a place of suspicion, persecution, and secrecy”); Jerke, supra note 21, at 270.

unhappily. The rural native who embarks on the Great Gay Migration may arrive to discover that she has little in common with “gay people,” feeling conspicuous or embarrassed because of her rural roots and provincial mannerisms. She might come to find that she abandoned her home and family for an accepting gay community that exists more in theory than reality, this is especially true for people of color who tend to place tremendous importance on families of origin and extended families both “as a means of social organization and child rearing” and as sites of solace and resistance against racial oppression in broader society. Accordingly, for those on the bottom of race, class, and place hierarchies, access to urban gay neighborhoods does not guarantee identification with other gay people. Instead, the promise of urban gay community and identity “is often compromised in the face of racism, Eurocentric aesthetic standards, and ultimately, new forms of marginality.” The disconnect between the gay imaginary and the reality of attempted assimilation into an urban gay community can also lead to tangible economic struggle and even homelessness. Because opportunities in rural communities are severely limited by a dearth of educational and economic resources, the rural person

---

76 See Weston, supra note 10, at 268-70.
77 See Eli Clare, Exile & Pride: Disability, Queerness, and Liberation 38 (2009) (describing her discomfort at urban LGBT social events, wondering whether she feels “conspicuous and embarrassed” because of her class, her rural roots, or a combination of both).
79 Hutchinson, Out Yet Unseen, supra note 16, at 592 (1997). Likewise, same-sex couples raising children are more likely to live where other couples, regardless of sexual orientation, are raising children. Id.
81 Weston, supra note 10, at 268-70.
82 Adam Isaiah Green, On the Horns of a Dilemma: Institutional Dimensions of the Sexual Career in a Sample of Middle-Class, Urban, Black, Gay Men, 37(5) J. BLACK STUD. 753, 764 (2007). Green goes on to explain that “experiences of racial marginality” complicate “integration into urban gay communities, mediating the potential psychological rewards of relocation and weakening . . . ties to gay community networks and resources.” Id. at 767.
83 Between thirty and forty percent of homeless youth in New York City, for example, identify as LGBT. See, e.g., Margot Adler, Young, Gay, and Homeless: Fighting for Resources, NPR (Nov. 20, 2011), http://www.npr.org/2011/11/20/142364493/young-gay-and-homeless-fighting-for-resources. Many of these homeless LGBT youth came to the city from their hometowns in hopes of greater acceptance and freedom, and, of course, many came after being kicked out of their homes. For personal narratives from queer youths who have lived on the streets, see generally KICKED OUT (Sassafras Lowrey, ed., 2010).
who wants to leave his or her community for better prospects may be uncompetitive in metropolitan markets saturated with better-trained workers and applicants.84

Second, in most migration narratives, “the rural is not only the space of dead-end lives, oppression, and surveillance. It is also a landscape emptied of gay people.”85 The presumption that gay people belong in cities obcludes the fact that sexual minorities exist in great numbers in rural communities and small towns. According to the Williams Institute at UCLA School of Law’s analysis of the 2010 Census data, approximately 64,000 cohabitating same-sex couples live in rural America (a figure grossly under-inclusive of all those who have same-sex sex or same-sex desire), representing roughly ten percent of all cohabitating same-sex couples in the country.86 Certainly, many of these rural sexual minorities may want to participate in the Great Gay Migration but simply lack the means to do so.87 Age, family obligations, and limited economic opportunities leave some with little choice in the matter “but to stay put and make do.”88 To migrate to a new location for enhanced quality of life generally reflects higher-than-average educational attainment as well as financial flexibility,89 both of which many rural areas disproportionately lack.90 Countless other rural sexual minorities, however, prefer small-town life.91

---

84 Cynthia B. Struthers & Janet L. Bokemeier, Myths and Realities of Raising Children and Creating Family Life in a Rural County, 21(1) J. FAM. ISSUES 17, 41 (January 2000).
85 Weston, supra note 10, at 265.
88 Gray, supra note 40, at 6.
89 See Kirkey & Forsyth, supra note 47, at 438 (“The mobility that allows people to migrate to a particular location based upon quality of life issues is generally reflective of a higher than average level of education, if not always income . . . .”).
90 Murray & Keller, supra note 55, at 222 (internal citations omitted); Bassett, supra note 29, at 303-04 (“Rural dwellers tend to have lower incomes than individuals living in urban areas. Moreover, for many rural dwellers, low wages trap even full-time workers into poverty.”).
91 Although rural areas are often crudely described as backwards, in the middle of nowhere, fly-over areas, and full of unsophisticated “rednecks, hicks, clods, and bigots,” not all sexual minorities share such unfavorable views. Clare, supra note 77, at 40. A long-time gay resident of rural Nebraska, for example, had this to say about his home: “Despite what people in New York or Los Angeles might say, I don’t consider Nebraska to be the middle of nowhere. I
Whether by choice or necessity, many of those who remain in small towns lack legal protection against discrimination on the basis of sexual orientation, and legal recognitions or benefits for same-sex couples are rare. Thus, not only are rural sexual minorities vulnerable due to the cultural and economic factors common to small-town life, they are vulnerable under the law. This vulnerability is rarely addressed, yet it denies opportunities to live autonomously and express sexual identity on one’s own terms. The metronormative narrative fixing sexual minorities into presumably welcoming urban gay neighborhoods is omnipresent, rendering it easily accessible by both pro- and anti-gay people. Gay rights activists eager to herald social progress and change can look to increasing gay visibility and acceptance in metropolitan areas; it is easy to forget that there is a much greater nonmetropolitan world in which sexual minorities exist largely untouched by gay liberation, like a “microcosm of pre-Stonewall America.” Meanwhile, the person uncomfortable with homosexuality in his or her small town can justify discrimination by accepting as true the conventional wisdom that homosexuality is incompatible with small-town life, and by presuming that sexual minorities can simply exile themselves to the city, where they truly belong.

think the Midwest is a wonderful place to be.” Fellows, supra note 3, at 205. Similarly, a woman from small-town Texas recalls her coming-out experience: “People asked me when I was moving to San Francisco, and I told them I don’t want to move to San Francisco. . . . I’m a small-town girl at heart. I want to . . . enjoy small-town living and Southern hospitality and all of the things about rural life that have such meaning to me.” Julie Cart & Edith Stanley, Rural Life Can Be Lonely, and Risky, for Gays, L.A. TIMES, Mar. 14, 1999. And in a study of fifteen elder lesbians living in rural Vermont, many viewed their communities as a “great place to be,” citing low population, face-to-face interactions, and interpersonal networks among the characteristics making Vermont so hospitable. Comerford et al., supra note 5, at 427.


94 See Kramer, supra note 3, at 206.

95 For a colorfully homophobic manifestation of the belief that small-towns are not places in which same-sex desires and acts belong, see Samantha Santa Maria, ‘I’m Gay . . . I Carry My Gun’, CLARION-LEDGER, Aug. 13, 2003, at E1. In response to the Supreme Court’s decision in Lawrence v. Texas, striking down laws prohibiting sodomy between two consenting adults, Gulfport, Mississippi city councilman, Billy Hewes, initiated a resolution condemning the Court. He proclaimed Gulfport to be a “straight town,” and called the Lawrence opinion “the worst thing to happen since they took prayer out of school.”
By exposing and contesting urban bias, this Article discredits the notion that sexual minorities “belong in cities in a way that they do not belong in . . . small towns or the rural recesses of the American hinterlands.”

It is important to recognize the positive aspects of small-town living in order to validate the affirming space in rural communities that many sexual minorities carve out for themselves. Solutions to discrimination and inequality should not require people to abandon the aspects of rural life that many hold dear. Discussing the criticism and mockery aimed at Wanda Henderson for her attempt to establish a lesbian music festival in rural Mississippi, Dr. Bonnie Morris offers a poignant response to those who question whether sexual minorities belong in rural places:

[T]hese are her people; this is her environment—and why should a woman-loving identity make refugees of individuals, require all activists to relocate to communities like San Francisco?

. . . Not only is the idea of uprooting every lesbian feminist a slap in the face to folk with kinship ties and emotional history in their own land, it is impossible for those women who lack the discretionary funds to leave town.

In numerous studies, rural sexual minorities routinely identify families as among the “best” things about their lives. Rural inhabitants

96 Colin R. Johnson, Homosexuals In Unexpected Places?, 48(2) AM. STUD. 5, 5 (Summer 2007).

97 Studies show that rural sexual minorities often report high rates of satisfaction with their communities, citing among the best aspects a deep connection to friends and families of origin, access to and a love for nature and open spaces, religion and supportive local churches, and the close-knit feeling of community in which people know each other well. Oswald & Culton, supra note 53, at 74 (discussing the “best” aspects of rural living); see also, e.g., Tracy J. Cohn & Sarah L. Hastings, Special Issue: Rural Lesbian Life: Narratives of Community, Commitment, and Coping, 15 J. LESBIAN STUD. 141, 142 (2011) [hereinafter Cohn & Hastings, Rural Lesbian Life] (sexual minorities widely report “self-acceptance, close relationships, and high quality of life” as the primary benefits of rural living).

98 Bonnie J. Morris, Women’s Festivals on the Front Lines, in OUT IN THE SOUTH 57 (Carlos Lee Barney Dews & Carolyn Leste Law eds., 2001). Wanda Henderson founded the Gulf Coast Women’s Festival in 1989 after losing custody of her children to her former husband; she started the community as a clean and sober alternative to the bar scene and to do political work. Id. at 56-7.

99 See, e.g., Oswald & Culton, supra note 53, at 74; See Robert L. Corber, Queer Regionalism, 11(2) AM. LITERARY HIST. 391, 394 (Summer 1999) (noting the importance of
tend to rely on their families for social, emotional, and financial support, and families of origin represent important safety nets in rural communities where resources and opportunities are limited. Similarly, rural religious institutions can have “an important impact on gay people,” and sometimes offer social, emotional, and spiritual support for sexual minorities who might otherwise feel isolated. Rural sexual minorities also pinpoint an intimate sense of community as a positive attribute of rural living. Many feel that they can create more personal and less transient friendships than they might develop in a large city. In one study of gay men in a small town, respondents explained that the familiarity with others in town is what they liked most. “There is something reassuring . . . about seeing everyone in everyday life: at the stores, driving down the streets. . . . There is a sense among people of coming to know the others well.” Jill, a self-identified lesbian living in Alabama, explains why she likes her small town: “Folks ride by and wave at you when you are sitting on your porch. I like being involved in the community things here. It is easy for me to do that in a small town.”

Rural sexual minorities also share a love of nature and the land, “and activities particular to the area, such as farming and hunting.” Some feel that “larger geographic distances between neighbors” offers greater freedom to go about their lives than in cities. Some own farms or acreage and scoff at the idea of giving up spatial freedom to be in more

---

100 See Anthony R. D’Augelli & Mary M. Hart, **Gay Women, Men, and Families in Rural Settings: Toward the Development of Helping Communities**, 15(1) AM. J. COMMUNITY PSYCHOL. 79, 85 (1987) [hereinafter D’Augelli & Hart, **Gay Women, Men, and Families**] (“Rural residents ordinarily rely on families, kin, and close friends to solve their problems, seldom turning to professionals . . . .”).

101 **Gray, supra** note 40, at 128. Sarah, a self-identified lesbian youth living in rural Kentucky, noted that she “didn’t want to escape from rural Kentucky,” in part because of her close ties with family. *Id.* Moreover, she, as well as most of the other rural youth who participated in the study, had no funds to leave their hometowns, “and no educational training or particularly marketable job skills to make moving anything but a frightening prospect.” *Id.*

102 See James Donald Smith, **Working With Larger Systems: Rural Lesbians and Gays**, 7(3) J. GAY & LESBIAN SOC. SERVICES 13, 18 (1997) [hereinafter Smith, **Working With Larger Systems**].

103 **Otis, supra** note 37, at 283.

104 David Knapp Whittier, **Race and Gay Community in Southern Town**, in **OUT IN THE SOUTH, supra** note 98, at 89-90 [hereinafter Whittier, **Race and Gay Community**].

105 *Id.*

106 **Miller, supra** note 4, at 21.

107 **Struthers & Bokemeier, supra** note 84, at 20.

108 Comerford et al., **supra** note 5, at 426.
heavily populated areas. Others feel that the “beauty of the natural environment” contributes to their physical and emotional wellbeing, and some even feel a “spiritual” connection to the land. Emmett, a Russell County, Alabama native, and a self-identified gay black man, had this to say about his rural home:

I feel it’s comfortable here because . . . there’s not a very big population. You got less people to really deal with and less congestion. I sometimes think—that just the smell of the air puts me in a certain mood. ‘Cause sometimes the freshness can be so nice and so loving and peaceful that there’s just nowhere else to be.

Finally, although most rural areas lack organized LGB communities and provide little or no access to LGB-specific gathering places, informal support networks for sexual minorities can develop. These informal networks cultivate a tight-knit sense of community among members. They are generally unknown to heterosexuals, and are difficult to permeate unless one has an “in.” Yet for those who can find them, important “car-facilitated networks across space” stand in for “place-based communities,” and provide support, advice, and a “source of profound reassurance.” For rural women who face pronounced forms of

---

109 Oswald & Culton, supra note 53, at 74.
111 Fellows, supra note 3, at 166.
112 Joseph Beam, Emmett’s Story: Russell County, Alabama, in OUT IN THE SOUTH, supra note 98, at 13. Emmett’s story confirms that not all southern, black, self-identified gay men live in or want to live in cities. When prodded about whether he had ever considered moving to Atlanta, Georgia, Emmett responded, “I was afraid of Atlanta.” Id. at 9.
113 See, e.g., Oswald & Culton, supra note 53, at 75; Cody & Welch, supra note 5, at 66.
114 See Anthony R. D’Augelli, Cathy Collins, & Mary M. Hart, Social Support Patterns of Lesbian Women in a Rural Helping Network, 8(1) J. RURAL COMM. PSYCH. 12, 14 (1987) [hereinafter D’Augelli et al., Rural Helping Network]. See also D’Augelli & Hart, Gay Women, Men, and Families, supra note 100, at 88. The study discusses a group of self-identified lesbian women in rural Pennsylvania, and notes that they meet in each other’s homes, meeting locations are not publicized, and the meeting-places change periodically. “Many small towns have such groups, and they are not generally known to the nongay community.” Id.
115 Bell, Heartland, supra note 28, at 187.
isolation and a lack of women-specific services, informal helping networks are critical forms of support, especially for those raising children.117

Contrary to urban bias, therefore, sexual minorities belong in rural communities every bit as much as their heterosexual friends, families, and neighbors. Eloquently put by Judith Halberstam, “[t]he rural queer may be attracted to the small town for precisely those reasons that make it seem unthinkable to the urban queer.”118

B. Urban Gay Culture

In his landmark Perry v. Schwarzenegger decision, Judge Vaughn Walker aptly noted: “Well known stereotypes about gay men and lesbians include a belief that gays and lesbians are affluent, self-absorbed and incapable of forming long-term intimate relationships.”119 These and other stereotypes about sexual minorities and their “lifestyles” 120 reflect persistent assumptions about homosexuality and gay identity that operate to perpetuate discrimination against all people who have same-sex desire. But while these assumptions are indeed “well-known,” their embedded urban implications are less frequently acknowledged.

Cities have a seemingly magnetic force on sexual minorities. They are positioned in the gay imaginary as utopias of sexual freedom, places where one is within reach of endless possibilities, pleasures, and an accepting gay culture. The urban metropolis has thus come to symbolize “the epicenter of contemporary queer life.”121 Accordingly, the city is not only conceptualized as where to be, but also the cultural referent for how to perform gay sexual identity.

Urban cultural markers, at least as they exist in popular imagination, include several key tenets. First, depictions of urban gay culture project an image of socioeconomic freedom and access to gay events and leisure locales. Both pro- and anti-gay representations situate LGB people around sites of consumerism, where they spend lots of time

---

117 Id.; see also Comerford, et al., supra note 5, at 420-23 (discussing the “critical” nature of informal helping networks for rural elderly lesbians); Jo Little, Gender Relations in Rural Areas: the Importance of Women’s Domestic Role, 3(4) J. RURAL STUD. 335, 388 (1987) (noting the special importance of informal helping networks for women with children).
118 HALBERSTAM, supra note 11, at 43.
119 704 F.Supp.2d 921, 982-83 (N.D. Cal. 2010).
121 HERRING, supra note 26, at 4.
and money in gay bars, dance clubs, bookstores, coffeehouses, theaters, gyms, and other shops. These gay-specific amenities, while perhaps common to city life, are not typically found in rural or poor areas. Society also frequently broadcasts the most exaggerated exemplars of gay pride organizations and activities as inextricably entwined with gay life; these depictions likewise signal distinctly urban markers of gay identity. Moreover, urbanized gay stereotypes embody an aesthetic that evokes a brand of refinement and sophistication not typically allied with perceptions of rural communities. Professor Scott Herring describes this stereotype of gay subculture as one in which urban queers value trendy tastes in art, fashion, and entertainment, and exude “a cosmopolitanism that discriminates [against] anybody or any cultural object that does not take urbanity as its point of origin, its point of departure, or its point of arrival.” This aesthetic can repel poor, working class, and rural sexual minorities who are not part of urban queer culture.

In these ways, gay culture and identity are effectively constructed by perceived differences from, and prestige over, rural people and places.

---

122 See, e.g., Jeff Maskovsky, Do We All “Reek of Commodity”? Consumption and the Erasure of Poverty In Lesbian and Gay Studies, in OUT IN THEORY: THE EMERGENCE OF LESBIAN AND GAY ANTHROPOLOGY 264, 266-68 (Ellen Lewin & William L. Leap eds., 2002) (the growth of presumably liberating gay communities in cities, fueled by urban-based consumerism, has come at the expense of poor sexual minorities); Mark Bartholomew, Advertising and Social Identity, 58 BUFF. L. REV. 931 (2010) (today, gay identity is constituted by a consumption of advertised products more than by shared sexuality); David M. Skover & Kellye Y. Testy, Lesbigay Identity as Commodity, 90 CAL. L. REV. 223 (2002) (describing the impact of commercialism on the construction of LGB identities).


124 See, e.g., Weston, supra note 10, at 262. “From pride parades to persons with AIDS, representations of a gay subject are almost always situated in an urban setting.” See also Kazyak, supra note 52, at 565 (many rural sexual minorities understand participating in activism, pride groups, “or doing drag as connected to an urban-based gay identity”).


126 See HERRING, supra note 26, at 15-16.

127 The 1970s and ‘80s, for example, witnessed a flourish of back-to-nature separatist gay and lesbian movements take root in rural America—many of which persist today—due to anti-urban sentiment. See generally David J. Bell, Insignificant Others: Lesbian and Gay Geographies, 23(4) AREA 323, 325 (1991) (groups of lesbians and gay men have established rural communes “embracing separatist anti-materialist and anti-urban values”); Mark Thompson, This Gay Tribe: A Brief History of Fairies, in GAY SPIRIT: MYTH AND MEANING 260-78 (Mark Thompson ed., 1987) (charting the development of a separatist gay men’s movement in the rural U.S., outflowing from dissatisfaction with urban-based gay political, cultural, and social scenes).
Second, stereotypes of urban gay culture stress a proclivity towards sexual variety in practices and partners, especially for men. In fact, some prominent queer activists champion unrestrained sex as authentically queer. For example, in arguing for a queer ethic that embodies sex and sexual variety, prominent queer activist and scholar Michael Warner embraces the urban cultural prerogative: “The sexual culture of New York City serves people around the world, even if only as the distant reference point of queer kids growing up in North Carolina or Idaho, who know that somewhere things are different.”

Finally, urban gay culture is thought to deemphasize, and in many cases disown, traditional conceptions of family and religion. The narrative that places rural sexual minorities on a direct route to the nearest city presumes either severed ties with families of origin or interaction only from a distance. Many self-identified LGB people feel that familial connectedness in small towns leads to surveillance and prevents one from living “as Nature demands.” Conventional wisdom likewise presumes that to be homosexual or bisexual requires a shedding of religious identity. Yet many sexual minorities perceive urban gay culture as dismissive or discriminatory towards those who emphasize religious or traditional family values as key to their understanding of self, which can disproportionately affect sexual minorities of color and those who have rural or working class roots.

Urbanized stereotypes of gay, lesbian, and bisexual people are pervasive, and they narrowly define the contours of gay identity. Even

128 See id. at 15-16.
129 See, e.g., Michael Warner, The Trouble With Normal: Sex, Politics, and the Ethics of Queer Life 41-52 (1999) (criticizing elements of the queer movement that decline to identify sex as the central component of self as engaging in the “politics of shame”).
130 Id. at 190 (emphasis in original).
131 “In New York one can live as Nature demands without setting every one’s tongue wagging. In his hometown he had needed to conform at all times to the social conventions of the community, for he had been subject to the constant (albeit normally benign and unselfconscious) surveillance of his family and neighbors.” Chauncey, supra note 63, at 131.
132 Vaid, supra note 22, at 17 (“Gay and lesbian people are not thought of as people of faith . . . .”).
135 See, e.g., Herring, supra note 123, at 348-54 (2007) (discussing The Advocate as confirming a “white middle-class cosmopolitanism that marked norms of cultural and economic
for those sexual minorities who defy the Great Gay Migration, society presumes that urban gay culture represents and is embraced by most people who have same-sex sex or desire. These urban cultural biases can have legal consequences. Rhetoric in judicial decisions underscores the law’s internalization of ubiquitous societal stereotypes of sexual minorities, and courts’ language choices and their descriptions of LGB people can reveal common attitudes and presumptions which inevitably infiltrate legal decision-making.

For example, courts may embrace the fiction that sexual minorities are typically class-privileged and have access to urbanized amenities. In Mockeviciene v. U.S. Attorney General, a case involving a sexual orientation-based asylum petition, the Eleventh Circuit Court of Appeals upheld an Immigration Judge’s ruling that a woman’s claim to lesbian identity was not credible. The IJ disbelieved the applicant because, among other reasons, she neither had a lesbian partner nor “joined any groups” that involved lesbian activities during the four years she had been in the U.S., and because she failed to produce any witnesses or credible documentation validating her lesbianism. Indeed, courts typically require asylum applications to prove homosexuality via visible cultural markers of gay identity, often demonstrated by membership in LGBT organizations, subscriptions to LGBT publications, and participation in gay pride events. Many scholars have criticized courts’ analyses in asylum jurisprudence, arguing that judges base their perceptions of LGB identities

---

136 Scott Herring describes this as an assimilation demand for “compulsory urbanization.” See HERRING, supra note 26, at 6, 14.
138 In Chicoine v. Chicoine, 479 N.W.2d 891, 896 (S.D. 1992), for example, Justice Henderson raises the specter of the urbane homosexual by describing a lesbian mother’s “homosexuality conduct” as “leaving the home,” “not attending the children,” “spending money in bars,” and spending money on a partner.
139 237 Fed. Appx. 569 (11th Cir. 2007).
140 Id. at 572.
141 See Dan Bilefsky, Gays Seeking Asylum in U.S. Encounter A New Hurdle, N.Y. TIMES, Jan. 18, 2011, at A19 (noting that judges and immigration officials require an applicant’s homosexuality to be socially visible).
on “racialized stereotypes and white gay norms,” and “certain traits stereotypically associated with gay identity in American culture.” In the same ways that these conceptions are racially exclusive and rely on cultural stereotypes, they also embody urban bias. Even the seemingly private act of ordering an LGBT magazine in the mail, for instance, may be too risky in a rural atmosphere lacking anonymity.

Similarly, in Marlow v. Marlow, the Indiana Court of Appeals held that a restriction in a marital dissolution decree prohibiting a father from taking his children to activities that promoted “the homosexual lifestyle” was not unconstitutionally vague or overbroad. The court found, based on the father’s testimony, “a specific intent by him to orient the children to a gay lifestyle . . . by taking them to gay religious services and ceremonies, gay social events and gay artistic performances.” The court found the contours of a “homosexual lifestyle” to be so clear that it did not need to explain what precisely makes a social gathering or artistic performance “gay.” This legal outcome required the father to persistently second-guess when and how his social life might cross a line sufficient to jeopardize his relationship with his children.

Importantly, judicial rhetoric, as demonstrated in these exemplars, reflects the societal presumption that there is a discernible gay way of

---

143 See generally Morgan, supra note 142.

144 See generally, e.g., Sarah Hinger, Finding the Fundamental: Shaping Identity In Gender and Sexual Orientation Based Asylum Claims, 19 COLUMN. J. GENDER & L. 367, 387-88 (2010) (courts establish “whether the particular asylum applicant is truly a member of the social group” by policing “the boundaries of the particular social group, most often through appeal to certain traits stereotypically associated with gay identity in American culture”).

145 For the purposes of this Article, the focus on the law governing refugees and the right to seek political asylum is on proving “membership of a particular social group” necessary to make a successful asylum claim. See Matter of Toboso-Alfonso, 20 I. & N. Dec. 819 (BIA 1990) (being “homosexual” qualifies as membership in a “particular social group.”) (designated as precedent by Attorney General Janet Reno in 1994 per Attorney General Order No. 1895-94). But in assessing the credibility of a claim that a person faces persecution on the basis of sexual orientation if returned to their country of origin, judges quite literally define the contours of what counts as gay. See generally Melanie A. Conroy, Real Bias: How Real ID’s Credibility and Corroboration Requirements Impair Sexual Minority Asylum Applicants, 24 BERKELEY J. GENDER L. & JUST. 1 (2009) (explaining the challenges asylum applicants face when attempting to prove the truth of their sexual orientation); Jenni Millank, ‘The Ring of Truth’: A Case Study of Credibility Assessment In Particular Social Group Refugee Determinations, 21 INT’L J. REFUGEE L. 1 (2009) (describing the problematic nature of credibility assessments given the gulfs between the experiences and cultural vantage points of applicants and adjudicators).

146 McCarthy, supra note 70, at 91.


148 Id. at 736.

being apart from self-identification, same-sex desire, or same-sex sex. In cases involving the most marginalized sexual minorities, judges may incorrectly presume that these individuals have access to sites common to urban gay culture (gay bars, gay-oriented social events, and gay-specific art), have disposable income to spend at these urban amenities, and organize and congregate around a visible politics of sexuality. As discussed below in Part IV, judges may deploy these presumptions to justify societal discrimination or ignore vulnerability.

By internalizing urban bias, judges may also find it easier to accept the belief that sexual minorities, and particularly MSM, are self-absorbed, promiscuous, and detached from family and religious life. Courts’ belief that these stereotypes are true can have disastrous consequences for efforts to end discrimination against LGB people. In State v. Walsh, for example, which involved a pre-Lawrence v. Texas challenge to Missouri’s anti-sodomy statute that prohibited “deviant sexual intercourse between persons of the same sex,” the Missouri Supreme Court held that the statute was rationally related to the state’s objective “of implementing and promoting public morality and public health.” Discussing the public health risks purportedly inherent in same-sex sexual intercourse, the court stated that it did not need to defer “to medical literature” to “suggest, for example, that there might rationally be health ramifications to anal intercourse and/or oral-genital sex.” Instead, the Court cited to a dated pre-HIV/AIDS study describing the ostentatious sexual practices of a select group of self-identified gay men living in San Francisco, hardly an

---

150 See, e.g., Morison v. Sadler, 821 N.E.2d 15 (In. Ct. App. 2005) (implicitly reasoning that gay and lesbian parents are wealthy given the great expense of in vitro fertilization and adoption—the methods by which, according to the court, most gays and lesbians become parents). See also Courtney Megan Cahill, The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage, 64 WASH & LEE L. REV. 393, 448 (2007) (noting that the Sadler court assumed that same-sex couples “possess an abundance of resources, financial and otherwise, which allow them to engage in responsible procreation”).

151 713 S.W.2d 508 (Mo. 1986) (en banc).


153 713 S.W.2d at 509.

154 Id. at 512.

155 Id.

156 “Almost one-half of the white homosexual males (WHMs) and one-third of the black homosexual males (BHMs) said that they had had at least five hundred different sexual partners during the course of their homosexual careers. Another third of the WHMs and a quarter of the BHMs reported having had between one hundred and five hundred partners.” Id. at 512 n.4 (citing A. BELL & M. WEINBERG, HOMOSEXUALITIES: A DIVERSITY AMONG MEN AND WOMEN 27 (1978)). The researchers stated that they consciously chose a large urban setting in which to conduct their study. They required a place where “local homophile organizations and certain key individuals” supported the idea of the study, where there would be a “large number of
accurate representation of all MSM, and found it reasonable for the State of Missouri to determine that “the general promiscuity characteristic of the homosexual lifestyle made such acts among homosexuals particularly deserving of regulation, thus rationally distinguishing such acts within a heterosexual context.”

The stereotype of sexual minorities as non-committal and sexually reckless is harmful to all LGB people, and, as Walsh demonstrates, has historically justified the criminalization of those who have sex to express same-sex love, affection, and erotic desire. The urban “sex as lifestyle” assumption frequently deems and reduces gay identities and relationships to “fisting and fucking.”

But to depict all sexual minorities as embodying sexual stereotypes thought to represent urban gay communities also overlooks the way in which religion and traditional values regarding family, relationships, and sex centrally operate for many sexual minorities. Particularly in small communities and communities of color, the church may serve as the primary institution for recreation, social congregation, and economic support. For sexual minorities who hold traditional beliefs about relationships and morality, they may find that their connection to a local church reinforces the value they place on monogamy and “a committed long-term relationship with a single life partner.” For others, religious gatherings may even be opportunities to meet and develop relationships with other same-sex interested people.

The urbanized stereotype that sexual minorities spend their days in gay bars and in bed can make it even more difficult for rural sexual

different sources from which potential respondents could be drawn,” and where the “the community life-style” would “enhance the possibility of a successful conclusion of the study.”

713 S.W.2d at 512-13.

Fajer, supra note 169, at 532 (Gay sexuality is perceived as “all-encompassing, obsessive, and completely divorced from love, long-term relationships, and family . . . .”).


See HOWARD, supra note 6, at 49-50, 230-31 (especially in the South, churches were the most important institution for people of color). Metronormative assumptions that deem religion incompatible with homosexuality means that sexual minorities often find themselves caught between mainstream LGB culture and dominant religious subcultures in their communities. See Krista McQueeney, “We Are God’s Children, Y’All:” Race, Gender, and Sexuality in Lesbian-and Gay-Affirming Congregations, 56(1) SOC. PROBS. 151, 152 (2009).

HOWARD, supra note 6, at 109.

Id. at 50-52. I grew up in a small community in West Virginia and was heavily involved in a local church. Weekend church getaways and church summer camps were among the only opportunities I had to socialize alone with another male in whom I was romantically interested. And, when we could share a private room together during religious events, these were also among the only opportunities we had to be sexually intimate.
minorities to find acceptance in churches and communities already scrupulous about homosexuality. For rural sexual minorities, this can limit the ability to engage with their community and receive the emotional and financial support they may need. Importantly, in small towns, where sexual minorities are inevitably more visible than in urban areas, the urban queer tenet of sexual gratification creates additional pressure to surmount those stereotypes lest courts and communities perceive lesbian and gay parents as “self-absorbed and incapable of forming long-term intimate relationships,” reckless, and unfit to be parents.  

C. LGB Identification and “Coming Out”

Many LGBT youth can’t picture what their lives might be like as openly gay adults. They can’t imagine a future for themselves. So let’s show them what our lives are like, let’s show them what the future may hold in store for them.

These words are featured prominently at the top of the website for the “It Gets Better” project. The project advertises as its essential aim to encourage young sexual minorities to “come out” and assume an identity as an “openly gay” person. Discussing the impetus for the project, Dan Savage quips as if in the role of a bully, “You can’t talk to the kids we’re still torturing, the LGBT teenagers being assaulted emotionally, physically, and spiritually in the same cities, schools, and churches you escaped from.” And in the inaugural “It Gets Better” video, Savage and his husband, Terry Miller, tell us what their openly gay lives are like. Savage recounts how the couple first met while at a gay bar, the (expensive) process of adopting his son, and his memories of “going to Paris for the first time as a family” and of the ski trips they have taken together. Towards the end of the video, Savage offers as encouragement, “one day you will find your community.”

164 Perhaps rural judges might be more inclined than their urban counterparts to tediously scrutinize an LGB parent who is before the court in a family law matter. The glaring exposure of openly LGB people or same-sex partnered in rural areas, coupled with urban stereotypes that paint sexual minorities as promiscuous and detached from families, makes rural sexual minorities easy targets in the courtroom.
In American culture, people who experience same-sex desire or engage in same-sex sex are expected to self-identify as lesbian, gay, or bisexual and come out to the world. This presumably enables them to live “truthfully and openly,” and leads to greater happiness. To some, “coming out,” or telling others that they are gay, is one of the “central events” in sexual minorities’ lives today. “Gay activists push for people to be open, out and known,” arguing that visibility is imperative to change people’s hearts and minds. And indeed, LGBT social movement activism has historically been contingent on the existence of a cohesive, visible community and its group consciousness and resistance to oppression. Collectively, sexual minorities would not be where they are today if not for pioneers and visible activists who worked to fight for rights and liberties while simultaneously combating the disgust and stereotypes that shaped and continue to shape society’s understandings of their lives.

But when society urges others to self-identify and come out, it must be careful not to presume to know what a person thinks or feels; nor can it presume that publicly embracing a non-heterosexual identity is always in a person’s best interest or will lead to any greater truth. Though the “It Gets Better” project is a valuable resource, especially for isolated sexual minorities who might not otherwise know that others like them exist, it confirms pre-existing beliefs about sexual identity. Contrary to what the project suggests, creating a “life worth living” does not necessarily require one to be “openly gay” and integrate into queer communities. Many factors—including place, race, and class—drastically affect the calculus of self-identification and sexual expression.

---

169 See, e.g., Marc A. Fajer, Can Two Real Men Eat Quiche Together?: Storytelling, Gender-Role Stereotypes, and Legal Protection For Lesbian and Gay Men, 46 U. MIAMI L. REV. 511, 520 (1992). Contra Hutchinson, Out Yet Unseen, supra note 16, at 603 (arguing that Fajer’s characterization “blurs race and class differences”). Professor Hutchinson argues that people who are race and class-subordinate experience many forms of societal oppression, and “can likely point to other, perhaps more ‘central’ and ‘traumatic’ experiences in their ‘gay lives’—such as racial discrimination and economic deprivation.” Id.
170 Smith, Working With Larger Systems, supra note 102, at 18.
171 V A ID, supra note 22, at 33.
173 See, e.g., Darrell G. Yarbrough, Gay Adolescents in Rural Areas: Experiences and Coping Strategies, 8(2) J. HUM. BEHAV. SOC. ENV’TS 129, 141 (2003) (in a study of rural gay youth in Texas, “participants who were not out in high school reported fewer negative experiences”).
174 SAVAGE, supra note 15.
Far removed from urban gay communities and culture, “rural non-heterosexuals . . . [do] not necessarily position sexuality as the definitive characteristic of self.”

Instead, “the rural context allows for different acts, practices, performances, and identifications.” For example, some rural sexual minorities might consider cultural or occupational identities, like “redneck,” “hillbilly” or “farmer,” to be more salient to their identity than sexual orientation.

Others have deep genealogical roots, and their identities are more entwined with familial heritage and place than sexuality. Where faith plays a key role in community cohesion, one’s spirituality can constitute a moral identity that has currency with friends and neighbors. And for people of color, racial identity may be what matters most; sexual minorities of color may seek solidarity not with other lesbians and gay men but with their racial communities, “privileging race over other identities.”

Though we all have multiple identities and make choices about when, where, and to whom we reveal different parts of ourselves, “[i]n a place where one’s self is constructed publicly—at least under the watchful eye of the town’s gossips—asserting one’s sexuality at every opportunity can easily negate, or minimize, other part’s of one’s identity.”

Rural sexual minorities who come out, or tell others that they are gay, tend to be seen only through the prism of sexual orientation regardless of how significant or insignificant sexuality is to the individual’s identity. Rural people who have same-sex desire or same-sex sex may therefore reject

---

175 Angelia R. Wilson, *Getting Your Kicks on Route 66!: Stories of Gay and Lesbian Life in Rural America, c. 1950-1970s*, in DE-CENTERING SEXUALITIES, supra note 185, at 210 [hereinafter Wilson, *Route 66*].

176 HALBERSTAM, supra note 11, at 44.

177 Wilson, *Route 66*, supra note 175, at 211. Iconography from country music demonstrates this point well. For a playful modern example, see Gretchen Wilson, *Redneck Woman*, http://www.youtube.com/watch?v=82dDnv9zELs (last visited Mar. 29, 2012) (“Cause I’m a redneck woman, I ain’t no high class broad, I’m just a product of my raising, I say, ‘hey ya’ll’ and ‘yee-haw.’”).

178 Lisa R. Pruitt, *How You Gonna’ Keep Her Down on the Farm . . .*, 78 UMKC L. REV. 1085 (2010) (describing how, because of the long-reaching roots her family has in a community and geographic area in rural Arkansas, a significant component of her identity continues to be “grounded in place” even though she long ago left her rural home); Kazyak, supra note 52, at 564 (rural LGBs might perceive the “rural” facet of identity as more important than sexuality).

179 McQueeny, supra note 160, at 156 (many rural sexual minorities have relied on their religious identities since childhood “as evidence that they were good people”).

180 Id. at 158. Commenting on the delicate balancing of identities necessary in rural areas, one young sexual minority recalls that he had to choose between being Black and being labeled as “the gay guy.” Gray, supra note 40, at 132. “I don’t think I could have handled being rejected by other black kids,” he states; “Being black was more important to me.” Id.

181 Wilson, *Route 66*, supra note 175, at 211.
LGB identities, and expressions of sexual orientation can “be very different from that of their urban counterparts.” In fact, “the split between homosexual activity and homosexual identity . . . is a major feature of nonmetropolitan homosexualities.” Further, because many rural sexual minorities are oblivious to the markers presumed to signal gay identity, or are unable to tangibly access gay communities and amenities, they simply decline to self-identity as LGB because they feel excluded by indicia of gay culture.

Many small-town people, of course, do self-identify as lesbian, gay, or bisexual. But mere self-identification should not mandate that one come out and be open or explicit about their sexuality. As Russell Robinson notes, “Whenever we talk about coming out, we should ask, ‘Coming out to what?’” Does a community of welcoming lesbians, gay men, and bisexuals exist for a particular individual given that person’s identity and the norms of their environment? If not, might coming out be self-destructive or even dangerous?

182 Id.
184 Kramer, supra note 3, at 210. Professor Will Fellows reflects: “The gay-identity package, in terms of being out and open about [your sexuality] in your everyday life, is something that just won’t work well in most rural communities . . . . Rural communities have this very strong value of fitting in, not setting oneself apart in any particular way.” Jeffrey A. Roberts, Ex-Farm Boy Tells of Rural Gay Lives Small Towns Meant Life In the Closet, DENVER POST, May 28, 1996, at B04.
185 See William J. Spurlin, Remapping Same-Sex Desire: Queer Writing and Culture in the American Heartland, in DE-CENTERING SEXUALITIES: POLITICS AND REPRESENTATIONS BEYOND THE METROPOLIS 183 (Richard Phillips, Diane Watt, & David Shuttleton eds., 2000), (discussing the “dissatisfaction” than many sexual minorities in non-urban parts of the country express towards LGBT people in coastal cities due to their “narrow image of what constitutes a queer identity”); see generally EDMUND WHITE, STATES OF DESIRE: TRAVELS IN GAY AMERICA 155-194 (1991). Rural people who experience same-sex desire or have same-sex sex are less likely than urban people to identify under a politicized LGB rubric; they “often actively deny the label ‘homosexual,’ let alone ‘gay’ or ‘lesbian.’” David Bell & Gill Valentine, Queer Country: Rural Lesbian and Gay Lives, 11(2) J. RURAL STUD. 113, 116 (1995). Tom Rygh—born, raised, and remaining in rural Wisconsin—describes his life as an MSM in the following way: “Even though I’m living in a predominately straight rural community, I feel very comfortable with my sexuality. And in some ways I feel freer out here, in terms of being my own person. I’m not sure how much I identify with the gay mainstream, whatever that is.” FELLOWS, supra note 3, at 182.
187 Id.
188 VAID, supra note 22, at 33 (articulating an exception to the “coming out” imperative if one lives in an “extremely dangerous” situation where “to come out might be self-destructive”).
In reality, the cohesive, visible gay communities from which activism and social change spring are largely urban phenomena. In big cities, it is possible to assume anonymity simply by walking a few blocks from one’s neighborhood. Likewise, in suburbs, the temporary anonymity offered by an adjacent metropolitan area is not too far out of reach. The anonymity commensurate with higher population density means that urban and suburban sexual minorities are more likely to be connected to a gay community than are rural residents and have more freedom to form openly LGB identities.

Conversely, most rural areas have few LGB resources and low concentrations of self-identified gay men and lesbians. The concept of “gay community”—understood as a cohesive, physically accessible community of people formed around a politics of visible LGBT identities—lacks tangible meaning. Even informal networks may be invisible due to fears of discovery. There may be no locally known role models to counter societal stereotypes about LGB people, no LGB-specific gathering places or tangible communities to look to for support, and little information available about LGB people and their lives to promote gay-affirming identities. It may make little practical sense for one to declare an avowed allegiance to a foreign gay community in places where one may not know any self-identified LGB people, where the nearest

---

190 Peterson et al., HIV-Preventative Interventions, supra note 49, at 2.
191 HOWARD, supra note 6, at 15.
192 See D’Augelli & Hart, Gay Women, Men, and Families, supra note 100, at 82. “The gay community is invisible to all but the most diligent searcher, and even within the identifiable social or sexual marketplaces, many self-identified homosexuals limit personal exchanges,” Kramer, supra note 3, at 209. See also Cohn & Hastings, Rural Lesbian Life, supra note 97, at 143 (“lack of a discernible community [is] one of the most frequently cited disadvantages”).
193 See Kramer, supra note 3, at 211 (the lack of accurate information about homosexuality and positive LGB role models hampers the ability to counter stereotypes).
194 In a study of lesbian-identified women living in rural Pennsylvania, all participants were concerned about the lack of space for sexual minorities; participants found it difficult to develop connections to an organized community in their hometowns. Yost & Chmielewski, supra note 46, at 160.
195 See D’Augelli & Hart, Gay Women, Men, and Families, supra note 100, at 90 (the invisibility of LGB people and their families and the lack of supportive networks impede positive identify-formation); McCarthy, supra note 70, at 90 (there is a “complete lack of information about homosexuality in rural areas”). “Perhaps the greatest difference between metropolitan and nonmetropolitan social environments lies in the availability and accuracy of locally obtainable information about homosexuals and homosexuality, and how this greater deficit affects the identity formation process of local gay men and lesbian women.” Kramer, supra note 3, at 208.
gay bar or bookstore may be hundreds of miles away, and where traditional values may dictate community norms.

Rural sexual minorities must therefore carefully negotiate their sexual selves. Some may simply remain closeted, particularly those whose rural identities “are too precious and too foundational to risk.” Though often denounced by gay activists as a symbol of shame, the closet can serve as a location of resistance against widespread rural oppression. Especially for rural or deeply religious sexual minorities, the closet can facilitate pride, albeit in secret, in the face of hostile social environments that otherwise deem homosexuality shameful.

Many others deploy the “public secret” as a strategy different from that of “coming out” expected by mainstream LGB activists. The public secret allows one to live a gay life, perhaps even be in a same-sex relationship, as long as that person does not discuss their sexual identity or engage in overt same-sex intimacy or other markers of gay identity (particularly “in-your-face” activism). The public secret operates as an unspoken transactional bargain between sexual minorities and their communities; it permits sexual minorities to participate in community life provided that the community-at-large is not forced to actively acknowledge homosexuality. The breach of this bargain does not result in a balanced set of circumstances—a sexual minority stands to lose a great deal more than the community in which he or she lives. When rural LGB people come out, it is common for others to avoid associating publicly with them to thwart insinuations of homosexuality by association. Emotional and

196 McCarthy, supra note 70, at 92.
197 ERIBON, supra note 69, at 49 (noting that gay activists often forget that the closet, for some, is a “space of freedom and a way—[perhaps] the only way—of resisting” dominant modes of heterosexual being).
198 Id.
199 See generally R. Bruce Brasell, Greetings From Out Here: Southern Lesbians and Gays Bear Witness to the Public Secret, in OUT IN THE SOUTH, supra note 98, at 151 (explaining the “public secret” as an identity negotiation strategy employed by LGB southerners).
200 I credit Nan Hunter for introducing me to the idea that the “public secret” can be characterized as a transactional bargain rather than a form of expression.
201 Kazyan, supra note 52, at 573 (“the close-knit atmosphere of small towns facilitates an implicit recognition of sexual identity, yet one that is not necessarily explicitly talked about” or explicitly recognized).
202 Romona Faith Oswald & Brian P. Masciadrelli, Generative Ritual Among Nonmetropolitan Lesbians and Gay Men: Promoting Social Inclusion, 70 J. MARRIAGE & FAM. 1060, 1069 (2008) (rural LG people are accepted in the broader community “as long as they did not bring attention to their sexuality”).
203 Snively, supra note 20, at 101.
economic loss follows. Public hostility towards open homosexuality can instill in sexual minorities a fear of violence and personal attacks.

Put simply, unlike in urban areas, “[i]n a small town or rural county, being ‘out’ to some may mean being ‘out’ to the entire town.” Given the traditional sexual climate and the fact that “most families know one another and share conservative values,” the high value placed on fitting in, and the limited economic opportunities in most small towns, coming out may be a practical impossibility for some. Interdependence is a fact of rural life, and good relationships with friends and neighbors are especially important for the most vulnerable sexual minorities in these communities. Typically, only those “with a certain degree of social and economic privilege will have a greater opportunity to live openly gay or lesbian lives,” and, for rural people, “the politics of LGBT visibility do not provide greater access to unequivocal pleasures of acceptance” but instead can place their very survival in jeopardy.

IV. TAKING RURAL SEXUAL MINORITIES INTO ACCOUNT

We as a society know very little about the lives of rural and small-town people who experience same-sex desire. The law reflects this ignorance, and therefore impedes the recognition that rural sexual minorities exist and have unique experiences and legal needs. The law, of

---

204 Williams et al., Rural Frontier State, supra note 36, at 50 (in a study of rural sexual minorities in Wyoming, the “most often mentioned form of social hostility was an enforced silence surrounding the issue of homosexuality”).

205 Id. at 48-50 (describing the heightened threat of anti-gay violence in rural areas).

206 McCarthy, supra note 70, at 83.


208 See, e.g., D’Augelli, Lesbian Women, supra note 116, at 127 (“Women with access to few resources in their rural settings may find it impossible to consider alienating their parents without alternative resources.”).

209 See, e.g., Comerford et al., supra note 5, at 432 (noting the importance of sexual privacy for vulnerable elder and disabled lesbians).


211 See, e.g., Oswald & Culton, supra note 53, at 75 (rural LG respondents “attested that survival within this climate meant downplaying or completely hiding their sexual orientation”). Though mainstream activists push for sexual minorities to be open and known, negotiating sexual identity less overtly in rural areas can be “a means for survival or a way of coping with non-acceptance, discrimination, oppression or sometimes actual physical or psychological violence.” Smith, Working With Larger Systems, supra note 102, at 18.
course, is multi-faceted, and its inattention to rural realities manifests on many planes. The predominant legal focus of this Article, however, is on the judiciary, and I focus on courts for two reasons. First, judicial decision-making can powerfully affect sexual minorities’ access to justice in the communities in which they live. Second, local legislative solutions may be far off in small towns and states that are hostile to sexual difference. To fully address rural sexual minorities’ disempowerment requires the attention of gay rights activists as well as legislative and policy changes, but I reserve detailed discussion of those strategies for another article.

Though by no means an exhaustive legal survey, this Section highlights a variety of legal areas where rural sexual minorities’ realities should bear on legal doctrine and analysis. As Lisa Pruitt suggests, attention to place “adds texture and value by making room for explicit consideration of regional identities, cultures, and economies, with their attendant structures of inequality.”

Judges (and, by extension, lawyers) should therefore consider how rural context could operate to “perpetuate disadvantage, inequality, and oppression.”

A. Rural Norms Should Not Justify Discrimination

Courts rarely acknowledge sexual minorities as valuable rural citizens who belong in their communities no less than heterosexuals. Accordingly, they fail to consider how rural context might impede sexual minorities’ access to justice. Instead, they tend to recognize the rural only when its norms comport with the belief that homosexuality is incompatible with small-town life; they use rural context against sexual minorities to relegate them as outsiders while ignoring the economic and emotional dependence many have on their communities. Courts are ignorant of the practical realities that shape rural sexual minorities’ lives, and they are therefore part of the societal force that pushes sexual

---

213 Pruitt, Rural Justice, supra note 18, at 389-90; see also Jerke, supra note 21, at 304-05 (“Judges would benefit greatly by taking a more nuanced approach when considering rural queer litigants who appear before them . . ..”).

214 Pruitt, Rural Justice, supra note 18, at 391.

215 Contra Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009) (noting that the twelve petitioners seeking the right to marry in Iowa are from six communities across the state, and outlining the contributing role each plays in his or her community and the commonalities they share with all Iowans). This case is a rare example of a court positively, albeit implicitly, acknowledging sexual minorities as members of small, rural communities.

216 For a discussion of at least three contexts in which rural place may be relevant to sexual minorities’ legal claims, see infra Part IV-B.

217 See Pruitt, Rural Feminist Theory, supra note 18, at 426 (explaining that the law’s urban presumption and bias harms rural women).
minorities to leave their homes in search of accepting gay communities to live openly or even discretely as gay people.

One realm where courts frequently use rural context against sexual minorities is with respect to children in family law. When a parent is openly (or presumed to be) LGB in a small town, judges invoke the conservative or close-knit context to “protect” children, marginalizing families headed by homosexual or bisexual parents. Specifically, in cases involving custody, visitation, and adoption, courts expressly use a child’s presumed social condemnation in her rural community by virtue of having a lesbian, gay, or bisexual parent as a factor in denying or limiting parental rights.218

The cases that follow illustrate how courts employ rural context to stymie opportunity and autonomy, forcing sexual minorities to compromise aspects of themselves for the presumed good of their rural communities. Perhaps the most explicit representation is S.E.G. v. R.A.G, where the Missouri Court of Appeals removed four minor children from a lesbian mother’s custody.219 The court explained: “Union, Missouri is a small, conservative community with a population of about 5,500. Homosexuality is not openly accepted or widespread. We wish to protect the children from peer pressure, teasing, and possible ostracizing they may encounter as a result of the ‘alternative life style’ their mother has chosen.”220 The Court further admonished the mother for “inviting acknowledgment” of her sexuality by both her children and the community,221 failing to consider that the lack of anonymity commensurate with rural life may necessarily call one’s sexual orientation into question and “invite” acknowledgement from the community.

Even mere suspicion of homosexuality may support limiting parental rights. In Bowen v. Bowen, the Mississippi Supreme Court

---

218 This is true despite Palmore v. Sidoti, 466 U.S. 429, 433-34 (1984), where the Supreme Court held that a child’s exposure to potential societal prejudice against interracial couples is a constitutionally impermissible factor in the adjudication of parental rights. Several courts have failed to recognize parallels in the case of societal prejudice against same-sex couples and have flatly rejected the argument that Palmore applies in this circumstance. See, e.g., Marlow v. Marlow, 702 N.E.2d 733 (Ind. Ct. App. 1998) (“Clearly, the facts of this case are distinguishable from those in Palmore because the visitation restrictions were not based on a private bias. Rather, the restrictions were based on the children’s best interests.”); S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (“Palmore involved an interracial marriage where the mother was seeking custody of her child in her own interracial home. We do not agree that Palmore applies to the situation at hand. Homosexuals are not offered the constitutional protection that race” has been afforded.).

219 735 S.W.2d 164.

220 Id. at 166.

221 Id.
affirmed a chancellor’s decision to award custody of a fifteen-year-old boy to his mother, while awarding custody of the boy’s eleven-year-old brother to his father. “Rumors and speculation were rampant in the Raleigh and Cohay, Mississippi, communities” that the mother, due to her close relationship with a known lesbian, was also a lesbian. The chancellor found that the mother’s apparent lesbian relationship had subjected the younger child to continued cruel and hurtful taunts from other children in their small community, and accordingly found it better for the younger child to live with his heterosexual father. For the “known lesbian” in this case, the court’s holding exemplifies the social forces that lead to rural sexual minorities’ endemic feelings of isolation and loneliness. Community-wide disapproval of homosexuality and the presumption that one is gay-by-association act as a deterrent for those who might otherwise associate with openly LGB people, in turn making it harder for people to both self-identify and form meaningful relationships.

Similarly, in *McGriff v. McGriff*, the Idaho Supreme Court affirmed a lower court’s decision granting legal and physical custody of the parties’ children to a heterosexual mother, permitting a gay father visitation provided that he not reside in the same house with a male partner during the visitation. In reaching its decision, the court evokes the community solidarity common in small towns to limit the father’s parenting rights: the father’s “choice of lifestyle should not be minimized in light of the conservative culture and values of the community in which the parties and children reside.”

Importantly, by using rural norms to justify discrimination against sexual minority parents in the name of children’s best interests, courts discount the realities of rural sexual minorities’ lives. While it is true that rural communities are generally less accepting of difference than are urban communities, metronormative stereotypes about who sexual minorities are fuel these higher rural rates of anti-gay sentiment. As discussed in Sections

---

222 688 So.2d 1374 (Miss. 1997)
224 668 So.2d at 1376.
225 Id. at 1381-82.
226 See, e.g., D’Augelli et al., *Rural MSM*, supra note 183, at 2 (noting the “common experience” of isolation and lack of networking opportunities). Kate Black & Marc A. Rhorer, *Out in the Mountains: Exploring Lesbian and Gay Lives, in OUT IN THE SOUTH*, supra note 98, at 17. In a study of self-identified Appalachian lesbians and gay men, all respondents reported feelings of isolation, many stating that they did not know that other gays and lesbians existed.
228 Id.
III and IV-B above, however, urban assumptions do not accurately reflect rural sexual minorities' experiences, nor are rural sexual minorities fundamentally different from their heterosexual peers. In fact, conservative communities and heterosexual norms comprise the very ingredients that result in the birth of children to LGB parents. Many small towns, far removed from urban gay communities and symbols of gay identity, contain few or no positive gay-identified role models and share traditional values regarding sexuality; the lack of a visible reference group and the perceived need to assimilate leads many with same-sex desire to heterosexual partnering. Acknowledging their homosexuality or partnering with a person of the same-sex may come much later in life than for those in urban areas.

Contrary to stereotypical urban narratives, rural lesbian, gay, and bisexual parents are not “self-absorbed and incapable of forming long-term intimate relationships.” They are often intimately involved in community activities, attend religious services, and place great significance on family life. These are profoundly traditional values wholly commensurate with life in conservative rural places.

In evaluating children’s best interests, therefore, courts must not presume that homosexuality is incompatible with rural life. It is not in a child’s best interest for a court to deny a meaningful relationship with an LGB parent based solely on the basis that the community in which they live may be averse to sexual difference. To find otherwise ignores the fact that thousands of same-sex couples are successfully raising children in rural areas in the United States, that sexual minorities can and do find meaningful belonging in rural communities, and that the traditional values of family and faith are not uniquely heterosexual characteristics. The popular presumption that homosexuality is, at root, about unbridled and non-committal sex and a leisure lifestyle discounts sexual minorities who, like their straight friends and neighbors, have found a romantic partner with whom they want to be monogamously coupled and be intimately involved in family life.

Invoking the conservative environment common in many rural places as a rationale for limiting parental rights serves only to irrationally justify discrimination against sexual minority parents, not to protect children. These courts invoke small communities’ conservative sexual

\[229\] D’Augelli et al., Rural MSM, supra note 183 (many rural MSM are in heterosexual partnerships); Puckett et al., Rural Sexual Minority Mothers, supra note 47, at 181-82.

\[230\] Puckett et al., Rural Sexual Minority Mothers, supra note 47, at 181-82.

norms to require that parents “cover” their sexuality. They deny sexual minority parents the autonomy to negotiate and express their identity as they choose, allowing them to both be involved in a same-sex relationship (or even have known LGB friends) and fully participate in the lives of their children in their communities only if they maintain an outward heterosexual persona. While many rural sexual minorities employ this type of public secret as an alternative to coming out and being visibly gay, to render it a legal mandate strips sexual minorities of choice in how to construct families and participate in society.

Though not explicitly articulated, the analytical thread running through these decisions further suggests that those who live openly, or even discretely, as LGB parents should do so elsewhere—move to a more tolerant place, such as a big city, where homosexuality is more “accepted or widespread.” These courts affirm the fraught relationship between rural norms and visible manifestations of sexual difference as a basis for unfavorable treatment. The deference to community norms in this context reflects the law’s urban bias, and it ignores the fact that thousands of rural sexual minorities may have no meaningful alternatives for either community belonging or sexual expression. These citizens’ ingrained economic and emotional dependence on rural communities may mean that moving to a more tolerant place is impossible, and it imposes a heavy burden on those whose identity and life is intrinsically tied to rural place. Courts therefore perpetuate discrimination by conditioning the opportunity to participate meaningfully in society on either (1) uprooting and leaving

---

232 See Kenji Yoshino, Covering, 111 YALE L.J. 769, 837 (2002). “Covering permits an individual not only to be gay, but also to say that she is gay. All covering requires is that the individual modulate her conduct to make her difference easy for those around her to disattend her known stigmatized trait.”

233 735 S.W.2d at 165.

234 See Gary J. Gates, Family Formation and Raising Children Among Same-Sex Couples, FF51 NAT’L COUNCIL FAM. REL. F3 (Winter 2011) [hereinafter Gates, Family Formation], available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf (“Geographically, same-sex couples are most likely to have children in many of the most socially conservative parts of the country. . . . [S]ame-sex parenting is more common in the South, where more than 26% of same-sex couples are raising children, than in more socially liberal regions like New England (24%) or the Pacific states (21%).”).
their friends, families, and homes, which may be impossible; or (2) denying or covering the sexual aspect of self and identity.

Employment is another context where courts have used the power of conservative rural community norms against sexual minorities. In *Endsley v. Naes*, for example, the Saline County Sheriff’s Department fired plaintiff after “rumors began to circulate . . . that plaintiff and another female road patrol deputy . . . were homosexuals.” The court noted that members of the community were aware of the rumors, and the defendants admitted that “plaintiff was discharged to quell rumors . . . that plaintiff was engaged in a homosexual relationship with another female road patrol deputy.” The court found defendants’ concerns to be reasonable, explaining that defendants “acted to protect the public image of the Department and to maintain close working relationships internally and externally with the community.” Thus, because of the community’s disapproval of homosexuality, the Department’s request that Endsley resign was “legitimate” and “non-discriminatory.”

The *Endsley* court is callous to the dearth of jobs in rural areas, particularly for rural sexual minorities. By crediting community sexual mores and preferences as a “legitimate” basis for terminating Endsley’s employment, it exacerbates the already fraught economic situation facing all rural dwellers, and leaves sexual minorities at the mercy of benevolent employers—a particularly tenuous position for both employer and employee where small, deeply conservative communities can wield

---

235 Gates, *Family Formation*, supra note 234, at F3 (noting that childbearing among same-sex couples is substantially more common for those with low levels of education, and same-sex couples raising children are economically disadvantaged compared to their heterosexual counterparts).

236 For others cases in which conservative place-based norms affected legal analysis, see, for example, *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (internal quotation marks and citation omitted) (“And, we shall not overlook the mother’s [lesbian] relationship . . . , and the environment in which the child would be raised if custody is awarded the mother. We have previously said that living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the social condemnation attached to such an arrangement, which will inevitably afflict the child’s relationships with its peers and with the community at large.”); and *Matter of Adoption of Charles B.*, 1988 WL 119937, *1* (Ohio Ct. App., Mar. 28, 1990), overruled by 552 N.E.2d 884 (Ohio 1990) (among the first high court cases explicitly approving the adoption of a minor child by an openly gay person). The Ohio Court of Appeals reasoned, “As a matter of law, it is not in the best interest of a seven (7) year old male child to be placed for adoption into the home of a pair of adult male homosexual lovers. It will be impossible for the child to pass as the natural child of the adoptive ‘family’ or to adapt to the community by quietly blending in free from controversy and stigma.” *Id.*


238 *Id.* at 1035, 1037.

239 *Id.* at 1038.

240 *Id.* at 1037.
economic boycott power. This court therefore participates in the social discourse that leads to the exile of sexual minorities into cities by validating the rural community’s tacit restrictions on asserting sexual difference. Presumably, Endsley could both work for the government and be involved in a same-sex relationship if she lived in an urban environment where anonymity and more tolerant sexual attitudes are less likely to make sexuality an issue that concerns either the community or employers.

Though the facts in *Endsley* occurred almost twenty-five years ago, the case represents a social and legal reality that remains unchanged for many. As of August 2011, twenty-nine states lack laws that prohibit discrimination on the basis of actual or perceived sexual orientation, 241 and no federal law offers such protection. Today, if a privately employed sexual minority is fired from a job due to his or her sexual orientation, and that person lives in a jurisdiction without employment anti-discrimination protections, he or she may have no legal remedy. 242 And though public employers’ actions are limited by state and federal constitutions, most courts apply mere “rational basis” review to claims of sexual orientation discrimination in the employment context. 243 For these courts, an employer’s deference to rural community standards, as in *Endsley*, may be considered rational and legitimate. 244

Imagine a scenario where a rural public employer fires a suspected homosexual employee. The employer argues that it fired the employee because the employee (or the community’s information grapevine) made

---


242 See, e.g., Williams v. Waffle House, 2010 WL4512819 (M.D. La., Nov. 2, 2010) (dismissing a complaint brought by a pro se plaintiff alleging that he was fired due to rumors that he had sex with his male supervisor). The court found that Williams’s discrimination claims were not on the basis of his sex but were, instead, based “upon the fact that his employer questioned him as to whether he is gay and perceived him as being gay.” Id. at *3. Thus, the claim against his private employer was not cognizable under state or federal law.

243 Many cases have held that, at minimum, the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution require that government classification on the basis of sexual orientation in the employment context must be rationally related to a legitimate government interest. For an annotated guide, see Robin Cheryl Miller, *Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on the Basis of Gay, Lesbian, or Bisexual Orientation or Conduct*, 96 A.L.R.5th 391 (2002).

244 But contra, e.g., Weaver v. Nebo School Dist., 29 F.Supp.2d 1279 (D. Utah 1998) (“If the community’s perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity, it is necessarily irrational and . . . provides no legitimate support for the School District’s decisions.”); Glover v. Williamsburg Local School Dist. Bd. of Educ., 20 F.Supp.2d 1160 (S.D. Ohio 2000) (finding that nonrenewal of Glover’s teaching contract was unconstitutional discrimination motivated by “animus”—perhaps in response to the local community’s disapproval of Glover’s sexuality).
his or her “personal sexual preferences the topic of comment and discussion”\textsuperscript{245} in town, which in turn made customers or co-workers uncomfortable. The employer insists that it did not fire the employee because of a bare “desire to effectuate one’s animus against homosexuals,”\textsuperscript{246} but rather because of genuine concern for the business’s reputation and economic bottom line. Or perhaps word spreads within a small town about the “manner and place” in which a public employee “exercised his sexual preference.”\textsuperscript{247} After learning that the whole town is talking about its employee’s unbridled sexual activity, a responsive employer concludes that the employee’s disruptive “conduct,” not his sexual orientation, “impaired his ability” to do his job.\textsuperscript{248} While these rationales may seem repugnant and mere pretext for discrimination based solely on animus towards LGB people, courts have and might still accept them as legitimate justifications for employers’ actions.

There is a real danger that conservative, rural disapproval of homosexuality—or urban stereotypes of LGB identity—might suffice as a legitimate basis for taking an adverse employment action against an employee who is LGB or suspected of homosexuality. Although the United States Supreme Court, in striking down Texas’s anti-sodomy law, recently suggested that “[m]oral disapproval of a group,” \textit{by itself}, “cannot be a legitimate governmental interest under the Equal Protection Clause,”\textsuperscript{249} whether morality can play a legitimate role in other contexts remains a contested question.

For example, in \textit{Williams v. Attorney General of Alabama}, the Eleventh Circuit Court of Appeals resisted the notion that public morality can no longer support governmental decision-making.\textsuperscript{250} In ruling that Alabama’s ban on the sale of “sex toys” is not unconstitutional, the court

\textsuperscript{245} See \textit{Rowland v. Mad River Local School Dist., Montgomery County, Ohio}, 730 F.2d 444 (6th Cir. 1984) (finding no Equal Protection violation where bisexual schoolteacher was asked to resign after coming out to several colleagues).

\textsuperscript{246} \textit{Id.}

\textsuperscript{247} \textit{Ross v. Springfield School Dist. No. 19}, 641 P.2d 600 (Or. Ct. App. 1982) (no Equal Protection violation where teacher was fired following public exposure of homosexual activities in adult bookstore). “Petitioner was not dismissed because of his sexual preference, but rather because of the manner and place in which he exercised that preference with the resultant notoriety surrounding his activities at the Adult World, which the school board was entitled to determine impaired his ability to teach in the district.” \textit{Id.} at 608.

\textsuperscript{248} \textit{Id.}

\textsuperscript{249} Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O’Conner, J., concurring). In the majority opinion, Justice Kennedy notes that Justice Stevens’s dissenting opinion in \textit{Bowers v. Hardwick} “should control here”; in \textit{Bowers}, Stevens had reasoned, “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting a practice.” \textit{Id.} at 577.

\textsuperscript{250} 378 F.3d 1232, (11th Cir. 2004).
suggested that the Lawrence holding rejected “public morality as a legitimate state interest [only to] justify criminalizing private consensual sexual conduct,” not commercial public conduct. Though the court seemingly recognized that its contextual distinction rests on shaky ground, it skirted the issue by blaming the Supreme Court for any legal ambiguity: “One would expect the Supreme Court to be manifestly more specific and articulate than it was in Lawrence if now such a traditional and significant jurisprudential principal has been jettisoned wholesale . . . .”

Other courts have likewise embraced the Williams court’s reasoning, paving the way for rural public employers to argue that an adverse employment decision taken against a sexual minority is justified by strongly held community norms that deem homosexuality immoral. These employers may argue that they are merely protecting the public morality in their small towns—not expressing judgment about private sexual behavior. Upholding public morality, the argument may go, is key to a rural business’s very survival and success.

At least one modern federal Appeals Court has concluded that public manifestations of homosexuality in a conservative rural community cannot justify employment discrimination. In Milligan-Hitt, the Tenth

251 Id. at 1237 n.8 (emphasis added).
252 Id.
253 In Lofton v. Secretary of Department of Children & Family Services, 358 F.3d 804, 819 n.17 (11th Cir. 2005), the Eleventh Circuit again strongly suggested that promoting public morality is alive and well as a legitimate government interest. Though the court declined to explicitly rule on whether Florida’s interest in promoting “public morality” could justify its prohibition on adoption by any “homosexual person,” it noted the Supreme Court’s “conclusion that there is not only a legitimate interest, but ‘a substantial government interest in protecting order and morality,’ Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569, 111 S.Ct. 2456, 2462, 115 L.Ed.2d 504 (1991), and its observation that ‘[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.’ Gregg v. Georgia, 428 U.S. 153, 175, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976) (plurality opinion) (citation omitted).” See also: 1568 Montgomery Highway, Inc. v. City of Hoover, 45 So. 3d 319 (Ala. 2010) (noting that the Eleventh Circuit recently declared that the furtherance of public morality is a legitimate state interest) and Wilson v. Ake, 354 F. Supp. 1298 (M.D. Fla. 2005) (same); Williams v. King, 420 F.Supp.2d 1224, 1250 (N.D. Ala. 2006) (“To hold that public morality can never serve as a rational basis . . . after Lawrence would cause a ‘massive disruption of the current social order,’ one this court is not willing to set into motion.”).

254 In Seegmiller v. LaVerkin City, 528 F.3d 762 (10th Cir. 2008), for example, Sharon Johnson, an officer with the LaVerkin City police department, had a sexual affair with a male officer from a different department while attending an out-of-town training seminar. LaVerkin City, Utah, had a population 3,392 at the 2000 Census. News of the affair leaked to the press, and the City “issued Ms. Johnson an oral reprimand arising from the earlier incident, concluding her personal life interfered with her duties as an officer.” Id. at 764. The Tenth Circuit Court of Appeals deferentially upheld the constitutionality of the employer’s reprimand because the department reasonably believed that the reprimand would “further internal discipline or the public’s respect for its police officers and the department they represent.” Id. at 769.
Circuit Court of Appeals held that adverse actions taken against public employees who were same-sex partners was motivated by animus toward homosexuals and “community notions of morality,” neither of which constituted a rational basis for the defendants’ actions.255 There, female partners moved from Rock Springs, Wyoming, to Sheridan, Wyoming to work as administrators in the public school system.256 After the couple went on a school field trip to Montana, the Superintendent confronted each of them individually to relay that he had received complaints from parents; allegedly, during the field trip, a student saw the women “holding hands and walking into a Victoria’s Secret store.”257 Both women denied this accusation, but the Superintendent angrily explained that he had “called Rock Springs” and knew “all about” them. 258 They were each subsequently denied positions to which they applied and were qualified.

The Milligan-Hitt Court recognized that the community’s discomfort about—or moral disapproval of—open lesbians could not serve as a legitimate basis for discriminatory treatment, and it is a good example of an appropriate legal response when conservative values in rural places creep into justifications for employer discrimination. Though a federal Employment Non-Discrimination Act259 would more meaningfully ensure that sexual minorities living in all small towns have the same opportunities to earn a living as their straight friends and neighbors, in its absence courts should not participate in the hostile social discourse that validates rural disapproval of sexual difference and spurs exodus to the city.

B. Rural Context Demonstrates LGB Political Powerlessness

Perhaps nowhere in the vast sea of case law addressing sexuality are rural sexual minorities more noticeably absent than in Justice Scalia’s famed dissent in Romer v. Evans.260 At issue in Romer was whether “Amendment 2” to the Colorado Constitution, adopted in a 1992 statewide referendum, violated the Equal Protection Clause of the U.S.

255 Milligan-Hitt v. Bd. of Trustees of Sheridan County Sch. Dist. No. 2, 1233-34 (10th Cir. 2008).
256 Id. at 1221.
257 Id.
258 Id. at 1221-22.
259 For its latest incarnation in the U.S. Senate, see Employment Non-Discrimination Act of 2011, S.811, 112th Cong. § 4 (2011) (making it unlawful to, among other things, “discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity”).
Constitution. In short, Amendment 2 repealed all existing Colorado ordinances prohibiting discrimination on the basis of sexual orientation, and barred “all legislative, executive or judicial action at any level of state or local government designed to protect” homosexual or bisexual people.

The Court ultimately held that Amendment 2 violated the Equal Protection Clause because it “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.” “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”

In a fiery and oft-discussed dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, disagreed with the majority’s characterization of sexual minorities as “politically unpopular”:

[B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide.

Justice Scalia’s conclusion regarding the characteristics of “those who engage in homosexual conduct” embodies the arguments raised by both the State of Colorado and Proponents of Amendment 2: LGB people are wealthy, live and organize in (urban) gay communities, and have disproportionate political power which they wield to secure “special protection” of their “behavior-based lifestyle.” Indeed, one group in support of Amendment 2 disseminated a video entitled “Gay Rights/Special

---

261 Id. at 623.
262 Id. at 624.
263 Id. at 635.
264 Id. at 634-5 (citing Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
265 Id. at 646-47.
266 The notion that self-identified LGB people are disproportionately wealthy and well-educated stems from flawed and outdated studies of sexual minorities based on unrepresentative convenience samples drawn from readers of gay-specific magazines or newspapers, or solicited from gay-specific Internet sites or in gay bars. See Dan A. Black et al., The Earnings Effects of Sexual Orientation, 56 INDUS. & LAB. REL. REV. 449, 449 (2003). These samples rely on a degree of economic and visibility privilege unavailable to many rural people.
Rights

that focused on activist-organized pride parades in major U.S. cities, highlighting only the “most spectacular and shocking” markers of gay identity, and creating “the false impression that these caricatures represented the ‘lifestyle’ gay and lesbian activists espoused.”

Justice Scalia’s characterization of sexual minorities is not wholly inaccurate. In fact, as we know, many sexual minorities converge in gay metropolitan enclaves, take on a gay identity, and take up the banner of gay rights. But his rhetoric is grossly underinclusive, particularly given its broad focus on those who engage in same-sex sex and not just those who self-identify as LGB. The conclusion that people who engage in “homosexual conduct” are politically powerful relies on only the perceived successes of one sect of this diverse group—those who are geographically concentrated in urban gay enclaves, and who are popularly depicted as immersed in sex, consumerism, and displays of political activism.

The Equal Protection Clause of the United States Constitution commands that no State shall deny any person “the equal protection of the laws,” or, in other words, the government must treat all people similarly situated alike. In reviewing Equal Protection challenges to state actions, courts have traditionally applied three levels of review. When the government treats members of a “suspect” class of people differently from others, judges evaluate the government’s action under strict scrutiny, which means that the classification must be narrowly tailored (in the least restrictive way possible) to achieve a compelling state interest. “Quasi-suspect” classifications, in turn, warrant heightened judicial review, which means, at a minimum, the classification must be “substantially related to an important government objective.”

---

269 See Mutz, supra note 120, at 72-73.
270 See generally Benjamin Forest, West Hollywood as Symbol: The Significance of Place in the Construction of a Gay Identity, 13 ENV’T & PLAN. D: SOC’Y & SPACE 133 (1994) (documenting the creation of a gay identity as associative with urban territorial place).
271 U.S. CONST. amend XIV, § 1.
273 Id. at 439-42 (articulating the three standards of review as “strict scrutiny,” intermediate scrutiny, and rational basis review).
274 See, e.g., Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 720 (2007) (“In order to satisfy this searching standard of review,” the government must show that the use of a suspect classification is “narrowly tailored” to achieve a “compelling government interest.”) (internal quotation marks omitted).
There is no precise formula for determining which classifications are suspect or quasi-suspect and are entitled to some form of heightened judicial review. But courts tend to look at all or a combination of several factors in making their determination. One important factor is the amount of political power that the class in question wields. In his groundbreaking decision in Golinski v. U.S. Office of Personnel Management, Judge Jeffrey White characterized the relative political powerlessness of gays and lesbians as “the basic inability to bring about an end to discrimination and pervasive prejudice, [and] to secure desired policy outcomes and to prevent undesired outcomes on fundamental matters that directly impact their lives.” While activists and litigators have been pushing courts for years to designate LGB people as a suspect or quasi-suspect class, considering rural context strengthens the argument that sexual minorities lack the type of political power that generally diminishes claims to heightened constitutional protection.

The misperception that LGB people are overwhelmingly affluent and engaged in urban gay culture can dissuade courts from seeing or sympathizing with the actual powerlessness of most sexual minorities who live in small towns. In Romer, Justice Scalia exemplifies this misunderstanding by broadly ascribing political power to persons who engage in “homosexual conduct” based on a narrow class and place exclusive subset of LGB people. While the persons of whom Justice Scalia speaks in Romer may share in common certain sexual practices, they often share neither sexual identity, political goals, nor meaningful access to policymakers. Urban gays and lesbians who live in gay enclaves are easily able to mobilize and raise funds, whereas, for rural sexual minorities, local mobilization based on sexual identity and issues regarding sexual

276 See Golinski, 2012 WL 569585, at *9 (“No single factor for determining elevated scrutiny is dispositive.”).
277 First, have members of the class suffered a history of discrimination; second, do they exhibit “obvious, immutable, or distinguishing characteristics that define them as a distinct group; third, are they a minority or “politically powerless.” See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).
278 Id.; see also U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (famously discussing the relative political powerlessness of a group as a factor warranting a “more searching judicial inquiry” under the Fourteenth Amendment).
279 Golinski, 2012 WL 569585, at *14 (concluding that “the appropriate level of scrutiny to use when reviewing statutory classifications based on sexual orientation is heightened scrutiny”).
280 See, e.g., Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 HARV. L. REV. 1285 (1985) (“it is clearly in the interest of gay people to be deemed a suspect class”).
orientation is nearly impossible. Justice Scalia overlooks the fact that 
gay urban enclaves exist in large part because sexual minorities living in 
small towns lack the autonomy and political power requisite to bring about 
local change—he fails to see that rural sexual minorities lack even the 
 basic tools “to bring about an end to discrimination and pervasive 
prejudice.”

Importantly, rural sexual minorities may not share the “desired 
policy outcomes” of urban gays and lesbians. In Romer, Justice Scalia 
characterizes as part of the political power wielded by this group a shared 
interest in “homosexual rights” issues. But issues considered most pressing 
for urban gays and lesbians, such as marriage equality or benefits for same- 
sex partners, may lack the same urgency for rural sexual minorities who 
have same-sex sex or desire but do not identify as gay or lesbian, who live 
the “public secret,” or who cannot feasibly come out in the way that 
marrying a same-sex partner would require. For them, even more pressing 
“homosexual issues” may involve access to basic resources.

Research shows that, like their straight friends and neighbors, rural 
sexual minorities are more likely to worry about basic family needs such as 
having enough food or money than are their urban counterparts. Indeed, 
despite still-prevailing stereotypes that paint sexual minorities as affluent 
consumerists (a stereotype that Justice Scalia buys into wholesale), studies 
show that rural sexual minorities evince patterns of economic disadvantage 
similar to in many communities of color. Compared to their urban 
counterparts, rural people who are in same-sex relationships are almost

---

281 “Unlike urban gay and lesbian communities able to mobilize significant numbers of people and dollars to generate visibility, rural youth and their allies live and work in communities and legislative districts that prioritize solidarity, rely on familiarity, and lack the public or private resources to underwrite sustained, visible dissent to assert queer difference.” Gray, supra note 40, at 3.

282 See, e.g., Clark, supra note 65, at 720 (“[T]olerant communities induce both immigration by outsider gays and greater openness among native ones. From these dynamics have emerged gay havens, discrete places where a progressive climate and strong gay presence give lesbians and gay men an unparalleled opportunity to exercise a measure of social, economic, and political influence over the atmosphere of our communities and, hence, the conditions in which we live.”).


284 Id.

285 See, e.g., Eric Heinze, Gay and Poor, 38 HOW. L. J. 433, 434-45 (1995) (noting that the problems of poor gay and lesbians are often overlooked).


twice as likely to receive public assistance, and are significantly less likely to have health insurance.\(^{288}\) Rural sexual minorities forcefully struggle against unemployment, inadequate food and housing, and lack of access to basic health care and education.\(^{289}\) The felt effects of common rural poverty are further exacerbated by the insufficiency of basic amenities and resources. Where resources do exist, already hostile rural environments materialize into tangible hurdles for those who seek access to what services are available; this is particularly true for rural health and legal services regarding HIV and AIDS.\(^{290}\) Discrimination and “unwillingness to care for both MSM and people living with HIV/AIDS . . . have been found among physicians, dentists, [nurses, and social workers.”\(^{291}\)

Moreover, many sexual minorities live in small towns that remain largely “untouched by gay liberation.”\(^{292}\) They have little to no meaningful connection to a greater queer movement, and being “out and proud,” which some courts find to be indicia of political power,\(^{293}\) runs contrary to rural

---

\(^{288}\) Gates, Economic Disadvantage, supra note 287.

\(^{289}\) CLARE, supra note 77, at 40 (noting that rural sexual minorities, who are mostly poor and working-class, persistently struggle against economic injustice in addition to rural sexual oppression).

\(^{290}\) Deborah Bray Preston et al., The Influence of Stigma on the Sexual Risk Behavior of Rural Men Who Have Sex With Men, 16(4) AIDS EDUC. & PREVENTION 291, 292 (2004) (“Gay and bisexual men in most rural areas have fewer educational and health care resources for HIV/AIDS at their disposal.”).

\(^{291}\) See id. generally; see also, e.g., Williams et al., Rural Frontier State, supra note 36, at 48. “Requesting an HIV test, even if no reason is given for the request, was perceived by participants to be an admission of homosexuality.” Id. at 52. “Just being seen going into a county public health facility might lead to difficult questions about sexuality . . . .” Id.

\(^{292}\) See generally EDMUND WHITE, STATES OF DESIRE: TRAVELS IN GAY AMERICA 155-194 (1991) (describing same-sex interested men and women in the Midwest as “untouched by gay liberation”).

\(^{293}\) In Ben-Shalom v. Marsh, 881 F.2d 454, 466 n.9. (7th Cir. 1989), for example, the Seventh Circuit Court of Appeals, in a footnote, summarized the relative political power of sexual LGB people in just five sentences. The court matter-of-factly declared, “Homosexuals are not without political power,” and explained that, according to Time magazine, “one congressman is an avowed homosexual” and there “is a charge” that five others are “known to be.” A then-current issue of the Chicago Tribune had also apparently “reported that the Mayor of Chicago participated in a gay rights parade on the preceding weekend.” Id.

Likewise, to the district court in Steffan v. Cheney, 780 F.Supp. 1, *8 (D.D.C. 1991), judgment vacated by 41 F.3d 677 (D.C. Cir. 1994), “it is very clear that homosexuals as a class enjoy a good deal of political power in our society, not only with respect to themselves, but also with respect to issues of the day that affect them.” \(^{293}\) “One need only remember St. Patrick’s Day 1991 in New York City to see Mayor David Dinkins marching in the traditionally Irish-Catholic parade with homosexual groups and activists who were important supporters during his tough mayoral campaign.” Id. at *8-9. The court further notes that there are several “openly homosexual” members of Congress, and it comments on the ability of “the homosexual community” to “move well and gain attention in political circles.” Id.
inhabitants’ different strategies for negotiating sexual identity. For them, the perceived political powerfulness of those who are concentrated in gay communities has not yet trickled down into their hometowns in a way that provides the autonomy to freely stake out an LGB sexual identity and participate in community discourse on LGB issues.

For rural sexual minorities, therefore, “homosexual issues” are not only the more universal problems regarding societal discrimination against LGB people. They are also issues of economic injustice, as well as the structural barriers, legal vulnerabilities, and societal pressures that constrict autonomy of identity and a way of life. These factors powerfully coalesce and “operate to make effective political participation unlikely if not impossible.” Sexual minorities in small towns have neither the resources nor the privilege of visibility necessary to draw political attention to the issues most important to them.

In light of the increasing national acceptance of LGBT people, and recent achievements in enacting pro-gay programs and legislation over the past several decades, some contemporary commentators now urge the gay rights movement to end its quest for heightened scrutiny review under Equal Protection when the government classifies on the basis of sexual orientation. They argue, for example, that gay affirmative action programs are more likely to be deemed unconstitutional under heightened scrutiny review. However, until courts, lawmakers, and activists address the social and structural vulnerability of rural sexual minorities, it is disingenuous to presume that LGB people as a class wield great political power, and it could be dangerous to abandon the pursuit of heightened scrutiny review when it can still benefit so many rural sexual minorities who otherwise lack legislative legal protections.

And as recently as 2008, in Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 446-61 (Conn. 2008) (concluding that gays as a class do possess some political power), the Connecticut Supreme Court conceptualized the “political power” of LGB people in part by focusing on empirical data regarding the number of “openly gay” people in public office and other positions of power. Cf. High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) (finding that homosexuals do not lack political power because “legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation.”). Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (Norris, J., concurring in the judgment) (reasoning that homosexuals “lack the political power necessary to ensure fair treatment at the hands of the government” because the social and economic pressures that cause people to conceal their sexuality means that “voices of many homosexuals are not even heard”).
C. Sexual Difference, Rural Courts, and Unfair Prejudice

For rural sexual minorities who have suffered a compensable civil injury, or who are involved in a criminal proceeding, justice and fairness in the legal process may be entwined with the ability to keep issues of sexuality discrete. Empirical research shows that, as compared to heterosexuals, self-identified gay men and lesbians “generally hold less favorable opinions of the judicial system’s ability to treat sexual minorities fairly. Moreover, these studies also demonstrate that heterosexuals sometimes undervalue the risks that sexual minorities run by making their sexual orientation visible in court.”

Inevitably, some rural sexual minorities will forego legal recourse for fear that their sexuality will be exposed or called into question. Lawyers, particularly in small towns, should always discuss these possibilities with MSM, WSW, and LGB clients, and weigh the costs and benefits of pursuing legal action. Where sexual minorities and their lawyers do involve courts, either willfully, in dispute resolution, or through the criminal justice system, judges must be mindful of how rural place renders sexual privacy uniquely important. Legal actors therefore should acknowledge the lack of anonymity and the constraints placed on asserting sexual difference common in rural places when making arguments and rulings regarding the admissibility of sexual orientation evidence, as well as the appropriateness of argument in open court implicating or invoking sexual orientation.

Consider, for example, City of Kalispell v. Miller. On February 9, 2008, Molly (a probation and parole officer) and her girlfriend Jennifer spent an evening drinking at a local bar in Kalispell, Montana with Jennifer’s friend and co-worker, Amanda. As the night wore on and the three women became intoxicated, Jennifer threw a beer bottle at Molly and was asked to leave the bar. Molly and Amanda stayed at the bar, but Amanda grew increasingly concerned about Jennifer and called to check on

---

297 Brower, supra note 80, at 7.
298 Telephone interview with Amy Williams, Managing Attorney, Legal Services of Northern California, (Oct. 19, 2011).
299 Id. Ms. Williams, who works with rural LGB people living in northern California, explained that she counsels her clients about the possibility that their sexual orientation may be called into question by pursuing legal recourse; she and her LGB clients engage in a cost/benefit analysis inclusive of this risk in determining whether to go to court.
300 230 P.3d 792 (Mont. 2010).
301 Id. at 793.
302 Id.
During their conversation, Jennifer indicated that she was “playing with her gun” and was upset; Amanda, then even more worried, called the Kalispell Police Department (“KPD”) and asked someone to conduct a “welfare check” on Jennifer.\footnote{303}{Id.}

When Amanda told Molly that she had called the police, Molly worried that Jennifer might lose her job.\footnote{304}{Id.} Panicked, Molly called the KPD dispatcher, identified herself as a probation and parole officer, and falsely explained that Amanda’s call was a prank and that Jennifer was with them at the bar.\footnote{305}{Id.} Meanwhile, Jennifer had gone home, taken several prescription sleeping pills, and left again in her car to buy a soft drink.\footnote{306}{Id.}

The KPD officers arrived at Jennifer’s residence after she left, but suspended their search when dispatch reported that the call was a prank.\footnote{307}{Id.} Unbeknownst to the officers, Jennifer had been in a minor car accident on her way to a convenience store.\footnote{308}{Id.}

Molly was charged with obstructing a police officer due to her false report that Amanda’s call was a prank.\footnote{309}{Id.} At trial, Molly moved to exclude the romantic and sexual nature of her relationship with Jennifer from evidence, arguing that to describe the women as close or best friends would be sufficient; the trial court judge rejected the motion, and the prosecutor saturated the trial with comments about Molly’s “homosexual” relationship with Jennifer.\footnote{310}{Id.} In deciding that the trial judge had erred by admitting the evidence, the Montana Supreme Court, in a 4-3 decision, reasoned:

Society does not yet view homosexuality or bisexuality in the same manner as it views heterosexuality. Because there remains strong potential that a juror will be prejudiced against a homosexual or bisexual individual, courts must safeguard against such potential prejudice. . . . There was no need to make repeated references throughout the trial to the homosexual nature of their relationship—either as an element of the crime or to establish context.\footnote{311}{Id. at 794; Molly Miller Appeal Brief, City of Kalispell v. Miller, 230 P.3d 792 (Mont. 2010) (No. DA-09-0255), 2009 WL 2251206, at *5 (the prosecutor referred to Molly’s homosexuality at least twelve times during trial).}

\footnote{312}{City of Kalispell, 230 P.3d at 794-95.
A brief but strongly worded dissent written on behalf of three Justices, however, chides the majority for presuming that “unspoken prejudice among the potential jurors rose to the level of a potential juror being more likely to convict” Molly due to her same-sex relationship.\footnote{Id. at 796-97 (Morris, J., dissenting).} The dissent further accuses the majority of engaging in the same “stereotypes from which it professes to protect” by presuming that homosexuality is a prejudicial issue.\footnote{Id. at 796.}

Many who believe in social justice and equality for LGB people might disagree with the \textit{City of Kalispell v. Miller} majority, and for a number of potentially valid reasons. First, entrenched in the argument that evidence of homosexuality is prejudicial and should not be admitted into evidence is the implication that, somehow, being a sexual minority is “wrong, embarrassing, or something to keep hidden.”\footnote{See Peter Nicolas, “They Say He’s Gay”: The Admissibility of Evidence of Sexual Orientation, 37 GA. L. REV. 793, 844-45 (2003).} Second, a finding that evidence of homosexuality is prejudicial arguably perpetuates the silence that renders issues of sexual orientation sensitive and fraught to begin with. And third, there is a risk that courts will apply unfounded stereotypes about jurors when determining whether evidence regarding homosexuality or bisexuality is prejudicial.\footnote{Under the Federal Rules of Evidence, evidence that is “relevant” is nonetheless inadmissible if “if its probative value is substantially outweighed by,” among other things, “unfair prejudice.” FED. R. EVID. 403. “Unfair prejudice” means an “undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” FED. R. EVID. 403 advisory committee’s note. State rules of evidence similarly exclude prejudicial evidence as inadmissible.}

This Article does not argue that evidence regarding sexual orientation is unduly prejudicial in all cases. Instead, courts must engage in an analysis that takes the norms common to rural life into account. “[I]t is possible that the potential bias of” or effect on “the jury may differ depending on where the jury is drawn, such that what results in unfair prejudice before a jury” in a small town may not result in unfair prejudice in metropolitan areas.\footnote{See Nicolas, supra note 315, at 845.}

According to 2010 Census data, Kalispell’s population is 19,927.\footnote{U.S. Census Bureau, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited Nov. 8, 2011).} It is unclear from the court’s opinion whether the town’s relatively small size affected its analysis, or what geographic or cultural reference points

\footnote{Id. at 796-97 (Morris, J., dissenting).}
\footnote{Id. at 796.}
\footnote{See Peter Nicolas, “They Say He’s Gay”: The Admissibility of Evidence of Sexual Orientation, 37 GA. L. REV. 793, 844-45 (2003).}
\footnote{Under the Federal Rules of Evidence, evidence that is “relevant” is nonetheless inadmissible if “if its probative value is substantially outweighed by,” among other things, “unfair prejudice.” FED. R. EVID. 403. “Unfair prejudice” means an “undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” FED. R. EVID. 403 advisory committee’s note. State rules of evidence similarly exclude prejudicial evidence as inadmissible.}
\footnote{See Nicolas, supra note 315, at 845.}
\footnote{U.S. Census Bureau, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited Nov. 8, 2011).}
the court applied when determining how “society” views homosexuality and bisexuality. In other cases, however, the issue of place may loom large. Consider a factual scenario like the one above, but imagine instead that the events occurred in a conservative Southern town with fewer than 1,000 residents, far removed from a major metropolitan area, and where there are few or no openly LGB people. By virtue of low population density, the traditional sexual mores common in places that fit this description, and the unfavorable views of homosexuality still shared by many in small towns, the potential for unfair prejudice should evidence of sexual difference be admitted (over objection) could be high.

Some would argue that this characterization of rural places reinforces the notion of the “rural as backwards, unaccepting, uneducated, and intolerant.” But studies on attitudes towards homosexuality show consistently higher degrees of intolerance towards sexual difference in rural areas than in urban and suburban areas. Importantly, when asked, rural sexual minorities widely report environmental resistance to sexual difference, and a perceived need to assimilate and conform to gender and sexual norms. Courts cannot gloss over these common facts of rural life when a person’s access to legal justice is at stake. Judges must be cognizant of rural realities—not blind to them—if the law is to address the specific needs of an otherwise invisible population.

Some courts have flatly rejected the notion that rural place is even relevant to the question of whether in-court references to, or disclosure of, homosexuality can affect a person’s access to justice. In U.S. v. Baldridge, for example, Randy Baldridge, a former elected commissioner in Rogers County, Oklahoma, appealed from his conviction on eight counts of white-collar crime. Baldridge raised six allegations of error on appeal, one of them being that the prosecutor committed “character assassination” by questioning witnesses in such a way as to signal that Baldridge is a homosexual. “Baldridge claims this situation is

---

319 Jerke, supra note 21, at 295.
320 See supra note 47 and accompanying text.
321 See, e.g., Tracy J. Cohn & Sarah L. Hastings, Resilience Among Rural Lesbian Youth, 14 J. LESBIAN STUD. 71, 72 (2010) (identifying gender conformity as one of three primary challenges in rural communities); Williams et al., Rural Frontier State, supra note 36, at 53 (identifying the “perceived need to assimilate” as a theme of rural life for sexual minorities).
322 559 F.3d 1126 (10th Cir. 2009).
323 Id. at 1129.
324 Appellant’s Opening Brief, U.S. v. Baldridge, 559 F.3d 1126 (10th Cir. 2009) (No. 07-5121), 2008 WL 2336808, at *2. “The efforts by the prosecutor in this case were unrelenting to get across to the jury the idea that the Appellant was a homosexual. Questions were repeated over and over again to Joseph Bentz and then to Brian Slover detailing that [Baldridge] and Slover took trips together and lived in the same house together, even though both were well
exceptional because an insinuation of homosexuality in rural Oklahoma is incendiary, not likely to be forgotten or forgiven by the jurors.”325 “Even if true,” the court responded, “it is not a reason to craft a ‘homosexual exception’ to a hallowed rule of evidence allowing wide latitude for the jury to assess possible witness bias.”326

The court plainly acknowledges the possibility that the prosecutor’s gay-baiting line of questioning could have prejudiced the jury, but nonetheless finds “no error,”327 and declines even to engage in any analysis of whether that potential prejudice affected the fairness of the trial.328 Though Baldridge’s attorney should be lauded for raising the relevance of rural place as it relates to homosexual prejudice, attorneys in future cases must do better in educating judges about the realities facing rural sexual minorities. Baldridge’s legal counsel claimed that an insinuation of homosexuality in rural Oklahoma is akin to suicide,329 but offered no substantive explanation, elaboration, or evidence. With few exceptions,330 judges overwhelmingly identify as heterosexual and may be ignorant to the needs and vulnerabilities of LGB people. Without an understanding of these realities, courts are likely to repeat the Baldridge court’s mistake by glibly dismissing even the suggestion that rural place is legally relevant.

Especially perilous is the situation for indigent and pro se claimants who cannot afford legal representation. Scrible v. Haines331 exemplifies

---

325 559 F.3d at 1135.
326 Id. at 1135-36 (emphasis added). The Court explains that if the witness and Baldridge had an “intimate relationship,” the witness’s testimony could have been biased. However, the Court acknowledges that the witness’s testimony could have been biased “even if their relationship was not sexual, but merely close.” Id. at 1135.
327 Id. at 1134. The court reviewed the prosecutor’s conduct for “plain error.” Id. at 1135. The court explained that “plain error” occurs when “there is (1) error, (2) that is plain, which (3) affects the defendant’s substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.” Id.
328 Moreover, the court mischaracterizes Baldridge’s claim. He did not ask for an across-the-board “homosexual exception” to the Federal Rules of Evidence; instead, he sought a meaningful analysis of how invocation of homosexuality in his particular rural Oklahoma community affected his access to justice.
this problem. There, Lawrence Scrible filed a Writ of Habeus Corpus, *pro se*, following his conviction on several criminal counts, including one for “maintaining a house of ill fame and assignation,”332 in Pendleton County, West Virginia. Scrible argued that he was denied his right to a fair trial because the State of West Virginia subjected him to a “lesbian trial.”333 While the phrasing of the allegation lacks eloquence, the record colorfully validates Scrible’s characterization. First, the court allowed into evidence before the jury a videotape of “two dancers simulating lesbian sex,” and the State’s witness testified to the performance of “homosexual activities” on stage.334 Then, during his closing argument, the Prosecutor stated as follows:

Now, you’ve heard . . . the evidence of Monica Brunty, who testified that she had a homosexual relationship with Bernita Underwood, that it was taped. Monica Brunty was brought to the Cadillac Ranch by Larry Scible. You heard the evidence of Kim Martin, who is a lesbian, and who lived with Bernita Underwood and who performed oral sex on Bernita Underwood on the stage, engaged in all this perverted activity. She was brought to the Cadillac Ranch by Larry Scible. And last, but not least, you have Bernita Underwood, who lived with her husband and her children and her lover. Her husband had a baby by her lover, and she comes over here, and she has a lesbian affair with Kim Martin; she has a lesbian affair with Moncia Brunty; she has a lesbian affair with Tara Fritz. She was brought to the Cadillac Ranch by Larry Scible. Everything you heard here in this case the past two days is a result of the conduct of this defendant.335

According to 2010 U.S. Census data, Pendleton County, West Virginia has a population of 7,695.336 Ignoring for a moment that the evidence and argument described border on pornographic, in communities of this size, and particularly in this geographic area, the word “lesbian” may be considered dirty, and even the word “homosexual” is difficult for many to say; often, rural heterosexuals broach the uncomfortable topic of

---

332 *Id.* at *2.*
333 *Id.* at *11.*
334 *Id.*
335 *Id.* at *12.*
homosexuality by referring to people as “that way” or “like that.” Scrible was right to raise the argument that “the county prosecutor titillated the rural community and jurors of Pendleton County with a lesbian trial . . .” Yet in discussing whether the introduction of the video evidence, as well as the Prosecutor’s closing argument, impugned the “fundamental fairness” of the trial, the court simply concluded that Scrible had provided “no evidence” that he had been prejudiced.

It is unclear what “evidence” courts would find sufficient to demonstrate the prejudicial effect of inflammatory gay-baiting evidence and argument in cases like Scrible and Baldridge. But at minimum, courts must acknowledge that rural context is at least relevant in cases implicating sexual orientation, and must conscientiously analyze whether evidence and argument regarding homosexuality is unduly prejudicial. Simply brushing these questions aside without meaningful thought may effectively deny access to justice.

To determine whether homosexuality’s intersection with rural place may implicate access to justice in a given case, courts should take care to consider and analyze the community’s overall perception of LGB people and its attitudes towards homosexuality. Judges should question lawyers and solicit testimony from parties about the atmosphere and attitudes towards homosexuality and sexual difference in their communities. Courts can also attempt to discern the predominant climate regarding issues of sexual orientation by “reviewing public opinion polls, legislation, [or] recent case law.” They should take into consideration whether any local laws, regulations, or ordinances prohibit discrimination on the basis of sexual orientation or provide benefits to same-sex partners.

See generally HOWARD, supra note 6. On a personal note, I remember often hearing the phrases “that way” and “like that” (or worse) ascribed to effeminate men or openly LGB people in my small West Virginia town, but rarely the terms “gay” or “lesbian.” There is a distinct discomfort in uttering words associated with sexuality for many rural people.

Abigail A. Rury, Note, He’s So Gay . . . Not that There’s Anything Wrong With That: Using A Community Standard to Homogenize the Measure of Reputational Damage in Homosexual Defamation Cases, 17 Cardozo J. L. & Gender 655, 657 (2011).

For example, in considering whether a statement imputing homosexuality is defamatory according to “community” standards, one court looked to public opinion polls regarding gay rights in the state of New York, as well as enacted and pending gay rights legislation in the state of New York. Stern v. Cosby, 645 F.Supp.2d 258, 273-76 (S.D.N.Y. 2009). Similar evidence, though on a local rather than state scale, may be relevant in analyzing the prejudicial effect of evidence or argument regarding sexual orientation in rural courts.
Courts also could take judicial notice of the vulnerability inherent in being a sexual minority in most rural areas. Some scholars have criticized courts’ use of judicial notice when drawing distinctions between rural and urban locales, or when describing rural people and places, arguing that judges tend to rely on and fuel unfounded stereotypes of the rural. But as this Article demonstrates, it is possible to appreciate how rurality can disadvantage sexual minorities without simply stereotyping all rural dwellers. As a basic principle ripe for judicial notice, courts can recognize the empirical results of studies showing that low population density and physical isolation from metropolitan areas commonly result in lower tolerance for sexual difference than in urban areas.

A final suggestion for legal actors in cases where sexual orientation may be implicated is to conduct *voir diré* regarding potential homosexual bias. The Due Process Clause of the Fifth and Fourteenth Amendments “protects a [criminal] defendant from jurors who are actually incapable of rendering an impartial verdict,” and courts permit both civil and criminal litigants to strike prospective jurors whom they suspect may be biased. Courts have broad discretion in determining the scope of *voir diré*; some courts have denied requests to pose questions regarding attitudes about sexual orientation, while others have permitted them. Judges must appreciate that the high potential for bias regarding issues of sexual difference in rural areas warrants *voir diré* on the issue. Further, if permitted by state law, courts should question—or permit attorneys to

---

342 See Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159, 211 (2006). “Judges who discuss the rural and base their rulings on its legal relevance are often taking judicial notice of the consequences of being rural rather than inviting and considering hard evidence about rural people, their lifestyles, and their land. Because judges usually do not acknowledge taking judicial notice, it is difficult to be certain when they have done so. The assumptions judges make about rural places and people are often incapable of being empirically proven, although they may have been the subject of testimony.” Id. at 207.


345 See, e.g., Aldridge v. U.S., 283 U.S. 308, 310 (1931) (the trial court has “broad discretion as to the questions to be asked” during *voir diré*). A decision to deny a *voir diré* question is reviewed for abuse of discretion. See, e.g., U.S. v. Hirschberg, 988 F.2d 1509, 1514 (7th Cir. 1993); U.S. v. Bobo, 994 F.2d 524 (8th Cir. 1993).

346 See, e.g., U.S. v. Click, 807 F.2d 847, 850 (9th Cir. 1987) (not an abuse of discretion to deny questions regarding attitudes towards homosexuals).

347 For a discussion of some of the various decisions permitting questions on sexual orientation bias, see Eisemann, *supra* note 344, at 14-21. The issue of whether state and federal constitutional provisions compel *voir diré* regarding potential homosexual bias is beyond the scope of this Article.
question—jurors individually rather than collectively\textsuperscript{348} to guard against the embarrassment and fraught nature of publicly discussing issues regarding sexual orientation in rural areas. The potential for prejudice and discomfort in these situations is not merely “speculative,”\textsuperscript{349} but manifests concretely in the findings of studies in diverse fields, as well as in the lived experiences of sexual minorities in many small communities.

This Article does not purport to answer how to weigh the potentially prejudicial effect of sexual orientation evidence in every given rural community. Instead, it urges courts to be cognizant and engage in thoughtful analysis of how the factors common to rural life may affect access to justice for those who fail to conform to heterosexual norms in their small towns and communities.

\textbf{D. Protecting Rural Sexual Minorities’ Privacy Rights}

Information about sexuality and sexual orientation is especially sensitive in many small towns. Unwanted disclosure of a same-sex sexual affair or of someone’s self-identification as LGB can have devastating effects, including, in many places, loss of employment, housing, or custody of children. Socially, one could be ostracized from his or her family (perhaps the only means of support), or subjected to verbal or physical violence. As exemplified in \textit{Sterling v. Borough of Minersville},\textsuperscript{350} where a young man in a small town committed suicide following a police officer’s threat to expose his homosexuality to his grandfather, even the potential of disclosure can lead to death.

Exacerbating the seriousness of these consequences is the relative ease with which sexual privacy can be lost in rural areas. The distinction between public and private life in rural areas is thin. Social scientists and courts alike acknowledge the existence of rural information grapevines. A Justice of the North Dakota Supreme Court once noted that in “nearly all” counties in North Dakota, most people “know something about every other person in the county, their families, or their business.”\textsuperscript{351} A New York court similarly noted that, in rural communities, “word of mouth spreads

\footnotesize{\textsuperscript{348} Eisemann, \textit{supra} note 344, at 16-21; see also Heather C. Brunelli, Note, \textit{The Double Bind: Unequal Treatment For Homosexuals Within the American Legal Framework}, 20 B.C. THIRD WORLD L. J. 201, 223-26 (discussing how different courts have handled requests for individual \textit{voir dire}).

\textsuperscript{349} \textit{Click}, 807 F.2d at 850 (courts may refuse questions that are “tied to prejudice only speculatively”).

\textsuperscript{350} 232 F.3d 190 (3rd Cir. 2000). “It is difficult to imagine a more private matter than one’s sexuality . . . .” \textit{Id.} at 196.

\textsuperscript{351} State v. Brooks, 520 N.W.2d 796, 802 (N.D. 1994) (Meschke, J., concurring).}
like a brushfire.” And according to the Iowa Supreme Court, “It is still a hallmark of our still rural-oriented society—often scorned by elitists but nonetheless extant—that we know the misfortunes of our neighbors.”

Judges in rural communities are keenly aware of this truth, and they must take this factor of rural life into account when considering claims premised on the infringement of sexual minorities’ privacy rights.

In American law, “both constitutional law and tort law recognize the right to privacy, understood as legal entitlement to an intimate life of one’s own free from undue interference by others and the state.” Particularly in geographic areas lacking specific anti-discrimination protections on the basis of sexual orientation, sexual minorities have attempted to invoke privacy law as a means to live autonomously and control their intimate destinies in rural communities where the line between public and private is blurred. Unfortunately, they have had only limited success.

*Michael v. Plaxico* is a stark example of judicial antipathy to privacy-based claims brought by LGB people in rural communities. In this case, a woman—the former wife of a man named Glenn Michael—and her six-year-old daughter lived in a secluded cabin in the woods in Tippah County, Mississippi, which then had a population of 19,517. When the woman’s same-sex partner, Rita Plaxico, moved into the cabin, Michael was “informed” that his ex-wife was having a relationship with Plaxico. Michael drove to the cabin and hiked through the woods, grabbed a camera from his truck, and, through the bedroom window, watched and took photos of Plaxico and his ex-wife engaging in sexual activity while

---

353 Lunday v. Vogelmann, 213 N.W.2d 904, 910 (Iowa 1973). See also, e.g., McCarney v. Meler, 286 N.W2d 780, 787 (N.D. 1979) (Vande Walle, J., concurring) (“It is no mystery that it is easier to determine the residence of a person in rural North Dakota where most people know one another than it is in the more densely populated cities . . . .”); and State v. Jerrett, 307 S.E.2d 339, 348 (N.C. 1983) (noting that the alleged crime at issue occurred in a “small, rural and closely knit county where the entire county was, in effect, a neighborhood”).
354 Anita L. Allen, *Unreliable Remedies for LGBT Plaintiffs*, 98 CAL. L. REV. 1711, 1712 (2010). See id. at 1715-16 (“Courts may fail to discern that sexual orientation and sexual identity-related privacy protection is warranted for LGBT individuals if, on the societal level, there has been a significant reduction in violence, social stigma, and discrimination associated with open LGBT status.”).
355 735 So.2d 1036, 1038 (Miss. 1999).
356 Id. at 1038. See also U.S. Census Bureau, Mississippi: Population of Counties by Decennial Census: 1900-1990, http://www.census.gov/population/cencounts/ms190090.txt (last visited Nov. 8, 2011).
358 Plaxico, 735 So.2d at 1038.
Plaxico sat naked, exposed from the waist up. Michael had the film developed, showed the pictures to his lawyer, and produced several photos as evidence in support of his motion seeking custody of his daughter (which the Chancellor granted, presumably to protect the minor child from her mother’s “illicit” relationship).

Plaxico sued Michael for invasion of privacy—a claim requiring “a substantial interference” with her seclusion of a kind that “would be highly offensive to the ordinary, reasonable man, as the result of conduct to which the reasonable man would strongly object.” The Mississippi Supreme Court ruled that “a reasonable person would not feel Michael’s interference with Plaxico’s seclusion was a substantial one that would rise to the level of gross offensiveness”: in fact, “most reasonable people would feel Michael’s actions were justified in order to protect the welfare of his minor child.”

The court’s ruling in this case is shocking, regardless of whether Michael had viewed and photographed heterosexual or homosexual activity through a private bedroom window. Yet the court is disingenuous in its glib conclusion that the intrusion on Plaxico’s seclusion was not grossly offensive under the law. In a rural community where anonymity is lost and “each man knows his neighbor,” the seclusion of one’s home (particularly a cabin in the woods) may be the only place where people are free to live and socialize with each other without “word of mouth spread[ing] like a brushfire.” Michael encroached upon one of the few spaces in Plaxico’s rural community where she felt comfortable being intimate with another woman—her home. Unlike in urban places, where same-sex interested women may seek out and socialize with “other women in bookstores, bars, organizations, or in community centers,” rural women have far fewer opportunities for social and intimate interaction and must “chart a new course that creates space for a lesbian narrative.”

---

359 Id.
360 Id. at 1037-40. Michael’s “concern was based on numerous rumors of an illicit lesbian sexual relationship between Plaxico and his former wife,” and decided it was not in his daughter’s best interest to remain in her mother’s custody. Id. at 1039.
361 Id. at 1039.
362 Id. at 1039-40.
363 Id. at 1041 (McRae, J., dissenting) (“it matters not whether Michael’s former wife was involved in a lesbian or a heterosexual relationship”).
364 Sims v. Reeves, 261 S.W.2d 812, 814 (Ky. Ct. App. 1953) (describing sparsely populated communities as ones in which “each man knows his neighbor”).
366 McCarthy, supra note 70, at 88.
367 Cohn & Hastings, Rural Lesbian Life, supra note 97, at 141.
Private homes are places of solace for rural WSW who might otherwise face extreme isolation, and intrusion into that space can strip rural sexual minorities of their only safe outlet for sexual expression.

Michael “substantially interfered” with these women’s seclusion at the one place in their rural community where they may have been shielded from the scrutiny and judgment of those who disapprove of same-sex desire and affection. He may also have effectively outed Plaxico to the entire town via hard photographic evidence. The majority neglects to consider who developed the photos Michael took and whether information regarding their existence had disseminated throughout the community, but the dissent correctly implies that these issues are pertinent.368

The court in this case is callous to the hallmark lack of anonymity in rural communities. By declining to extend the force of the law to offer protection in the one place where anonymous encounters may be ensured, the court invites the community into these women’s private lives and circumscribes their ability to control their own intimate lives.

At least one court, however, has not allowed the inherently public nature of rural life to render sexual minorities’ privacy rights meaningless. Simpson v. Burrows369 is a model for how courts should apply privacy law in a way that permits sexual minorities to define their own existence in rural places. In Burrows, plaintiff, JoAnn Simpson, and her same-sex partner purchased a commercial Lodge in Christmas Valley, Oregon, which, as the court notes, is a “primarily rural area with approximately 200–300 residents in the valley and approximately fifty residents in the town.”370 Shortly after the couple bought the Lodge, Howard and Jean Burrows distributed a series of letters to various Valley residents regarding the sexual orientation of Simpson and her partner.371 All together, twelve letters were submitted into evidence.372

One of the first letters refers to the “two Lesbians” as an “immoral abomination” and suggests that the sale of the Lodge to them will make Christmas Valley “a mecca for Queers, Lesbians, Perverts & other degenerates.” . . . Another letter states that the sale of the Lodge to “two Lesbians” “brings an immoral & unfavorable element into our

368 Id. at 1040 (Banks, J., dissenting) (noting that Michael had “those photographs developed by third parties and delivered to his attorney thereby exposing them to others”).
370 Id. at 1113.
371 Id. at 1114.
372 Id. at 1114.
community,” and indicates that the sale to “perverts” is the start of a “revolting development.” . . . A third letter, printed in heavy marking pen, states “NO FAGS IN C.V.” immediately above a swastika. . . . Another letter implores the residents of Christmas Valley to “boycott the evil which invades your community.”

Simpson raised various tort-based claims against Burrows, including a claim for “invasion of privacy.” In Oregon, a claimant states a valid invasion of privacy claim if: (1) the facts disclosed are private; (2) defendant disclosed them to the public or to a large number of persons; and (3) disclosure was in a “form of publicity of a highly objectionable kind.”

Although the court describes Simpson as a “lesbian” throughout the opinion, and acknowledges that others in the community “learned” of Simpson’s sexual orientation before the dissemination of the letters, it nonetheless concludes, without analysis, that Simpson’s sexual orientation is a private fact. This finding is sensitive to the fact that many rural sexual minorities engage in a public secret regarding their sexual orientation, living gay lives but without overtly identifying as LGB or engaging in public discourse regarding issues of sexual orientation. It respects one’s privacy interest in sexual orientation despite widespread rumors, speculation, and even explicit markers of homosexuality—in this case, Simpson’s cohabitation with her partner.

Conscientious of the way in which private information about sexuality can quickly become public in small communities, the court finds that the disclosure of Simpson’s sexual orientation via dissemination

---

373 Id. (internal brackets and exhibit citations omitted).
374 Id. at 1124.
375 Id. at 1125.
376 “Lanier, and other witnesses, also indicated that plaintiff’s and Swanson’s sexual orientation in and of itself, independent of the letters, caused some residents to boycott the Lodge. Lanier testified that the ‘churchgoers’ stopped coming, because of plaintiff’s and Swanson’s lifestyle, as soon as the sale papers were signed. Carl Shamway stated that controversy began almost instantly after plaintiff and Swanson bought the Lodge and that it was unrelated to the letters.” Id. at 1121.
377 Id.
378 Based on the testimony of several witnesses, the court found that Burrows disclosed Simpson’s sexual orientation to the public: “knowledge of the letters’ existence, and their contents, was widespread in the community, extending even to those who had not personally seen or read them.” Id. at 1114-15. “Trooper Watson stated that most people in Christmas Valley either had copies of the letters, had seen them, or had heard about them from others who had received them.” Id.
of inflammatory and vitriolic letters throughout the community was “extremely outrageous,” and there was “no doubt” that the purpose in writing and distributing them was to force Simpson to sell the lodge and leave Christmas Valley. The court demonstrates that it understands the harmful emotional and economic effects that unwanted disclosure might have, even for those who live a life that few might presume to be heterosexual. Indeed, in the end, the court awards Simpson economic damages, finding that “some people boycotted the Lodge after seeing or hearing about the letters.”

Taking the rural into account, the court provides a remedy for the place-based wrong Simpson suffered. The court offers Simpson and her partner the autonomy to negotiate their sexual identity as they see fit in their community, and declines to let public nature of the secret of their sexuality render their interest in privacy meaningless.

In response to the myriad common law tort claims one may bring for invasion of privacy, courts have embraced a First Amendment defense when the private information exposed is “newsworthy” or a matter of “legitimate public” “interest” or “concern.” Just as courts should take the rural into account when analyzing the merits of tort law claims, courts should likewise bring context of place to bear in the analysis of whether disclosure of that information is protected by the First Amendment. Otherwise, there is a real danger that courts might credit as “legitimate public concern” a small rural community’s interest in homosexuality.

Perhaps the most famous example of the First Amendment at work in the context of the disclosure of information regarding one’s sexual orientation is Sipple v. Chronicle Publishing Co. There, a self-identified gay man, who was in a crowd in San Francisco, saved President Ford’s life

379 Id. at 1125.
380 Id. at 1123.
381 Id. at 1128.
383 In Crumrine v. Harte-Hanks Television, Inc., 37 S.W.3d 124, 125-26 (Tex. App. 2001) for example, Crumrine sued KENS-TV (“KENS”) for “invasion of privacy” after the news station aired stories regarding Crumrine’s ongoing child custody dispute with his ex-wife; KENS reported on a television broadcast that Crumrine is a gay HIV-positive police officer. The court ultimately found that KENS asserted a valid First Amendment defense. Id. at 127. Noting that this determination must be made on a case-by-case basis “considering the nature of the information and the public’s legitimate interest in its disclosure,” the court, in a single sentence, simply framed the matter as relating to a child’s safety. Id. The court offered no explanation regarding how that information related to the public’s “legitimate” interest in a child’s safety. In light of such shallow analysis and deference to an interest broadly defined in terms of safety, there is a real danger that other courts might similarly credit as legitimate a small rural community’s broadly defined interest in homosexuality per se.
by grabbing a would-be assassin’s arm before he could shoot his gun at the president.  

Sipple was “out” in San Francisco, but not to his friends and family back home in Michigan; he sued several publishers for “invasion of privacy,” but the California Court of Appeals held that his sexual orientation was “newsworthy” and of “legitimate public interest” and thus the First Amendment precluded liability.

Citing the restatement of torts, the court explained: “In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community . . . . The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.”

While information regarding homosexuality or same-sex sexual behavior may be commonplace in large urban areas, similar revelations in many rural locales may be shocking or salacious—or, at the very least, novel. Rumors that someone is gay, bisexual, or lesbian in small towns may thus pique curiosity more intensely than in urban areas, particularly because of the relatively few LGB people who exist openly in most small communities. Simply by living in a small town, the minute details of one’s life can become a matter of public interest. Even a person with the most “decent standards” may therefore be part of a community where homosexuality is everyone’s “concern.”

Thus, if a rural sexual minority suffers a disclosure of private sexual information and brings a claim for invasion of privacy, courts should not simply let an interest in homosexuality per se qualify as legitimate; courts should carefully scrutinize the interest asserted to discern whether a rural community seeks simply to hike through the woods and peer into the windows of otherwise private intimate lives. Alternatively courts could determine what counts as “newsworthy” under a First Amendment defense by assessing what information is of legitimate concern to a “reasonable member” of the general public—not a member of the rural community at issue. If rural community standards dictate what matters are of legitimate public interest, many sexual minorities may have a right without a remedy.

385 Id. at 666.
386 Id. at 670 (Sipple’s sexuality was found to be newsworthy because it dispelled “the false public opinion that gays were timid, weak and unheroic figures”).
387 Id.
The spatial and social realities of small-town living should not render meaningless one’s right to privacy under the law. Rather than encouraging sexual minorities to participate in the Great Gay Migration—to pursue the anonymity and freedom to live a gay life one is presumed to find in cities—the law must be sensitive to the factors that might inhibit those who seek alternative forms of belonging in their rural homes.

V. CONCLUSION

At the end of 2011, over half of all U.S. states still lacked statutory employment anti-discrimination protections on the basis of actual or perceived sexual orientation. And currently, only one federal statute provides any form of affirmative protection for LGBT people. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, signed into law by President Obama in 2009, authorizes the Justice Department to investigate and prosecute “crimes of violence” when the crime is motivated by prejudice against the victim’s actual or perceived sexual orientation or gender identity. To benefit, a person must therefore already be a victim of a crime.

Because this Article focuses on the judiciary, the legal suggestions it sets forth for empowering sexual minorities are modest rather than sweeping. Broad legal interventions—such as federal legislation barring employment discrimination, access to housing and health care, and safe schools—are just some of the preliminary social and economic safety nets requisite for providing rural sexual minorities maximum autonomy in negotiating their sexual identities and intimate destinies. Until structural safeguards are put in place, the brunt of the responsibility for making positive change falls on the individual rural sexual minority.

Appreciating that rural minorities exist and thrive forces us—as judges, lawyers, legislators, advocates, and scholars—to think critically about how to address the unique realities they face. It requires that we understand the limitations they experience with regard to making visible a homosexual or bisexual sexual identity, and that we accept that not everyone wants to or can identify as gay, bisexual, or lesbian. For those who struggle to negotiate identities and search for same-sex love, affection,

---

391 § 3716(a)(1).
and erotic experience in the face of oppression, we must do more than simply tell them “it gets better.”